STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13109

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

41 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 2, 2002

Mr. Russell McCoy
99-A-0559
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

Dear Mr. McCoy:

I have received your letter in which you requested a variety of information concerning two attorneys.

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 does not maintain records generally, and this office does not possess any of the information in which you are interested.

Unless the information sought is made available directly by the attorneys, there may be no single source of information indicating the number of cases an attorney tries and wins or the number of those that he or she handles on appeal with the outcome of those appeals. Further, assuming that the two individuals to whom you referred are private attorneys, their records would not be subject to the Freedom of Information Law. That statute is generally applicable to records maintained by entities of state and local government; it would not extend to records of a private law office.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-13110

From: Robert Freeman
To: jdayton@catskill.net
Date: 1/2/02 9:33AM
Subject: Dear Mr. Dayton:

Dear Mr. Dayton:

I have received your communication in which you asked whether you can have minutes of meetings faxed to you as they are produced.

In this regard, certainly a school board or other public body may choose to fax minutes of meetings to you on an ongoing or subscription basis. However, it has been advised that there is no legal obligation to agree prospectively to make records available that do not yet exist. From a technical perspective, since the Freedom of Information Law pertains to existing records, an agency is not required to agree in advance of the creation of records to make them available. That being so, an agency may, in my opinion, require that a request be made in writing in each instance in which records are requested.

Further, I do not believe that an agency can be required to fax records to an applicant. Under the law, an applicant has the right to inspect or copy existing records. Inspection of available records is free; an agency may charge up to twenty-five cents per photocopy. However, there is nothing in the Freedom of Information Law that requires that records be transmitted electronically or by fax.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3393
FOIL-AO-13111

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

41 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 3, 2002

Ms. Traci L. Pena
[redacted]

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

Dear Ms. Pena:

I have received your letter of December 14 in which you raised questions involving the Freedom of Information and Open Meetings Laws in relation to meetings and records of Arts and Culture for Oswego County. According to your letter, Arts and Culture for Oswego County is "a private, non-profit organization, established in 1991 and incorporated in 1993 as an advocate for the arts and cultural community in the County." If that is so, it appears that neither of those statutes would be applicable.

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."

The Open Meetings Law pertains to meetings of public bodies, and §102(2) of that law 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."

Based on the foregoing, both of the statutes at issue generally apply to entities of state and local government. Assuming that the organization of your interest is not a governmental entity, it would not be subject to either.

I note that records transmitted by or pertaining to Arts and Culture for Oswego County that are maintained by a unit of municipal or state government (i.e., Oswego County or the State Council on the Arts) would fall within the coverage of the Freedom of Information Law. If you believe that a governmental entity maintains records relating to Arts and Culture for Oswego County, you might want to request them from the appropriate agency's records access officer. The records access officer is the person designated by an agency to coordinate the agency's response for requests for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1312

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

41 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 3, 2002

E-i

TO: Gerard Murello [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. Murello:

I have received your communication concerning the propriety of a fee sought to be assessed by the Town of Laurens for a copy of payroll data maintained in electronic media. The matter was considered exhaustively in an opinion addressed to you on July 2, a copy of which was sent to the Town Board.

As I understand your remarks, in November, you were informed that the original fee of $200 would stand because the Town official who maintains the data, the financial officer, indicated that she did not believe that she had the ability to extract the data and that, consequently, an "outside specialist" would have to be retained to do so. When you asked whether she took advantage of the technical support available through a toll free number made available by the producer of the software or the technical service organization with which the Town has contracted, you apparently received no response. You added that another reason for avoiding the use of a Town employee or employees to transfer the data at your request involved an intent, in your words, to "avoid any suspicion of the information being 'tainted' by the town employee processing the request."

With respect to the need to retain an "outside specialist" to generate the data, the issue in my view is whether it is reasonable to do. If indeed the task of generating data is complex and requires special expertise, perhaps there would be justification for hiring a specialist to offer assistance. However, if the same or similar service is available at no cost by the manufacturer of a computer program, or if training or assistance is offered at little or no cost, it would seem that the retention of a specialist would be unnecessary and, therefore, unreasonable. Further, government and private sector employees frequently engage in training to improve or gain skills that enable them to carry out their duties and function more effectively. I question whether the absence of skill or knowledge would, under the circumstances, constitute a valid justification for seeking the services of a person

outside of government. From my perspective, a key element of every job involves improving one's skills and increasing one's knowledge. If a failure to do so precludes an individual from functioning effectively as new technologies become widely used and commonplace, I do not believe that it would be reasonable for a member of the public to be forced to pay for the absence of skill or knowledge that can readily be attained.

Lastly, with regard to the other reason offered for the need to retain an outside specialist, the possibility that information might be tainted by a Town employee, that possibility has always existed. That information is maintained electronically rather than on paper or may be generated by a computer rather than being typewritten in my opinion should not be determinative. Further, there are several statutes in the Penal Law (see e.g., Article 175) that address the possibility and serve as a deterrent to illegal activity.

In short, the assessment of a fee of $200 to generate the data of your interest would be, in my view, a matter of questionable validity.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13113

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

41 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 3, 2002

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 facts presented in your correspondence.

Dear Mr. Chebere:

I have received your letter and attached material in which you appealed a denial of your request to the Bronx County District Attorney's Office for an interview statement of a prosecution witness. You also stated that "[w]hen an agency denies a request because it "cannot find the requested document in its files, it must certify that it does not have possession of the document."

This office has also received a copy of the response by E.F. Bernhadt, the Records Appeals Officer, in which the denial of access to the interview statement was affirmed.

First, of potential relevance to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintain records that had previously been disclosed, the agency would be required to respond to a request for the same records. I also point out, however, that the decision in Moore specified that the respondent office of a district attorney was "not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

Second, assuming that the records sought involving interviews of witnesses have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures,

§87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

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

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

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

Lastly, §87(2)(g) authorizes an agency to withhold records that:

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

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

Lastly, in regard to a certification, 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." In consideration of the foregoing provision, when an agency cannot find requested records, it would be required to provide a certification to that effect only if a certification is requested.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13114

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

41 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 3, 2002

Mr. Quincy Wade
84-B-1425
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. Wade:

I have received your letter in which you requested assistance from this office "in obtaining the investigator's report" that was prepared for your trial attorney.

You wrote that the trial attorney has not responded to your "FOIL request or any of [your] letters" and the Kings County District Attorney's Office has provided you with a certification that the record "could not be found after a diligent search."

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, 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." In my opinion, an agency satisfies the requirements of the Freedom of Information Law when it provides such a certification.

Second, in regard to your Freedom of Information Law request to your trial attorney, 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, a private attorney or a private investigator.

Lastly, if your trial attorney is a public defender, it is likely that the records in his or her custody are subject to the Freedom of Information Law. Section 716 of the County Law states in part that the "board of supervisors of any county may create an office of public defender, or may authorize a contract between its county and one or more other such counties to create an office of public defender to serve such counties." Therefore, a county office of public defender in my opinion is an agency subject to the Freedom of Information Law that is required to disclose records to the extent required by that statute.

In a case in which an attorney is appointed, while I believe that the records of the governmental entity required to adopt a plan under Article 18-B of the County Law are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, for reasons offered earlier, I believe that the records maintained by or for an office of public defender would fall within the scope of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to that statute.

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-13115

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

41 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 3, 2002

Mr. David Williams
99-A-0052
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. Williams:

I have received your letter in which you asked that your Freedom of Information Law request directed to the Office of the Westchester County District Attorney "be complied with as the denial was inappropriate." This office also received a copy of the determination from the Freedom of Information Law Appeals Officer, Mr. Richard E. Weill, denying your appeal.

You asked that the District Attorney's Office provide you with records and to waive fees for the records. Mr. Weill denied your "request on the ground that you did not offer to pay the cost of copying any records which might be provided pursuant to your request." Mr. Weill further stated that your "request was entirely hypothetical unless you could confirm to this Office your inclination to pay for what you are seeking. As you have not done so - even in response to the Records Access Officer's June 13, 2001 letter expressly addressing the fee issue - your request properly was denied as academic."

In this regard, while the federal Freedom of Information Act, which applies only to federal agencies, includes provisions concerning the waiver of fees, there is no reference to fee waivers in the New York Freedom of Information Law. Consequently, 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. Morgentahu, 552 NYS2d 518 (1990)].

Further, it has been advised and held judicially that an agency may require payment of fees for copying in advance of preparing copies (see Sambucci v. McGuire, Supreme Court, New York County, November 14, 1982).

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-13116

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

41 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 3, 2002

Mr. Kimree Wilson
00-A-6346
Five Points Correctional Facility
P.O. Box 199
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. Wilson:

I have received your letters in which you requested assistance in obtaining a "written statement" of a wheelchair repairman and an "order from Albany" stating that you" must be housed (celled) alone."

In this regard, I offer the following comments.

First, it is noted at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute 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.

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

or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It appears that the records in question, particularly those pertaining to your placement, would fall within the coverage of §87(2)(g). That provision permits an agency to withhold records that:

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

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

Lastly, you wrote that this office did not respond to your previous correspondence. For your information, a response to your inquiry was mailed to you at your previous facility on June 18, 2001. In the event that you did not receive it, I have enclosed a copy for your review.

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-13117

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

41 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 3, 2002

Mr. Jessie J. Barnes
97-B-1784
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. Barnes:

I have received your letters and the attached materials in which you sought an advisory opinion concerning your unsuccessful attempts to obtain a "surveillance videotape" from the Collins Correctional Facility, and copies of letters received by Judge Maloy from you and your daughter prior to the trial disposition of your case. In response to your request for the videotape, the Department of Correctional Services Appeals Officer, Anthony J. Annucci, wrote that there is "no available video."

In this regard, I offer the following comments.

First, it is noted at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to create a record in response to a request. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) 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 may request such a certification.

Second, with respect to the denial of your request for copies of letters contained in a court file, it is emphasized that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council,

> office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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

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

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

It is suggested that you resubmit your request to the clerk of the court, citing an applicable provision of law as the basis for your request.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13118

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

41 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 3, 2002

Mr. Reuben Avent
01-A-5796
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. Avent:

I have received your letter in which you sought assistance regarding the Rockland County Jail's "refusal" to respond to a request for records related to your "excessive force incident."

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, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should generally be directed to that person. While I believe that the person in receipt of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer, it might be worthwhile to resubmit your request to the records access officer.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 in consideration of the records sought is §87(2)(b), which enables an agency to withhold records insofar as disclosure would result in an unwarranted invasion of personal privacy.

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 the incident, 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 Treacy
Assistant Director

DT:jm

FOIL-AO-13119

From: Robert Freeman
To: Don Kaake
Date: 1/3/02 10:36AM
Subject: Re: truck dmv records

Dear Mr. Kaake:

The DMV functions under provisions of the Vehicle and Traffic Law that enable that agency to charge fees different from those that can be charged by other agencies.

As you may be aware, section 87(1)(b)(iii) of the Freedom of Information Law enables an agency to charge up to twenty-five cents per photocopy, unless a different fee is prescribed by statute. One such statute is section 202 of the Vehicle and Traffic Law, which states that the DMV shall charge five dollars for a search that is made manually, and that the fee for copies is one dollar per page, except when a request involves an accident report, in which case the fee is fifteen dollars.

If the Village of Angelica maintains a copy of a DMV record, it is limited to the fee permitted by the Freedom of Information Law; there is no other statute that would enable the Village to charge for a search or in excess of twenty-five cents per photocopy.

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13120

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

41 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, 2002

Ms. Carman Williams
[redacted]

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

Dear Ms. Williams:

I have received your letter of December 15 and the materials attached to it. Your complaint relates to requests to the New York City Clerk for copies of certain marriage records. Rather than photocopying the actual records, a letter was sent to you that included minimal information that appears to have been derived from the records. You have questioned whether the Clerk is obliged to provide "a physical copy of the document itself - with redactions if necessary."

From my perspective, the law requires that copies of the records of your interest be made available upon payment of the appropriate fee, likely after the deletion of various details. Several statutes are pertinent to an analysis of rights of access, and in this regard, I offer the following comments.

As you may be aware, under the Freedom of Information Law, it has been established that the reasons for which a request is made and an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 62 NYS 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. The only exception to that principle relates to §89(2)(b)(iii) of the Freedom of Information Law, which permits an agency to withhold "lists of names and addresses if such list would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses is relevant, and case law indicates that an agency can ask that an applicant certify that a list would not be used for commercial purposes as a condition precedent to disclosure [see Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980); also, Siegel Fenchel and Peddy v. Central Pine Barrens Joint Planning and Policy Commission, Sup. Cty., Suffolk Cty., NYLJ, October 16, 1996].

With specific respect to marriage records, provisions of the Domestic Relations Law include conditions regarding disclosure. I believe that some aspects of marriage records must be disclosed to any person, while others may or may not be made available, depending on the purpose for which a request is made. Subdivision (1) of §19 states in relevant part 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 and index such information as is required therein, which book shall be kept and preserved as a part of the public records of his office. 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. Whenever an application is made for a search of such records in the city of New York, 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 search is requested and fifty cents each additional year thereafter...All such affidavits, statements and consents, immediately upon the taking or receiving of the same by the town or city clerk, shall be recorded and indexed as provided herein and shall be public records and open to public inspection *whenever the same may be necessary or required for judicial or other proper purposes.* At such times as the commissioner shall direct, the said town or city clerk, excepting the city clerk of the city of New York, shall file in the office of the state department of health the original of each affidavit, statement, consent, order of a justice or judge authorizing immediate solemnization of marriage, license and certificate, filed with or made before such clerk during the preceding month. Such clerk shall not be required to file any of said documents with the state department of health until the license is returned with the certificate showing that the marriage to which they refer has been actually performed.
>
> "*The county clerks of the counties comprising the city of New York shall cause all original applications and original licenses with the marriage solemnization statements thereon heretofore filed with each,* and all papers and records and binders relating to such original documents pertaining to marriage licenses issued by said city clerk, in their custody and possession to be removed, transferred, and delivered to the borough offices of the city clerk in each said counties."

The foregoing makes reference to "original applications and original licenses", as well as other records relating to the application for and issuance of a license.

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" [see §§87(2)(b) and 89(2)(b)]. In my view, disclosure of the names of applicants for marriage licenses or those who have been granted marriage licenses would not rise to the level of an unwarranted invasion of personal privacy. The court in Gannett referred to an opinion that I prepared and found that such a disclosure "does not equate with the type of personal, confidential, or sensitive information precluding public access."

While the court focused on names of applicants, nowhere was it stated that other items are confidential. The issue, in my view, involves the extent to which disclosure of the records in question would constitute an unwarranted invasion of personal privacy. In Hanig v. State Department of Motor Vehicles (79 NY 2d 106), the issue involved a request for a driver license application that included reference to the existence of or treatment for certain medical disabilities. Even though those items were not medical records or medical histories, the Court affirmed the lower court's denial of access, stating that "it does capture the essence of the exemption in that it encompasses the very sort of detail about personal medical condition that would ordinarily and reasonably be regarded as intimate, private information" (id., 112). Based on the foregoing, the Court considered the nature of the information and whether it could be characterized as intimate. In a similar analysis, it was found that "an individual's educational background, i.e., the level of education attained and the particular institutions attended" must be disclosed, for the court was not "persuaded that a reasonable person of ordinary sensibilities would find if offensive and objectionable to have such information disclosed" [Ruberti, Girvin and Ferlazzo v. Division of State Police, 64 NYS 2d 411, 415 (A.D. 3 Dept. 1996)].

If a special consent is noted on a marriage record, or if such a record includes medical or health information, those items might justifiably be deleted. It is likely in my opinion that other items would be found by a court to constitute an unwarranted invasion of privacy if disclosed to the public, such as social security numbers, ages, occupations, names of fathers and countries of birth, maiden names of mothers and their countries of birth, and whether former spouses are living or deceased. They are largely incidental to the qualifications of individuals to marry. In addition, while

I believe that the municipality of residence should be disclosed, the street address of applicants could in my view be withheld as an unwarranted invasion of privacy.

With respect to the "proper purpose" standard appearing in §19 of the Domestic Relations Law, again, I believe that certain aspects of marriage records must be disclosed to any member of the public. The remaining aspects of the records would be available or deniable based on the "proper purpose" standard. By means of analogy, in the case of death records, which are typically exempted from public disclosure under §4174 of the Public Health Law, there are exceptions that authorize disclosure, i.e., "when a documented medical need has been demonstrated" or "when a documented need to establish a legal right or claim has been demonstrated." That kind of justification provides town and city clerks with the flexibility to make judgments regarding the ability, but only upon a showing of a good reason, a "proper purpose", to disclose items which could routinely be withheld on the ground that disclosure would result in an unwarranted invasion of privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward F. O'Malley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13121

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

41 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, 2002

Mr. Frederick Alexander Jones
[redacted]

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

Dear Mr. Jones:

I have received your letter in which you explained that several agencies have not responded to your requests for the names of employees. You requested this office to "cause all such full names to be sent" to you.

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, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should generally be directed to that person. While I believe that the person in receipt of your request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer, it might be worthwhile to resubmit your request to the records access officer.

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

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

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

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

With certain exceptions, the Freedom of Information Law 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 described above must be disclosed for the following reasons.

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

Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

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

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

I hope that I have of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

FOIL-AO-13122

From: Robert Freeman
To: [redacted]
Date: 1/7/02 9:53AM
Subject: Dear Mr. Muszak:

Dear Mr. Muszak:

The Freedom of Information Law is applicable to agency records, and section 86(3) defines the term "agency" to mean, in essence, any entity of state or local government in New York, except the courts or the State Legislature. Therefore, it is clear that police departments and offices of district attorneys fall within the requirements of 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-13123

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

41 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 7, 2002

Mr. Joseph Spector
Democrat and Chronicle
55 Exchange Boulevard
Rochester, NY 14614-2001

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

Dear Mr. Spector:

I have received your letter of December 17, as well as the materials relating to it. You have sought an advisory opinion concerning the propriety of a denial of access to records by Ontario County.

As I understand the matter, having been accused of starting a house fire that killed his wife and four children, a particular individual has been charged in Seneca County with five counts of second degree murder and one count of first degree arson. Your request directed to the Ontario County Sheriff's Department involved "any and all arrest records and complaints" pertaining to that individual. The request was denied on the basis of §87(2)(e)(i) and (ii) of the Freedom of Information Law. Those provisions authorize an agency to withhold records "compiled for law enforcement purposes" insofar as disclosure would "interfere with law enforcement investigations or judicial proceedings" or "deprive a person of a right to a fair trial or impartial adjudication." It is your contention that the records that you requested "are from closed cases" and do not relate to "the current charges."

From my perspective, the basis for the denial of your request is inconsistent with law. For the following reasons, it is likely that some aspects of your request should be granted while others may be denied, but not for the reason offered by the County. In this regard, I offer the following comments.

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

authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the 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 County has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. Again, I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the Department for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

Second, 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)].

Also relevant may be §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In general, it has been advised that when a person is the subject of an unsubstantiated or unfounded complaint or allegation, the records relating to the complaint or allegation may be withheld to protect the privacy of the subject of the complaint. There may also be privacy considerations relative to a witness, a victim or complainant, and rights of access, in my view, would be dependent upon attendant facts. By means of example, if a burglary occurs at a private home and police officers visit the premises, their presence is generally known, particularly when police vehicles are on the scene or officers interview neighbors. The event in that kind of situation becomes somewhat public, and I cannot envision how an agency could justify withholding portions of a record summarizing the event or indicating the address. However, if the resident is aged and lives alone, his or her identity might justifiably be withheld to protect personal privacy and safety. Similarly, it is likely that identifying details may be withheld with respect to witnesses or persons interviewed. On the other hand, if a burglary or property crime occurs at a business establishment, there may be no issue regarding personal privacy.

Often the provision cited by the County is most significant in determining rights of access to records relating to criminal activity. That provision, §87(2)(e), states in its entirety 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."

If you requested records regarding the alleged murder and arson, which relate to charges that are pending, I would agree that substantial portions of the records might justifiably be withheld under subparagraphs (i) and (ii). However, since your request involves records pertaining to events unrelated to the charges, I do not believe that those provisions could justifiably be cited to withhold records concerning those events.

Another ground for denial of possible relevance, §87(2)(f), enables an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person." Reliance on that provision is, as in the case of other grounds for denial, dependent on attendant facts and circumstances.

The remaining ground for denial of potential significance, §87(2)(g), permits an agency to deny access to records that:

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

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

Lastly, I note that another source of information concerning persons arrested within the County may involve the records kept by county jails pursuant to §500-f of the Correction Law. That provision states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what 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."

The record of commitments and discharges maintained pursuant to §500-f is accessible independent of the provisions of the Freedom of Information Law. Insofar as entries in that records pertaining to the individual in question can be located or extracted with reasonable effort, I believe that they must be made available.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Donald C. Ninestine, Chairman
John Park
Lorraine Marchildon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3395
FOIL-AO-13124

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

41 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 7, 2002

Allen Hershkowitz, Ph.D.
[redacted]

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

Dear Mr. Hershkowitz:

As you are aware, I have received your letters of December 17 and 19, as well as your letter of January 4.

In brief, in the first, you raised issues involving the extent to which the Lewisboro Town Board complied with the Open Meetings Law relative to a "work session" and an executive session held during that gathering. The second pertained to the "firing" by the Town Supervisor of a resident from several positions that she held. When the Supervisor refused to answer questions concerning the dismissal, he stated, according to your letter, that "This is a personnel issue and I am prohibited from discussing personnel issues in public." You also indicated that the "supervisor imposes a three minute limit on speaking during town board public comment periods" and refused to enable you to speak beyond three minutes when another person yielded his three minutes to you. You have questioned the propriety of his actions. In the latest letter, you referred to the absence of any record of a vote taken during "an unspecified executive session", minutes of executive sessions and the absence of notice of work sessions.

In this regard, I offer the following comments.

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

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Since a work session held by a majority of a public body is a "meeting", it 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.

Since a work session is a "meeting", it must be preceded by notice given pursuant to §104 of the Open Meetings Law. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be

> conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week 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 notice must be given to the news media, I point out that the recipient may choose to publicize a meeting, but is not required to do so.

I note that the judicial interpretation of the Open Meetings Law suggests that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in a Westchester County case, Previdi v. Hirsch:

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual

> meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Based upon the foregoing, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

Second, based on the language of the Open Meetings Law and its judicial interpretation, a public body cannot conduct an executive session prior to a meeting, and in a technical sense, it cannot schedule an executive session in advance of a meeting. 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..."

In consideration of the foregoing, it has been consistently advised that a public body cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. 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. Ct., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, to comply with the letter of the law, in situations in which it appears that an executive session may properly be held, rather than scheduling an executive session, the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. When there is an intent to be considerate to the public, by indicating that an executive session is likely to be held (rather than *scheduled*), the public would implicitly be informed that there may be no overriding reason for arriving at the beginning of a meeting.

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". 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.

I note 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)].

Next, it appears that the Supervisor believes that he and perhaps others are prohibited from discussing "personnel issues" in public. In my view, that is inaccurate. Although I do not believe that they can be forced to discuss those issues in public, I do not believe that they are prohibited from doing so.

Although your inquiry does not deal with the latter, I point out that both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I am unaware of any statute that would generally prohibit a Board member from disclosing the information discussed during an executive session. Further, even when information might have

been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For instance, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the federal Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matters described in your correspondence.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

With respect to minutes of executive sessions, §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 of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be prepared and made available to the extent required by the Freedom of Information Law within one week of the executive session. If no action is taken, there is no requirement that minutes of the executive session be prepared.

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, supra, one of the issues involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

Therefore, if the Board reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action.

Whether action is taken in public or during an executive session, it has been held that both the Freedom of Information Law and the Open Meetings Law preclude secret ballot voting and require that a record be prepared indicating how each member voted. Since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although the Freedom of Information Law generally pertains to existing records and ordinarily does not require that a record be created or prepared [see §89(3)], an exception to that rule involves voting by agency members. Specifically, §87(3) of the Freedom of Information Law has long required that:

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

Stated differently, when a final vote is taken by members of an agency, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Further, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "[t]he use of a secret ballot for voting purposes was improper", and that the Freedom of Information Law requires "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987), aff'd 72 NY 2d 1034 (1988)].

Based on the foregoing, to comply with the Freedom of Information Law, I believe that a record must be prepared and maintained indicating how each member cast his or her vote, disclosure of the record of votes represents the only means by which the public could know how their representatives asserted their authority. Ordinarily, a record of votes of the members will appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law, and in my opinion, so long as minutes indicate how each member cast his or her vote, the requirements of the Freedom of Information Law would be satisfied.

Lastly, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, that statute is silent with respect to the issue of public participation. Consequently, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, it has been advised that it should do so based upon 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., Town Law, §63; County Law, §153; Village Law, §4-412; Education Law, §1709(1)], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, Town Law, §63; would be unreasonable.

In my view, if the Town Board has established a rule that is equally applicable to all of those who attend meetings and wish to speak which specifies that speakers cannot yield their time to others, the rule would likely be valid. I note that, according to §63 of the Town Law, "[t]he board may determine the rules of its procedure." Based on that provision, I believe that the ability to make rules involves a power of a town board, rather than an individual member of the board, such as a supervisor.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded to the Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13125

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

41 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 8, 2002

Mr. Edward Nelson
95-R-2256
Elmira Correctional Facility
Box 500
Elmira, NY 14902-0500

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

Dear Mr. Nelson:

I have received your letter in which you requested an advisory opinion concerning the denial of your Freedom of Information Law appeal for copies of records pertaining to you "from the South Carolina Department of Probation, Parole and Pardon Services that are in the possession of the NYS Division of Parole."

The Records Appeals Officer, Terrence Tracy, wrote that:

> "...these documents, if any, are exempt from disclosure pursuant to 9 N.Y.C.R.R. §8000.5(c)(2)(i)(b) which provides that access shall not be granted to reports, documents and materials of other agencies. Therefore, your request for these documents is denied."

I respectfully disagree with the substance of the basis for denial offered by Mr. Tracy in response to your appeal. In this regard, I offer the following comments.

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

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective, there is no statute that would exempt the records in question from disclosure. Section 259-a of the Executive Law requires that the Division of Parole maintain certain kinds of records, and §259-k provides in subdivision (2) that the

Board of Parole "shall make rules for the purpose of maintaining the confidentiality of records, information contained therein and information obtained in an official capacity by officers, employees or members of the division of parole." The Division's regulations, 9 NYCRR §8000.5(c), pertain to disclosure of case records maintained by the Division. That provision confers limited rights of access to case records and states in paragraph (2)(i)(b) that "access by the Division of Parole shall not be granted to reports, documents and materials of other agencies, including but not limited to probation reports, drug abuse and alcoholism rehabilitation records, and the DCJS report." Section 8008.2(a) of the regulations defines the phrase "case record" to include: "...any memorandum, document or other writing pertaining to a present or former inmate, parolee, conditional releasee or other releasee, and maintained pursuant to sections 259-a(1)-(3) and 259-c(3) of the Executive Law."

The statutes and regulations that preceded those cited above and which pertained to the Board of Parole when it was part of the Department of Correctional Services included essentially the same direction. However, insofar as the regulations conflicted with the Freedom of Information Law, they were found more than twenty years ago to be invalid. Specifically, in Zuckerman v. Board of Parole, the court found that:

> "Section 221 of the Correction Law, entitled 'Records', requires the commissioner to keep complete records 'of every person released on parole or conditional release'. The statute also requires the commissioner to make rules as to the privacy of these records. Under the authority of these two statutory mandates (7 NYCRR 5.1 [a], the following regulation was promulgated: 'Department records. Any department record not otherwise made available by rule or regulation of the department shall be confidential for the sole use of the department.' (7 NYCRR 5.10). The minutes of board meetings are *not* 'made available by rule or regulation' and, therefore, Special Term held that the minutes are private.
>
> "It would seem clear that section 29 of the Correction Law exempts from disclosure those specifically enumerated statistics and, further, that section 221 exempts those records dealing with parolees. Minutes of Parole Board meetings are not *specifically* exempted by either of these statutes. Applying the rule of *ejusdem generis* (McKinney's Cons Laws of NY, Book 1, Statutes, §239, subd b), the nonexclusive list contained in subdivision 1 of section 29 of the Correction Law could not be construed to include those minutes.
>
> "It would therefore appear that this regulation, as applied to the minutes of Parole Board meetings, is invalid on two grounds. As shown above, the regulation makes *all* records private initially and is not limited solely to those categories of information specifically set forth or included by reasonable implication in the statutes. Furthermore, by making *all* records initially confidential in a broad and sweeping manner, the regulation violates the clear intention of

> the Freedom of Information Law (see Public Officers Law, §85). It is established as a general proposition that a regulation cannot be inconsistent with a statutory scheme (see e.g. *Matter of Broadacres Skilled Nursing Facility v. Ingraham*, 51 AD2d 243, 245-246)...This conclusion is further reinforced by the general rule that public disclosure laws are to be liberally construed..." [53 AD 2d 405, 407(1976); emphasis supplied by the court; see also Morris v. Martin, 440 NYS 2d 1026 (1982)].

In sum, based upon the direction provided judicially, I do not believe that the records in question can be characterized as being exempted from disclosure by statute or that the regulations serve to enable the Department to withhold records that would otherwise be available under the Freedom of Information Law.

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-13126

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

41 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 8, 2002

Mr. Pietro Gigliotti
[redacted]

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

Dear Mr. Gigliotti:

I have received your letter in which you requested information concerning access to Family Court records and criminal court documents.

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.

With respect to Family Court records, of possible relevance to the matter is §166 of the Family Court Act. That statute states that:

> "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13127

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

41 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 8, 2002

Mr. Jack Chase
96-B-0041
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. Chase:

I have received your letter in which you questioned the propriety of a response from the Washington County District Attorney's Office, which denied your request for records on the basis that the records were "previously provided to you at the trial" and because "the request seeks the production of court exhibits."

In this regard, I offer the following comments.

The District Attorney, Mr. Robert Winn, in his response to your request, indicated that court records are exempt from the scope of the Freedom of Information Law. Based on a judicial decision pertinent to the matter, I concur with the District Attorney's response.

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

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

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

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

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

I direct your attention to the decision cited in the response to your request, Moore v. Santucci [151 AD 2d 677 (1989)]. That decision specified that the respondent office of a district attorney "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

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

I note that Moore also held that an agency need not make available records subject to the Freedom of Information Law that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintains records that had previously been disclosed, the agency would be required to respond to a request for the same records. Otherwise, insofar as the records sought have been disclosed to you in the past, the District Attorney's Office in my view would not be required to provide copies of those same records.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13128

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

41 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 8, 2002

Mr. Askari Kalonji
85-C-0439
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Kalonji:

I have received your letter in which you requested this office to provide statistical information concerning "parole release ratios", and a variety of information pertaining to "parole commissioners."

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 does not maintain records generally, and this office does not possess the information in which you are interested.

Pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should generally be directed to that person.

In consideration of the nature of your request, it is suggested that you submit your request for records to Ms. Ann Crowell, Records Access Officer, NYS Division of Parole, 97 Central Avenue, Albany, NY 12206.

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-13129

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

41 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 8, 2002

Mr. Hubert C. Cary, Jr.
98-A-0286
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. Cary:

I have received your letter in which you explained that you have not received responses to your Freedom of Information Law requests, and asked for assistance from this office.

In this regard, since you requested records from Daytop Village, Inc., I point out that the Freedom of Information Law applies to agencies and that §86(3) of that statute defines the term "agency to mean:

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

Based on the foregoing, as a general matter, the Freedom of Information Law applies to entities of state and local government.

It is my understanding that Daytop Village is a private corporation. If that is so, it would not be subject to the Freedom of Information Law.

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-13130

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

41 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 8, 2002

Mr. Mario Garcia
91-A-6367
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. Garcia:

I have received your letter in which you explained that the Superintendent of your facility has not responded to your Freedom of Information Law request.

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

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

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

FOIL-AO-13131

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

41 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 8, 2002

John W. Caffry, 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. Caffry:

I have received your letter of December 17 and the materials relating to it. You have sought my views concerning your request made under the Freedom of Information Law to the Town Hartford and the Town Supervisor's response to it.

In brief, you requested "all documents and records" related to an agreement between the Town and Jointa Galusha, LLC from 1998 to the present, including all correspondence and communications between the parties or their representatives, drafts, notes, memos and written exchanges between the Supervisor and any other member of the Town Board or the Town Attorney pertaining to the agreement. In response, the Supervisor indicated that a search of some records would be made, but based on advice that I had provided by phone, he added that the request "must be honored if materials are filed by subject matter."

While I do not believe that my advice was exactly as the Supervisor suggested, I believe that the key issue involves the manner in which the records in question are maintained and the 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 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. 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 Town officials can locate the records sought with a reasonable effort analogous to that described above, i.e., perhaps by reviewing hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if 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.

You added that you "assume that, at a minimum, [the Supervisor] must make all of his correspondence for the period in question available, and [you] can look through it for what interests [you]." In my view, the Town could choose to do as you suggest, but it would not be required to do so. In short, in consideration of the nature of the records, while some might be available in their entirety, others might justifiably be withheld in whole in part on the ground that they consist of advice, opinion, recommendations and the like found within intra-agency materials [see Freedom

of Information Law, §87(2)(g)] or that they are subject to the attorney-client privilege [see §87(2)(a)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Supervisor
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13132

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

41 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 10, 2002

E-Mail

TO: David 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 information presented in your correspondence.

Dear Mr. Mack:

I have received two inquiries from you recently, the first of which pertains to the ability to obtain the "accident history" for certain roads during the past five years, as well as "weather history." The other involves the assessment of a search fee by a county clerk in relation to a request for felony conviction records.

In this regard, as you aware, motor vehicle accident reports are generally accessible to the public (see Public Officers Law, §66-a). With respect to the history of accidents in certain locations, the issue in my view involves the manner in which records are kept and, therefore, whether a request "reasonably describes" the records as required by §89(3) of the Freedom of Information Law. In short, if records are kept in a manner that enables staff to locate and identify the records sought based on the terms of a request, the request would meet the standard that it reasonably describe the records. For instance, if an agency maintains or can retrieve records pertaining to accidents on the basis of location, the records of your interest likely could be found with reasonable effort, and the request would reasonably describe the records. On the other hand, if records of accidents are kept chronologically and retrieving them by location involved a page by page search of hundreds or thousands of records, it has been held that the request would not meet the requirement of reasonably describing the records.

Assuming that the records can be found, I believe that they would be available for any use, unless the highway is in some way maintained or improved through the use of federal aid. Pertinent to the matter is 23 USC §409, which states that:

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130,144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

With regard to weather conditions, I know of no state agency that maintains records on the subject. However, it is suggested that you might contact the U.S. Weather Service.

With respect to a fee for search, while the regulations promulgated by the Committee on Open Government specify that agencies cannot charge for searching for records sought under the Freedom of Information Law (see 21 NYCRR §1401.8), neither that statute nor the Committee's regulations extend to the courts or court records. Since your request to the county clerk involved court records, the Freedom of Information Law would not apply. If you would like to attempt to determine whether the fee in question is valid or reasonable, it is suggested that you contact the Office of Court Administration. That agency can be reached at (212)428-2500.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3397
FOIL-AO-13133

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

41 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 10, 2002

Ms. Margaret A. Moses
[redacted]

Mr. David W. Fountaine
Village Administrator
Village of Hamburg
100 Main Street
Hamburg, NY 14075-4988

The staff of the Committee 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 Trustee Moses and Village Administrator Fountaine:

I have received your letters and a variety of related materials in which you raised a series of questions relating to the propriety of discussing various real property transactions during executive sessions and procedures regarding the implementation of the Freedom of Information Law, particularly in relation to the use of a prescribed request form.

I am responding to you concurrently in an effort to be fair, and I reiterate comments offered recently in a conversation with Mr. Fountaine and other Village officials: specifically, that when individuals contact this office, the information that they offer is accepted in good faith and with an assumption that the information is accurate. Nevertheless, it is acknowledged that the truth or the reality relative to a given situation is often based on perception; one person's view of facts or the effects of certain actions may differ from that of another person, even when both have acquired the same information and heard the same presentations. Over the course of years, there have been many instances in which the perceptions of members of a various boards have differed, and absent the ability to conduct investigations, it is impossible to ascertain which version of reality may be more accurate.

According to Ms. Moses, there are several incidents concerning the propriety of executive sessions held by the Board of Trustees. The first relates to a situation in which a developer owns a twenty-two acre parcel, which was the subject of a proposal offered several years ago. The proposal

was dropped and a moratorium, which has since ended, precluded development of the parcel. Adjacent to it is a fifteen acre parcel owned by the Village, and she wrote that the Village Attorney suggested that the Board sell the property to the developer and that the discussions on the matter have occurred in executive sessions. The second apparently involves the same parcel and a dispute over whether the parcel is a park, and that, too, has been considered in executive sessions. The remaining issue relates to a parcel that the Village Administrator would like to purchase from the Town, but the Town, to date, has shown no interest in engaging in that transaction. An offer was made, but again, the issue was discussed in executive session, as are similar matters, such as "the selling of fire halls, which we own."

Ms. Moses indicated that she is "uncomfortable talking about these issues in executive session because of possible litigation."

Mr. Fountaine suggested that I do not have all the information on the subject and referred to the absence of any response from me concerning an email sent to this office on December 24. I was the only person on staff present in the office that day, and I do not recall having received that communication. Further, there is no reference to it in our log of incoming mail. I note, too, that, in an effort to be fair, requests for opinions are answered in the order of receipt. Ms. Moses' communication was received on December 18, and I had not yet prepared a response when Mr. Fountaine telephoned this office. Again, I am considering trustee Moses' comments and those offered by Mr. Fountaine together in an effort to be fair and balanced in this response.

In his email letter of December 24 (faxed to me on January 7), Mr. Fountaine wrote that the Board has conducted executive sessions to discuss "real estate issues" as follows:

> "...a proposed sale of property to include offering price and all details accocitted [sic] with such.
>
> "The village has been discussing the possible sale of a village owned parcel of land to a developer who's land adjoins the village owned property. This sale is being considered as a negotiation with the developer to lower the density of the project he is proposing to build. The village has already been sued by the developer over this project. A neighborhood group is soliciting funds and has hired a lawyer to sue the village in relation to the possible sale of this village owned property. It is under these conditions that the village board was going to discuss this particular piece of village owned property. This appears to me to satisfy item h of section 105 of the open meetings law."

In a second letter addressed to me on January 7, Mr. Fountaine wrote in relevant part that:

> "For the complete record, Clover development has sued the village via an Article 78 over this project. A group of citizens (probably the

> ones who called you have hired an attorney (Mr. Walling). Ms. Moses letter is not totally factual. The Clover Article 78 was filed but dismissed by the Judge before trial...
>
> "You should know that we have on numerous occasions discussed the Clover project in open session. We have only gone into executive session when we are discussing litigation strategy related to the project. As I mentioned above the developer has already sued us once and has said they may resort to legal action should we not be able to reach some type of agreement on this project. Additionally, the citizen group that has raised funds and hired a lawyer also gives the board concern about litigation over the property. In fact Ms. Moses acknowledges such in her letter when she states that the citizen group is going to pursue whether the property is a park or not. To openly discuss this would give Clover information on what the board strategy would be should an agreement over the sale of the property not be concluded with Clover. The Village Attorney's information to the village board about whether this is a part or not is attorney-client information. He should be allowed to discuss this with the board due to the already actual litigation by the developer and their publicly announced intent to litigate as seen on the citizen group flyer and confirmed by Ms. Moses.
>
> "In regard to the other property for which Ms. Moses mentioned my name, here is the rest of the story. The citizens electric committee suggested that we consider generating our own power should we form a municipal utility. I brought this to the village board who discussed this is executive session due to the fact the property is on the open market and the village in the same discussion decided 1 - should we consider making an offer and 2 - how much should we offer. This was the extent of the discussion in executive session about this property. To publically [sic] discuss the consideration and sale price of a piece of real estate should clearly fall within executive session."

He added in a second letter of January 7 that:

> "...the discussion concerning the particular piece of real estate was already in litigation and we were discussing the potential sales price of several other village owned parcels that we planned on placing on the market. To discuss potential sales prices of property in open session before listing them for sale is ridiculous."

Notwithstanding the foregoing, Mr. Fountaine also wrote that "we have on numerous occasions discussed the Clover project in open session."

In this regard, as you are likely aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1). Consequently, a public body, such as a village board of trustees, cannot enter into an executive session to discuss the subject of its choice.

From my perspective, the grounds for entry into executive session are based on the need to avoid some sort of harm that would arise by means of public discussion, and that is so with respect to the grounds for entry into executive session that appear to be relevant in relation to the matters that you described.

First, with respect to real property transactions, §105(1)(h) of the Open Meetings Law permits a public body to enter into executive session to discuss:

> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

In my opinion, the language quoted above, like the other grounds for entry into executive session, is based on the principle that public business must be discussed in public unless public discussion would in some way be damaging, either to an individual, for example, or to a government in terms of its capacity to perform its functions appropriately and in the best interest of the public. It is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

A key question, in my view, involves the extent to which information relating to possible real property transactions has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or would in some way damage the interests of Village taxpayers. I note that the language of §105(1)(h) does not refer to negotiations *per se* or the impact of publicity upon negotiations relating to a parcel; rather its proper assertion is limited to situations in which publicity would have a *substantial* effect on the *value* of the property. It has been advised, for example, that when a municipality is seeking to purchase a parcel and the public is unaware of the location or locations under consideration, it is possible if not likely that premature disclosure or publicity would indeed substantially affect the value of the property. In that kind of situation, publicity might result in speculation or offers from others, thereby precluding the municipality from reaching an optimal price on behalf of the taxpayers. However, when details concerning a potential real property transaction, such as the location and potential uses of the property, are known to the public, publicity would have a lesser effect or impact on the value of the parcel. Again, the more that is known to the public, the less likely it is that publicity would affect the value of a parcel.

In short, the language of §105(1)(h) is limited and precise, for it focuses solely on the impact of publicity on the value of a parcel. I do not have specific knowledge regarding the extent to which

information pertaining to the transactions to which you made reference have become known by or available to the public. Nevertheless, based on the terms of that provision, only in those instances in which "publicity would *substantially affect the value*" of a parcel of real property could an executive session properly be held.

The other ground for entry into executive session of relevance to the matters considered would be §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". Based on judicial decisions, the scope of the so-called litigation exception is narrow. As stated judicially:

> "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 Yorketown, 83 AD d. 612, 613, 441 N.S. d. 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply by expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD d. 840, 841 (1983)].

In view of the foregoing, the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, so as not to divulge its strategy to its adversary, who may be present with other members of the public at the meeting. I note, too, that the Concerned Citizens decision cited in Weatherwax involved a situation in which a town board involved in litigation met with its adversary in an executive session to discuss a settlement. The court determined that there was no basis for entry into executive session; the ability of the board to conduct a closed session ended when the adversary was permitted to attend.

Based on the judicial construction of §105(1)(d), that exception would not apply if a party with whom the Village is negotiating is present or if the discussion deals with the substance of an issue that might result in litigation. In my view, only to the extent that a public body discusses its litigation strategy may that exception be properly invoked.

A second vehicle that might permit a meeting to be held in private involves "exemptions", and §108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes,

there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

Of possible relevance is §108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law."

When an attorney-client relationship has been invoked, it is considered confidential under §4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would in my view be confidential under state law and, therefore, exempt from the Open Meetings Law.

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

In a judicial determination that described the parameters of the attorney-client relationship and the conditions precedent to its initiation, it was 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 proceedings, 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)].

Insofar as the Board seeks legal advice from its attorney and the attorney renders legal advice, I believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. Therefore, even though there may be no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to §108. For example, legal advice may be requested even though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, often at some point in a discussion, the attorney has stopped giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting.

The remaining issue relates to the use of a form prescribed by the Village to be used by those requesting records under the Freedom of Information Law. As indicated by phone, it has consistently been advised that a person seeking records cannot be compelled to complete a form devised by an agency. Mr. Fountaine questioned the basis for that advice.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate rules and regulations governing the procedural implementation of the law, and the Committee has done so (see 21 NYCRR Part 1401). In turn, §87(1)(a) requires the "governing body of each public corporation" to promulgate rules and regulations "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", "this article" being the Freedom of Information Law.

That statute in §89(3) and 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. The regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. Neither the Law nor the regulations 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 and 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. It has been advised that an agency may ask that a standard form 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 but, in my view, cannot be required to complete the standard form as his or her written request.

I agree that the Village's form is similar with respect to the sample request letter in the Committee on Open Government's publication, "Your Right to Know." The sample letter is intended to enable the public to submit an appropriate request by letter and to avoid the necessity of seeking or using a form prescribed by an agency.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13134

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

41 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 10, 2002

Mr. Christopher Schuh
[redacted]

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

Dear Mr. Schuh:

I have received your letter and faxes concerning your request to the Warren County Sheriff's Department for a complaint filed against you.

Your request was denied on the ground that the record was "compiled for law enforcement purposes and could interfere with law enforcement investigations." Sheriff Cleveland denied your appeal, stating that the record is "part of an open criminal investigation."

In this regard, I offer the following comments.

The basis for denial offered by the Sheriff's Department, §87(2)(e), permits an agency to withhold records that:

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

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

Since the record appears to have been compiled for law enforcement purposes, I would concur with Sheriff Cleveland's determination to the extent that disclosure would interfere with an ongoing investigation. However, when the investigation is completed and the case is closed, in my opinion, §87(2)(e)(i) would no longer justify a denial of access.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Sheriff Larry G. Cleveland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13135

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

41 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 11, 2002

Ms. Jean Black
[redacted]

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

Dear Ms. Black:

As you are aware, I have received a variety of correspondence concerning your effort to obtain payroll information in an electronic medium from the Sewanhaka Central High School District.

According to the materials, you were initially informed that you could obtain the information sought in the form of 143 pages, with four names per page, at a cost of $35.75. You appealed, and the Superintendent modified the initial determination, indicating that another source of the information had been located. He added that "[t]his source also requires us to delete personal and confidential information", that it consists of 23 pages and would be available to upon payment of a fee of $5.75. Notwithstanding his offer, you sought an opinion concerning your right to obtain the information in an electronic storage medium, such as a computer disk."

In this regard, notwithstanding the comments that follow, I would recommend that you accept the superintendent's offer, for it appears to be reasonable.

With respect to the right to obtain records in electronic format, I offer the following comments, which focus particularly on the judicial interpretation of the Freedom of Information Law.

It is important to note at the outset that 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

> 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 recently 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 the principles enunciated in that decision would likely be applicable with respect to information maintained electronically in a variety of contexts.

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, based on the precedent offered in NYPIRG, the District must disclose data stored electronically for which there is no basis for a denial of access, and make it available in an electronic storage medium.

Lastly, pursuant to §87(1)(b)(iii), unless an agency makes copies of records available by making photocopies, it is authorized to charge a fee based on the "actual cost of reproduction." In general, it has been advised that the actual cost in the case of information reproduced electronically involves the cost of computer time and the storage medium, i.e., a disk or tape. It is unclear at this juncture whether agencies may charge for programmer time in those instances in which programming may be necessary.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Dr. George Goldstein
Douglas Libby

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13136

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

41 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 14, 2002

Mr. Frank Brown
97-A-2072
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. Brown:

I have received your letter in which you explained your difficulty in obtaining from the "Assistant District Attorney of New York" your "paperwork from trial." The District Attorney's Office informed you that your paperwork was not in its possession. You requested this office to determine the location of the records you seek to obtain.

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.

Section 86(4) of the Freedom of Information 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."

As a general matter, the Freedom of Information Law pertains to existing records. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

It is suggested that you contact your attorney in an attempt to obtain 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-13137

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 16, 2002

Mr. Alfred Mower
87-A-8232 LH 6-18
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. Mower:

I have received your letter in which you questioned whether you would "be able to access the records held by a new department created in the [division] of parole which is called the Bureau of Special Services" and which pertain to you as a" sex offender and is lable [sic] as Sex Offender File Analysis Report."

Since I am unfamiliar with the content of the record you seek to obtain, I cannot conjecture as to its 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.

Rights of access may not be governed by the Freedom of Information Law, but rather by the "Sex Offender Registration Act" (hereafter "the Act"), Article 6-C of the Correction Law, also known as "Megan's Law."

By way of brief background, subdivision (1) of §168-b of the Act directs the Division of Criminal Justice Services to "establish and maintain a file of individuals required to register" under the Act and includes guidelines concerning the content of what is characterized as the "registry." Subdivision (2) states that:

> "The division is authorized to make the registry available to any regional or national registry of sex offenders for the purpose of sharing information. The division shall accept files from any regional or national registry of sex offenders and shall make such available when requested pursuant to the provisions of this article. *The division*

> *shall require that no information included in the registry shall be made available except in the furtherance of the provisions of this article*" (emphasis added).

Based on the sentence highlighted above, it is the position of both the Department of Law and the Division of Criminal Justice Services, and I concur, that information contained in the registry is to be disclosed only pursuant to the provisions of the Act, "only in the furtherance of the provisions of this article", which, again, is Article 6-C of the Correction Law.

While the Freedom of Information Law deals generally with access to records, agencies' obligations to disclose records, and their ability to deny access, according to the rules of statutory construction (see McKinney's Statutes, §32), the different or "special" statute prevails when such a statute pertains to particular records. Since information contained in the registry may be disclosed only in furtherance of the Act, the Freedom of Information Law, in my view, does not apply to that information.

Another provision of potential relevance is §50-b of the Civil Rights Laws. 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."

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 would be based on the direction provided by the provisions of §50-b.

If the report of your interest falls under either of the above referenced provisions, the Freedom of Information Law, in my opinion, would not be applicable.

If neither of the statutes referenced above is applicable, it would appear that the Freedom of Information Law would govern. Of likely relevance in that event would be §87(2)(g), which states that an agency may deny access to records that:

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

iii. final agency policy or determinations; or

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

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

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13138

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 17, 2002

Mr. Vincent Malerba
82-A-2059
Woodbourne Correctional Facility
P.O. Box 1000
Woodbourne, NY 12788-1000

Dear Mr. Malerba:

I have received your letter and, as requested, have enclosed a copy of the decision rendered in Matter of Monteleione.

In relation to that case, you have sought guidance concerning the ability to obtain a copy of a search warrant. It is unclear whether the warrant pertains to a matter in which you are involved or otherwise. It is also unclear whether the warrant may have been disclosed in a judicial proceeding. Consequently, I cannot offer specific guidance.

Nevertheless, if the warrant was executed and the premises searched, and if the search resulted in a conviction, it is unlikely in my view that the grounds for denial in the Freedom of Information Law could justifiably be asserted. Further, if the warrant was submitted into evidence or became part of a court file, it is suggested that a request be made to the clerk of the appropriate court. While the Freedom of Information Law does not apply to the courts, court records are generally available to other provisions of law (see e.g., Judiciary Law, §255).

Lastly, if the warrant relates to a situation in which a person was charged and the charge was later dismissed, I believe that records pertaining to the event would be 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-13139

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 17, 2002

Mr. William Gonzalez
415471
Bayside State Prison
4293 Route #47, Box F-1
Leesburg, NJ 08327

The staff of the Committee on Open 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:

Your letter 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 provide guidance concerning public access to records of state and local government agencies in New York, primarily under the state's Freedom of Information Law. You expressed interest in obtaining court records from New York and federal courts.

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

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

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

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

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

The foregoing is not intended to suggest that the court records cannot be obtained. Although the courts are not subject to the Freedom of Information Law, court records are generally available

under other provisions of law (see e.g., Judiciary Law, §255). It is suggested that you request the records from the clerk of the court in which the proceeding was conducted, citing an applicable provision of law.

While I am not an expert with respect to access to federal government records, I believe that, as a general matter, federal court records are also available from the clerks of courts.

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-3398
FOIL-AO-13140

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 17, 2002

Bernard Sohmer, Chair
City University of New York
University Faculty Senate
535 East 80th Street
New York, NY 10021

The staff of the Committee 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. Sohmer:

I have received your letter of December 19 in which you requested an advisory opinion concerning the status of the Research Foundation of the City University of New York ("the Foundation") under the Freedom of Information and Open Meetings Laws. You wrote that "[i]t appears that the Research Foundation regards itself as a private corporation under contract to City University to provide general services related to the University's grant operations", but added that some Foundation employees "are physically housed at the University's central headquarters and report directly to CUNY administrators."

In an effort to learn more about the Foundation, its functions and its relationship with CUNY, I obtained a copy of its Absolute Charter, the document in which the Board of Regents designated the Foundation as an educational corporation, as well as material appearing on the Foundation's website.

The Charter describes the purposes of the Foundation as follows:

> "a. To assist in developing and increasing the facilities of The City University of New York to provide more extensive educational opportunities and service to its constituent colleges, students, faculties, staffs and alumni, and to the general public by making and encouraging gifts, grants, contributions and donations of real and personal property to of for the benefit of The City 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 The City University of New York; and
>
> "c. To finance the conduct of studies and research in any and all fields of intellectual inquiry of benefits to and in keeping with the educational purposes and objects of The City University of New York and/or its constituent colleges, and to enter into contractual relationships appropriate to the purposes of the Corporation."

The website indicates that the Foundation is "legally and financially separate from the University" and is "a private not-for-profit educational corporation with 501(c)(3) status", and that pursuant to an agreement with the University approved by the State Division of the Budget, it "undertakes post-award administration of all grants and contracts awarded to CUNY faculty and staff for research, training, education and services." The website also describes the composition of the Foundation's 17 member Board of Directors, which consists of:

> "...the Chancellor of the University as Chairperson, the President of the Graduate School as Vice Chairperson, two senior and two community college Presidents selected by the college Presidents, the Chairperson of the Faculty Advisory Council (FAC) to the Foundation and three other FAC members chosen by the FAC (a faculty advisory body chosen the University Faculty Senate), one full-time graduate student selected by the Doctoral Student Council, two individuals appointed by the Chancellor, and four at-large members."

From my perspective, based on the language of the law and its judicial interpretation, the records of the Foundation fall within the coverage of the Freedom of Information Law, and the meetings of its Board of Directors must be held in accordance with the Open Meetings Law. In this regard, I offer the following comments.

First, even if the Foundation 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 the Foundation as an "agency" has not been determined judicially, it is clear that the City University is an "agency" required to comply with the Freedom of Information Law.

Pertinent with respect to rights of access is §86(4), which defines the term "record" expansively to include:

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

Based on the foregoing, the Court of Appeals, the state's highest court, found that documents maintained by a not-for-profit corporation providing services for a 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 question that you raised, irrespective of whether the Foundation is an "agency", its records appear to be maintained for the City University. If that is so, the records 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 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 Foundation, would not exist but for their relationships with CUNY. Due to the similarity between the situation you have described and that presented in Eisenberg, as well as the functions of the Foundation and its relationship to the University, I believe that it is subject to the Freedom of Information Law.

Third, 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 the Foundation 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 City University, 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 Foundation 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 Foundation board in the terms of membership, for the description of the composition of the Board indicates that a majority of its seventeen members are officials of or chosen by CUNY or CUNY organizations.

Based on the foregoing, I believe that the Board of the Foundation is a "public body" required to comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13141

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

E-Mail

TO: John Kohlstrand <jkohlstr@democratandchronicle.com>

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Kohlstrand:

I have received your letter in which you referred to a request recently made under the Freedom of Information Law. Although the receipt of the request was acknowledged, the agency, Monroe County, indicated that the request would be granted or denied in "approximately 36 days." You have sought guidance concerning the propriety of the response.

Having seen several responses referring to the same time period within which the County responds to requests, it appears that the acknowledgment of the receipt of your request is routinely issued by the County.

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

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

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

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If a delay in disclosure is unreasonable or if an agency delays its determination to grant or deny access substantially beyond the approximate date referenced in the acknowledgment of the receipt of the request, I believe that the request may be considered to have been constructively denied and that you may appeal.

I hope that I have been of assistance.

RJF:jm

cc: John Riley

FOIL-AO-1312

From: Robert Freeman
To: kpsweeny@yorktownny.org
Date: 1/18/02 8:36AM
Subject: Dear Mr. Sweeny:

Dear Mr. Sweeny:

Neither the Freedom of Information Law nor the Open Meetings Law specifies where the minutes of a town zoning board of appeals must be "filed or maintained." However, as you may be aware, section 30 of the Town Law states in subdivision (1) that the town clerk is the legal custodian of town records. In addition, section 57.19 of the Arts and Cultural Affairs Law specifies that the town clerk is the "records management officer." In consideration of those statutes, I believe that the clerk is custodian of all town records, irrespective of where they may be kept or who has possession of the records.

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-1313

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

E-MAIL

TO: Geri Holstead <laurensclerk@stny.rr.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. Holstead:

As you are aware, I have received your letter in which you referred to a request for Town's bank statements. You indicated that you disclosed the statements following the deletion of the account number, and that the applicant for the statements asked that you specify the exception to rights of access that enabled the Town to withhold the account number. That person also questioned your ability "to withhold further requests until his previous ones are paid for."

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 pertinent exception with respect to bank account numbers in my view is §87(2)(i). For several years, that provision authorized an agency to withhold "computer access codes." Based on its legislative history, that provision was intended to permit agencies to withhold access codes which if disclosed would provide the recipient of a code with the ability to gain unauthorized access to information. Insofar as disclosure would enable a person with an access code to gain access to information without the authority to do so, or to shift, add, delete or alter information, i.e., to make electronic transfers, I believe that a bank account or ID number could justifiably have been withheld. Section 87(2)(i) was recently amended in recognition of the need to guarantee that government agencies have the ability to ensure the security of their information and information systems. That provision currently states that an agency may withhold records or portions of records which "if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and

infrastructures." If disclosure of a bank account number could enable a person to gain access to or in any way alter or adversely affect an agency's electronic information or electronic information systems, I believe that it may justifiably be withheld.

With regard to the second issue, there is no judicial decision of which I am aware that is pertinent to the matter. However, when a request for copies of records is served upon an agency, both the agency and the applicant bear a responsibility. The agency is responsible for compliance with the Freedom of Information Law by retrieving the records sought and disclosing them to the extent required by law. The agency is also required to produce copies of records "[u]pon payment of, or offer to pay, the fee prescribed therefor" [see Freedom of Information Law, §89(3)]. Concurrently, if the applicant requests copies, I believe that he or she bears the responsibility of paying the appropriate fee.

If an agency has prepared copies of records in good faith and the applicant fails or refuses to pay the fee, I do not believe that the agency would be required to make available those copies that have been prepared. In my view, it follows that an agency should not be required to honor ensuing requests until the applicant has fulfilled his or her responsibility by tendering the fee for copies previously made.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13144

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Peter Mundy
[redacted]

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

Dear Mr. Mundy:

I have received your letter and the materials attached to it. You have asked whether, in my view, there are "significant flaws"in your appeal made under the Freedom of Information Law to Delaware County.

By way of background, you attended a hearing on a proposed local law in the Town of Kortright on December 10, and at the end of the hearing, a representative of the Delaware County Planning Department, Ms. Nicole Franzese, distributed a copy of a memorandum to members of the Town Board. Although you asked for a copy then, Ms. Franzese refused to make a copy available to you. On the following day, you delivered a request for the memorandum to the County's records access officer. In an appeal dated December 18, you indicated that the memorandum was needed to prepare for a meeting of the Town Board held on December 17, but that you were able to obtain a copy only immediately prior to the start of that meeting. Since you contended that the lateness of the disclosure of the memorandum rendered it "no longer useful", you considered the County's failure to respond quickly to be a "constructive denial" of access. You also referred to §89(8) of the Freedom of Information Law.

In this regard, I offer the following comments.

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

Having reviewed the memorandum in question, it is noted at the outset that neither the Town nor the County would in my opinion have been required to disclose it. That document was addressed to Ms. Franzese by an attorney in which the attorney offered his legal opinion concerning the

language of the Town's proposed local law. When an attorney retained by a unit of government offers legal advice to that entity, such a communication would fall within the attorney-client privilege and would be exempt from disclosure under §87(2)(a) of the Freedom of Information Law. That provision pertains to records that are "specifically exempted from disclosure by state or federal statute", and §4503 of the Civil Practice Law and Rules codifies the attorney-client privilege. Since I am unaware of the relationship in this circumstance between the County and the Town, it is unclear whether the disclosure of the memorandum to the Town Board constituted a waiver of the privilege.

Even if the privilege was waived, a second ground for denial would have been applicable. In short, opinions, advice, recommendations and the like exchanged between or among government officers or employees or their consultants, i.e., a law firm, may be withheld under §87(2)(g).

Based on the foregoing, I do not believe that either the County or the Town would have been required to have disclosed the memorandum.

Second, because it was disclosed, I believe that the matter became moot, and that there likely would have been no basis for an appeal.

Lastly, I do not believe that §89(8) of the Freedom of Information Law was implicated. That provision states that "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation." 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 §89(8) applies when an agency fails to respond promptly or 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 the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James E. Eisel
Nicole Franzese

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1314/5

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Wallace S. Nolen
[redacted]

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

Dear Mr. Nolen:

I have received your letter in which you sought an advisory opinion concerning a request made to the Department of Correctional Services (DOCS).

The request involves the payroll record required to be maintained pursuant to §87(3)(b) of the Freedom of Information Law, and there appears to be no dispute concerning your right to gain access to the contents of that record. The issues involve your right to inspect the record at DOCS headquarters, which appears to be the only location where the record is kept, and the fee for a copy of the record if a copy is requested.

With respect to the former, as you are aware, §87(2) of the Freedom of Information Law states that agencies are required to make records accessible under that statute available "for public inspection and copying..." Further, the regulations promulgated by the Committee on Open Government provide in relevant part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3). In short, as a general matter, the law requires an agency to make records available for inspection at a certain location or locations.

I have contacted the records access officer for the DOCS, Mr. Daniel Martuscello, and he informed me that applicants for records are generally given the opportunity to inspect records at DOCS headquarters. He also indicated that your contacts with DOCS and its staff at headquarters raised concerns regarding the safety and security of staff. Mr. Martuscello, like others with whom I have spoken, said that you were abusive, that you have made threatening phone calls, and that your request to inspect records at headquarters was denied for security reasons. While I am unaware of any judicial decision involving an agency's denial of access to a building in which records are ordinarily made available for public inspection due to security concerns, there is a decision in which a proceeding brought under the Freedom of Information Law was dismissed based on the petitioner's

"continuing campaign to harass and intimidate" and his "abusive letters" sent to an agency official and others (Hanft v. Crosson, Supreme Court, New York County, January 25, 1991). From my perspective, if the DOCS can demonstrate that its concern regarding security is valid, the denial of access to its headquarters would be justifiable.

With respect to fees for copies of records, §87(1)(b)(iii) of the Freedom of Information Law states that such fees "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." As I under your comments, the record of your interest would not involve photocopies, but rather a printout that is computer generated. If that is so, the portion of the language quoted above pertaining to the fee for photocopying would not apply, and the standard for assessing the fee would be the actual cost of reproduction. In my view, the actual cost of reproduction would be the marginal cost, i.e., the additional cost incurred by the agency in preparing a copy. In the context of the situation that you described, it appears that the actual cost of reproduction would involve the use of computer time, paper and ink. It is noted that the regulations promulgated by the Committee provide that the actual cost of reproduction excludes "fixed costs of the agency..." [21 NYCRR §1401.8(c)(3)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Daniel Martuscello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1316

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Richard Hoffmann
FOIL Appeals Officer
Town of Islip
Office of the Town Attorney
Town Hall
Islip, NY 11751

The staff of the Committee 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. Hoffmann:

I appreciate having received a copy of your determination of an appeal made under the Freedom of Information Law by Assemblyman Steve Levy. Assemblyman Levy, in your words, sought "a list of property owners with veterans' tax exemptions and alternate veterans' exemptions in the Town of Islip." You referred to advisory opinions rendered by this office as the basis for your denial of his appeal on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

From my perspective, your reliance on the opinions that you cited is misplaced and the information sought should be disclosed. In this regard, I offer the following comments.

First, 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.

Second, one of the exceptions to rights of access, §87(2)(b), involves the basis for denial of access to which you referred. That provision, as you correctly state in your determination, is intended to protect against unwarranted invasions of privacy as records relate to natural persons, as opposed to entities such as corporations. However, not every disclosure of personally identifiable information would constitute an "unwarranted" invasion of personal privacy; on the contrary, many disclosures, as in this instance, involve a permissible invasion of privacy.

This is so particularly in relation to records involving the assessment of real property. As a general matter, records used or prepared in relation to assessments and the evaluation of real property have been found to be available to the public, even before the enactment of the Freedom of Information Law [see e.g., Sanchez v. Papontas, 32 AD2d 948 (1969); Sears Roebuck & Co. v. Hoyt, 107 NYS2d 756 (1951); Szikszay v. Buelow, 436 NYS2d 558, 107 Misc. 2d 886 (1981)]. Szikszay involved a request for an assessment roll that was prepared both in traditional paper format and on computer tape. The court determined that the assessment roll, which included personal information, must be disclosed under both the Freedom of Information Law and §516 of the Real Property Tax Law, irrespective of the intended use of its contents. I note that the court referred to §89(6) [formerly §89(5)] of the Freedom of Information Law, which provides, in brief, that nothing in that statute can serve to diminish rights of access to records conferred by another statute or by means of judicial determination.

Specifically, the Court in Szikszay found that:

> "An assessment roll is a public record (Real Property Tax Law [section] 516 subd. 2; General Municipal Law [section] 51; County Law [section] 208 subd. 4). It must contain the name and mailing or billing address of the owner of the parcel (Real Property Tax Law [sections] 502, 504, 9 NYCRR [section] 190-1(6)(1)). Such records are open to public inspection and copying except as otherwise provided by law (General Municipal Law [section] 51; County Law [section] 208 subd. 4). Even prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law [section] 66, repealed L.1974, c. 578, assessment rolls and related records were treated as public records, open to public inspection and copying (Sanchez v. Papontas, 32 A.D.2d 948, 303 N.Y.S.2d 711, Sears Roebuck & Co. v. Hoyt, 202 Misc. 43, 107 N.Y.S.2d 756; Ops. State Comptroller 1967, p. 596)" (id. at 562, 563).

Further, in discussing the issue of privacy, 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.).

In Szikszay, as in this instance, because the assessment roll has long been available under the Real Property Tax Law and through judicial decisions, an exception in the Freedom of Information Law cannot apply as a basis for a denial of access.

In an effort to ensure the accuracy of the foregoing, I contacted the Office of Real Property Services and discussed the matter with its attorney who specializes in disclosure issues. He informed me that the assessment roll, which, again, is clearly accessible to the public, includes reference to veterans' exemptions, either directly or by means of a code that is available to and can be used by the public. As such, the information sought by Assemblyman Levy appears on a record which is itself available to the public. Since you suggested that the denial was based in part on your contention that disclosure would reveal a person's income level, the attorney added that information on the assessment roll does not contain information regarding one's income, but rather the value of real property.

Lastly, the fact that a person has served in the armed forces and is a veteran is not secret. That information has long been available from the federal government under the federal Freedom of Information Act.

In short, for the reasons offered in the preceding remarks, I believe that the determination is inconsistent with law and that Assemblyman Levy's request should have been granted.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Steve Levy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3400
FOIL-AO-13147

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Ms. Sally Blackmer
[redacted]

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

Dear Ms. Blackmer:

I have received your correspondence in which you sought advice concerning your efforts in obtaining records from the Honeoye Central School District. You also indicated that it is "impossible to hear" substantial portions of meetings of the Board of Education.

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 a school district, is not required to create or prepare a record in response to a request. Therefore, insofar as the District does not maintain records containing the information sought, it would not be obliged to prepare new records on your behalf to satisfy a 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.

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 of the receipt of your request 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, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 sought records reflective of teachers' certifications, assuming that such records exist and are maintained by the District, the only ground for denial significant to an analysis of rights of access is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In conjunction with the principles described in the preceding paragraph, it would appear that the most important document regarding the qualifications of a teacher, administrator or supervisor, is a certification. As I understand it, the issuance of a certification, which I believe is the equivalent of a license, is based upon findings by the State Education Department that a particular individual has met the qualifications to engage in a particular area or areas of teaching or education. As such, the certification is likely the best and most accurate source of determining a teacher's qualifications. Further, I believe that it is clearly relevant to the performance of the employee's official duties.

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

Lastly, with respect 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 this instance, the Board must in my view situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with a basis requirement of the Open Meetings Law.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Kathy Hoertz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1314/8

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Ms. Kimberly Wilder
[redacted]

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

Dear Ms. Wilder:

I have received your letter of December 26, as well as a variety of other materials relating to your efforts in gaining access to records of the Town of Babylon.

You have sought my views concerning responses to requests that fail to provide a "timeline" that would indicate when a request would be granted or denied; access to communications between the Town and the Office of the State Comptroller during a specified period of a month and letters of resignation apparently submitted to the former Town Supervisor; and the propriety of the former Supervisor's destruction of those letters.

In this regard, I offer the following comments.

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

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

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement

is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. Several acknowledgements of the receipt of your requests did not make reference to such a date or "timeline."

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, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if an agency acknowledges the receipt of a request but fails to include an approximate date for granting or denying access, 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 includes within its coverage all agency records, and §86(4) of the Law defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets,

> forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, I believe that letters of resignation submitted to a town supervisor, for example, would clearly constitute "records" that fall within the coverage of the Freedom of Information Law.

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."

As in the case of the Freedom of Information Law, I believe that a letter of resignation would constitute a "record" for purposes of Article 57-A.

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..."

As such, 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. According to a comment by an official of the State Archives, a unit of the State Education Department, letters of resignation must be retained for a minimum of six years.

It is also noted that §30 of the Town Law specifies that the town clerk is the custodian of town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town. In that role, the clerk "shall coordinate legal disposition, including destruction of obsolete records."

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, 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.

Insofar as the records of your interest exist, I believe that their contents would serve as the factors important in determining rights of access.

For instance, with respect to letters of resignation, §87(2)(b) may be pertinent. That provision authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." To the extent that those letters include intimate or personal information, i.e., that a person has resigned due to poor health, I believe that they could be withheld. If they do not contain information of that nature, they would likely be available.

With regard to communications between the Town and the Office of the State Comptroller, both of those entities are "agencies" as defined in §86(3), and communications between them would constitute "inter-agency materials." Pertinent, therefore, is §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it may require 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 ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, 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: Hon. Janice E. Tinsley-Colbert
Lynn Bezarro
Janice A. Stamm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13149

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Robert C. 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 in which you expressed interest in obtaining school records pertaining to your grandfather. You indicated that he came to the United States between 1889 and 1891 and was educated in Cohoes.

In this regard, the statute that generally deals with public access to government records in New York is the Freedom of Information Law. Also relevant, however, is the federal Family Educational Rights and Privacy Act (20 U.S.C. §1232g; "FERPA"). FERPA focuses on education records identifiable to students and applies to all public educational agencies or institutions. Therefore, if your grandfather attended public schools, both FERPA and the Freedom of Information Law may apply. If your grandfather is deceased, FERPA would not be applicable.

I note that both of those laws pertain to existing records. Consequently, if the records of your interest were destroyed or discarded, neither law would be of assistance to you.

Assuming that records continue to exist, it is suggested that you write to the records access officer of the Cohoes City School District. The records access officer, pursuant to regulations promulgated by the Committee on Open Government, is responsible for coordinating the agency's response to requests. In your request, it is suggested that you refer to the Freedom of Information Law and provide some sort of proof that your grandfather is deceased, as well as an indication of your relationship with him. Section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include as much detail as possible. The District may charge up to twenty-five cents per page when making copies of records available.

The address of the Cohoes City School District is 7 Bevan Street, Cohoes, NY 12047.

Enclosed is a copy of "Your Right to Know", which summarizes the Freedom of Information Law and includes a sample letter of request that may be helpful to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3401
FOIL-AO-13150

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

E-Mail

TO: Robert Meller [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. Meller:

I have received your letter of January 3, as well as a variety of materials relating to it.

According to your letter:

> "Several Eden Central School District students faced felony charges for plotting a 'Columbine style' attack on faculty and public safety personnel. Charges against one of the students were recently dropped by the Erie County District Attorney. All of this information, including the students' names, has been reported by the local media several times in the past several months.
>
> "The school board adopted a "zero-tolerance" policy, which the superintendent presumably enforced by ruling that this student could not return to school and would continue to receive tutoring at home, at district expense. The student's parents appealed the superintendent's decision to the school board, which discussed the matter at a special meeting, called for this purpose on December 19, 2001. The board in executive session, attended by all seven members, declared to have sufficient votes in favor of reversing the superintendent's decision and allowing the student to return to school."

The Board of Education, in a written statement issued on December 20, indicated that it "reached a decision regarding a certain student disciplinary matter." Additionally, the Buffalo News reported that the Board "modified" the Superintendent's "earlier decision." That article included the student's name and photograph, which appears to have been obtained not from the school district, but rather in relation to the student's arrest.

In consideration of the requirements imposed by the Family Educational Rights and Privacy Act (20 U.S.C. §1232g; "FERPA"), you have asked whether that statute would "prohibit the school board from disclosing the vote of each of its members on this particular issue."

From my perspective, it would not; on the contrary, I believe that the Freedom of Information Law requires the preparation of a record indicating how each member of the Board cast his or her vote. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law requires that agency records, i.e., those of a school district, be disclosed, unless there is a basis for denial appearing in the Law that can be properly asserted. Similarly, the Open Meetings Law generally requires that meetings of public bodies, i.e., boards of education, be conducted in public, unless there is a basis for closing the meeting. I point out that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not applicable. Pertinent to the issue you raised is §108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law."

Relevant with respect to both records and meetings concerning the incident that you described and similar or related matters are FERPA and the regulations promulgated pursuant to FERPA by the U.S. Department of Education. In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;
(e) A list of personal characteristics that would make the student's identity easily traceable; or
(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

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

I note that the term disclosure is defined in the regulations to mean:

> "to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic means."

In consideration of FERPA, if the Board discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would deal with a matter made confidential by federal law that would be exempt from the Open Meetings Law.

Notwithstanding the FERPA, I believe that the Board would have the ability to discuss the discipline of specific students in executive session. Section 105(1)(f) of the Open Meetings Law permits a public to conduct an executive session to discuss:

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

Therefore, when the Board discusses a disciplinary matter that focuses upon a particular student or students, the discussion could in my opinion validly be held in an executive session.

With respect to the Freedom of Information Law, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the FERPA, and insofar as education records would if disclosed identify a particular student or students, I believe that they would be exempted from disclosure.

While the District may not disclose information personally identifiable to a student, as indicated earlier, the student's identity became known through disclosures by other governmental entities, and the substance of the Board's decision was made public. Indicating the votes of board members would not result in any additional disclosure of information regarding the student; on the contrary, a failure to do so in my view would diminish the accountability of and essentially insulate Board members.

Although the Freedom of Information Law generally provides that an agency is not required to create or prepare records [see §89(3)], an exception to that rule pertains to records of votes by members of public bodies. Specifically, §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", such as a school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

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)].

Because the record of votes of each member would not involve the disclosure of additional information regarding the student, I do not believe that FERPA would prohibit disclosure. Rather, for the reasons expressed in the preceding commentary, I believe that the Freedom of Information Law requires that such a record be "maintained" and made available.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13151

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Danny Andersen
[redacted]

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

Dear Mr. Andersen:

I have received your letter in which you sought assistance in obtaining portions of certain records from the Long Island Power Authority (LIPA).

As I understand the matter, you are attempting to obtain the street addresses, without the street numbers, of those residences in which geothermal heat pumps have been installed. LIPA, at this juncture, is willing to disclose the name of the town, and presumably the number of geothermal heat pumps installed in that town. You have contended that the "elimination of street number and resident names protects the privacy" of residents.

In this regard, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The issue is whether the disclosure of the street name within a certain town would constitute "an unwarranted invasion of personal privacy" under §§87(2)(b) and 89(2)(b) of the Freedom of Information Law.

It appears that you have agreed with LIPA's position that personally identifiable information pertaining to those who have installed heat pumps may be withheld to protect their privacy. I concur, for it is my view that it is simply nobody's business that a consumer may use a particular device and that, therefore, disclosure of such information would constitute an unwarranted invasion of personal privacy.

While it applies to considerations relating to records different from those of your interest, a standard which in my view is appropriate has been devised in regulations promulgated by the U.S.

Department of Education concerning education records. In short, the regulations require educational agencies or institutions to withhold from the public records pertaining to a student insofar as disclosure would make the student's identity "easily traceable" (34 CFR §99.3).

Similarly, in a case determined under the Freedom of Information Law concerning access to portions of a database, it was agreed by the parties that patient information, including but not limited to a patient's name, address and social security number could justifiably be withheld. Concurrently, the agency chose to disclose data reflective of the nature of a medical treatment and the hospital in which the treatment was given, as well as other details that would not, if disclosed, identify a patient. At issue was access to the portion of the database identifying the physician who provided treatment. Although the agency contended that disclosure of the name of the physician "could readily permit a third party to deduce logically the identity of a given patient, resulting in a breach of medical confidentiality", the Appellate Division held that "such speculation falls far short of 'articulating' a particularized and specific justification for denying access", as the state's highest court has required [New York Times v. New York State Department of Health, 243 AD2d 157, 160 (1999); see also Capital Newspapers v. Burns, 67 NY2d 562, 566 (1986)].

In the context of the records at issue, it would appear that identifying a resident who purchased a geothermal heat pump would involve a matter of conjecture, unless a street has only one residence. In other instances, if names are acquired by other means (i.e., from an assessment roll), that information alone would not indicate exactly which residences have heat pumps. That being so, it is unlikely in my view that LIPA could demonstrate with justification that disclosure of the town and the street name, without more, 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: Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13152

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. James R. Mercer, Jr.
87-C-0688
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. Mercer:

I have received your letter in which you sought clarification in response to your Freedom of Information Law request for records related to DNA testing of your blood sample, specifically test results and testing and storage procedures. The New York State Police denied your request on the ground "that the records you seek are exempt from disclosure by state statute, specifically section 995 of the Executive Law."

By way of background, Executive Law §995-c(3) states that subsequent to conviction and sentencing for certain felonies, a designated offender "shall be required to provide a sample of blood for DNA testing to determine identification characteristics specific to such person and to be included in a state DNA identification index pursuant to this article."

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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) states in relevant part that an agency may deny access to records that "are specifically exempted from disclosure by state or federal statute."

One such statute, Executive Law §995-d, provides:

> "1. All records, findings, reports, and results of DNA testing performed on any person shall be confidential and may not be disclosed or redisclosed without the consent of the subject of such DNA testing. Such records, finding, reports and results shall not be released to insurance companies, employers, or potential employers,

> health providers, employment screening or personnel companies, agencies, or services, private investigation services, and may not be disclosed in response to a subpoena or other compulsory legal process or warrant, or upon request or order of any agency, authority, division, office, corporation, partnership, or any other private or public entity or person, except that nothing contained herein shall prohibit disclosure in response to a subpoena issued on behalf of the subject of such DNA record or on behalf of a party in a civil proceeding where the subject of such DNA record has put such record in issue.
>
> "2. Notwithstanding the provisions of subdivision one of this section, records, findings, reports, and results of DNA testing, other than a DNA record maintained in the state DNA identification index, may be disclosed in a criminal proceeding to the court, the prosecution, and the defense pursuant to a written request on a form prescribed by the commissioner of the division of criminal justice services. Notwithstanding the provisions of subdivision one of this section, a DNA record maintained in the state DNA identification index may be disclosed pursuant to section nine hundred ninety-five-c of this article."

Based on the foregoing, it appears that the records of your interest may be disclosed only to the extent authorized in subdivision (2) of §995-d.

I note, too, that several aspects of your request refer to the federal Freedom of Information Act, which applies only to federal agencies. For your information, the New York Freedom of Information Law does not include a Vaughn index requirement or provisions concerning the waiver of fees.

Lastly, as requested, enclosed are copies of "Your Right to Know" and "You Should Know."

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DMT:tt

Encs.

FOIL-AO-13153

From: Robert Freeman
To: [redacted]
Date: 1/28/02 10:30AM
Subject: Dear Mr. Katz:

Dear Mr. Katz:

I have received your letter concerning a request for a tape recording of a meeting of the Village of Liberty Board of Trustees. You wrote that you were told that the tape recording is Village property and that you could not have a copy.

In this regard, I agree that the tape recording is Village property, as are all Village records. Nevertheless, it was determined in a judicial decision rendered more than twenty years ago that a tape recording of an open meeting is an agency record subject to the Freedom of Information Law. That statute requires that records be made available for inspection and copying, and that an agency, such as a village, must prepare a copy upon payment of the requisite fee. In this instance, the fee would be based on the "actual cost" of reproduction, which would be the cost of a cassette.

For more information on the subject, there are numerous advisory opinions available on our website. If you go to the opinions rendered under the Freedom of Information Law, click on to "T" and then to "tape recordings", the opinions written within the past ten years will be available in full text and will include citations for judicial decisions. The higher numbered opinions are most recent.

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-13154

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Thomas Caine
94-A-3357
Fishkill Correctional Facility
P.O. Box 307
Beacon, 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. Caine:

I have received your letter in which you explained that you have not received a response from the Division of Parole in relation to your request for "Statistics on Inmates convicted of Attempted Murder in the Second Degree that were granted Parole vs. those Inmates that were denied Parole."

You indicated that you received a letter acknowledging the receipt of your request and informing you that a response would be sent within approximately thirty days, but you have not yet received a response. You asked this office to assist you in obtaining the records of your interest.

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)].

For your information, the person designated to determine appeals by the Division of Parole is Terrence Tracy, Counsel.

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. If the statistics in which you are interested exist, I believe that they would be available [see §87(2)(g)(i)].

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-13155

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. James W. Brown
96-B-0850
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. Brown:

I have received your letter in which you sought assistance in obtaining records related to your arrest from the Elmira City 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 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 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 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.

You also requested the court to provide records "free of charge." Here I point out that there is nothing in the Freedom of Information Law or the Judiciary Law that requires that an agency waive fees, irrespective of the status of an applicant for records. Further, it has been held that an agency may charge its established fees even though the applicant is an indigent inmate [Whitehead v. Morgenthan, 552 NYS 2d 518 (1990)].

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-13156

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 28, 2002

Mr. Kevin Moss
99-A-6408
Five Points Correctional Facility
P.O. Box 119
Romulus, 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. Moss:

I have received your letter in which you sought assistance in obtaining phone records from your facility. You requested guidance on re-submitting an unanswered Freedom of Information Law request after the "time to file an Article 78 has passed.". You also questioned whether you should send your "request to the phone company, or to the institution."

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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, it is noted that 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."

In consideration of the foregoing, a phone company is not an agency for the purposes of the Freedom of Information Law and thus is not subject to the requirements of that law. A state correctional facility, however, is an "agency" subject to the Freedom of Information Law.

Lastly, with respect to resubmitting your request for records, judicial interpretations pertinent to the matter appear to reach somewhat contrary conclusions. In one decision, although a petition was dismissed on the ground that it was not timely commenced, it was held that a petitioner was not barred from seeking the records again under appropriate procedures (Matter of Mitchell, Supreme Court, Nassau County, NYLJ, March 9, 1979). In that situation, if the applicant renewed his or her request and appealed a denial of access, that person would have been able to seek judicial review of the denial within four months of the agency's determination. On the other hand, a proceeding was found to have been time barred when a challenge to a second denial of access was made on the same basis as an initial denial, and there was no change in circumstances [Corbin v. Ward, 160 AD 2d 596 (1990)].

In my view, due to the structure of the Freedom of Information Law and the fact that the grounds for withholding records are frequently based on the effects of disclosure, because those effects may change, an initial request for a record might properly be denied, but a second request might have to be granted due to changes in circumstances. For purposes of illustration, such changes may occur in a variety of situations. For instance, if a matter is currently under investigation, disclosure of records might interfere with the investigation and be withheld under §87(2)(e)(i) of the Freedom of Information Law. However, when the investigation has concluded, the records that were properly withheld in the first instance may become accessible, for disclosure would no longer result in any interference.

From my perspective, if an individual chooses not to initiate an Article 78 proceeding within four months after an agency's denial of his or her appeal, the choice not to do so should not forever preclude that person from seeking the records. There may be changes in circumstances, judicial precedents that could put an issue in a different light, an acquisition of records from other sources that might diminish an agency's capacity to justify a denial, or a change in one's financial ability to initiate a lawsuit. For those reasons, I do not believe that an agency may in every instance deny a second request on the basis of mootness.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13157

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 28, 2002

Mr. Wayne Gardine
96-A-5097
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. Gardine:

I have received your letter in which you requested assistance concerning a Freedom of Information Law request for records which you received on a previous occasion.

In this regard, nothing in the Freedom of Information Law pertains specifically to repeated requests made by an applicant for records that have already been disclosed. However, in those circumstances, it has been advised that an agency may inform the applicant that the records sought have been made available and that ensuing requests for the same items will be considered moot and will not be answered.

The decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)] appears to be relevant to the situation that you described. In Moore, 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" (id., 678).

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

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13158

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 28, 2002

Mr. Amin Booker
98-A-6245
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. Booker:

I have received your letter in which you referred to a response to a request made under the Freedom of Information Law by the records access officer for the Kings County District Attorney's Office. In short, the receipt of your request was acknowledged and it was indicated that you "will receive a response within 270 days." You asked whether there was any way for you to receive the records sooner.

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)].

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

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

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

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

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-13159

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 29, 2002

Mr. Jack Ferranti
Reg. No. 45299-053
FCI Ray Brook
Box 9006
Ray Brook, NY 12977

Dear Mr. Ferranti:

I have received your letters of January 19, which you characterized as "appeals" following denials of access by the New York City Office of the Medical Examiner and the State Insurance Fund.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning public access to government records; it is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision concerning the right to appeal a denial of access to records, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

While I am unfamiliar with the contents of the records of your interest or the extent to which the agencies to which your requests were made maintain any such records, 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.

Of likely relevance with respect to your request to the Office of the Medical Examiner 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 case of autopsy reports performed in New York City

by the Office of the Medical Examiner, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts records from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994].

Lastly, in consideration of the functions of the agencies to which your requests were made, I would conjecture that they would not, in many instances, maintain records containing the information of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-13160

From: Robert Freeman
To: rwood@warwick.net
Date: 1/29/02 5:17PM
Subject: Dear Councilperson Wood:

Dear Councilperson Wood:

I have received your communication and attempted to reach you by phone without success.

Before dealing with your specific questions, it appears that a major issue involves the assertion of authority by the Town Supervisor. From my perspective, the Supervisor is one of five Board members, and he or she does not have the authority to make decisions unilaterally; the Board makes decisions, ordinarily at meetings by means of a majority vote of its members. The record in question, the proposed master plan, is not the Supervisor's record; it is the Town's record.

If I understand your comments correctly, the intent is to print the master plan document and permit review by the Board and the public. In my view, once it is disclosed, a recipient of that record may do with it as he or she sees fit. If a member of the public wants to put it on a website, I know of no provision that prohibit that person from doing so. It is true that those with computers may have the ability to gain access to records at no charge. Nevertheless, under the Freedom of Information Law, inspection of accessible records is free. In this instance, the document could be viewed at no charge at the Town Hall or perhaps in a public library or similar facility.

With respect to the role of the "comprehensive board" and its chair, I believe that is dependent on the description of their duties and responsibilities. I know of nothing, however, that would prevent the chair or other members of the board from expressing their points of view or distributing the document.

I am not sure that I interpreted the matter correctly or that I addressed all of the issues. If I have not, please feel free to contact me. If you would like to discuss the matter, please provide a phone number where you can be reached with an indication of when I should try to reach you.

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-13161

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 30, 2002

E-Mail

TO: [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. [redacted]

I have received your letter in which you sought assistance in obtaining records pertaining to your request for records relating to your case involving public assistance.

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records. It is suggested that you contact the Office of Public Information and Communications at the New York City Human Resources Administration to ascertain the name of the records access officer and to learn of the status of your request. That unit can be reached in Manhattan at 331-6200.

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.

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 regard to access by the subject of a case, such as yourself, state regulations, 18 NYCRR §357.3, provide in relevant part that:

> "(c) Disclosure to applicant, recipient, or persons acting in his behalf.
> (1) The case record shall be available for examination at any reasonable time by the applicant or recipient or his authorized representative upon reasonable notice to the local district. The only exceptions to access are:
>
> > (i) those materials to which access is governed by separate statutes, such as child welfare, foster care, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Services;
> >
> > (ii) those materials being maintained separate from public assistance files for purposes of criminal prosecution and referral to the district attorney's office; and
> >
> > (iii) the county attorney or welfare attorney's files.
>
> (2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

Based on the foregoing, if you are the subject of a case file, it is likely that you would have rights of access under the regulations cited above. That being so, again, it is suggested that you contact the Human Resources Administration to learn of its procedures and the status of your request.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-13162

From: Robert Freeman
To: Stephen Filler
Date: 1/30/02 2:28PM
Subject: Re: Assistance with NY Foia request

Hi - -

First, the law applies equally to all units of state and local government in NY (except the courts and the State Legislature).

Second, a key issue involves whether the materials of your interest constitute "records" as defined in section 86(4). The definition of "record" is expansive, for it includes any information in any physical form whatsoever kept, held, filed, produced or reproduced by, with or for an agency. Therefore, if information exists in some physical form and it is maintained by or for a unit of government, or if it is kept by a legislator in conjunction with the performance of his or her official duties, it would constitute a "record" subject to rights of access.

The next question involves the possibility that the records or perhaps portions of the records may be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see section 87(2)(b)]. If the communications involve a person acting on behalf of an entity (i.e., a commercial enterprise) or by a person acting in a business capacity, the exception pertaining to privacy would not apply.

I hope that the foregoing is useful to you.

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-13163

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 30, 2002

Mr. Ray A. White
01-B-1249
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. White:

I have received your letter in which you appealed a denial of access to records that you requested from a court under the Freedom of Information Law. The appeal is based on the failure of the court to respond to the request.

In this regard, the courts and court records are not subject to the Freedom of Information Law. That statute pertains to agency records, and §86(3) defines the term "agency" to mean:

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

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

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

Based on the foregoing, again, the courts are excluded from the coverage of the Freedom of Information Law.

Notwithstanding the foregoing, court records are often available under other provisions of law (see e.g., Judiciary Law, §255). It is suggested that you renew your request and direct it to the clerk of the court, citing an applicable provision of law as the basis for the request.

For future reference, it is also noted that the Committee on Open Government is authorized to provide advice and opinions concerning the public access to government information, primarily

under the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision concerning the right to appeal, §89(4)(a), states in relevant part that:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13164

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 30, 2002

Reverend Jorge L. Negron, Sr.
74-A-6889
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. Negron:

I have received your letter in which you requested assistance regarding the failure of several agencies to respond to various 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 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)].

Please note that your correspondence refers to 5 USC 552 and 552a, which are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes apply only to federal agencies. Similarly, some of the records sought involve proceedings in Vermont, and the laws regarding disclosure differ from one state to another.

Enclosed for the review are copies of advisory opinions pertaining to the NYS Division of Parole in relation to access to its records.

I hope that I have of some assistance.

Sincerely,

David M. Treacy
Assistant Director

DMT:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13165

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 31, 2002

Mr. Michael Charles
84-A-2493
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

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

Dear Mr. Charles:

I have received your letter in which you requested assistance in obtaining your wife's address from the Dutchess County Department of Social Services for the purpose of having her served with divorce papers.

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.

Section 87(2)(b) provides that an agency may deny access to records if disclosure would constitute "an unwarranted invasion of personal privacy." That provision would allow the Department of Social Services to withhold portions of records indicating your wife's address. Further, §136 of the Social Services Law specifies that records identifiable to an applicant for or recipient of public assistance are confidential and, therefore, exempt from disclosure under §87(2)(a) of the Freedom of Information Law.

It is suggested that you seek the advice of an attorney for further guidance on the matter.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13166

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 31, 2002

Mr. Kenneth Samuels
97-A-0331
Elmira Correctional Facility
Box 500
Elmira, NY 14902

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

Dear Mr. Samuels:

I have received your letter in which you explained that your Freedom of Information Law request to the Bronx County District Attorney's Office was granted on appeal and "remand with instructions to the ADA to 1. locate the requested documents. 2. complete his determination pursuant to FOIL within 45 days. [You] then received a letter from the ADA informing [you] that [your] Attorney had adopt[ed] [your] FOIL request."

You have requested assistance from this office, but your letter does not explain the nature of your attorney's involvement with your Freedom of Information Law request or provide sufficient information to enable me to formulate a focused response to your inquiry. However, in an attempt to assist, I offer the following general 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 [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 decision rendered in Moore v. Santucci [151 AD2d 677, 679 (1989)] may be pertinent. In that decision, 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 ascertain the nature of records previously provided by the District Attorney's Office.

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-13167

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 31, 2002

Mr. David Zaire
83-A-2242
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. Zaire:

I have received your letter in which you asked whether you may obtain the judge's "bench notes" prepared in your criminal trial and copies of certain trial exhibits.

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 point out, however, it has been held that a judge's personal notes are generally not accessible to the public [see Herald Companies v. Town of Geddes, 470 NYS2d 81 (1983)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13168

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 31, 2002

Mr. Anthony Bennett
96-B-1530
Attic 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.

I have received your letter in which you requested assistance in obtaining medical records of your deceased mother from the Erie County Medical Center, which denied your request.

Since your inquiry involves medical records, it is noted that a different provision of law, §18 of the Public Health Law, deals specifically with access to patient records. In brief, that statute prohibits disclosure of medical records to all but "qualified persons." Subdivision (1)(g) of §18 defines the phrase "qualified person" to mean:

> "any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law, or a parent of an infant, a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record pursuant to paragraph (c) of subdivision two of this section, or an attorney representing or acting on behalf of the subject or the subjects estate."

To obtain additional information regarding access to patient information, it is suggested that you contact the NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

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-13169

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 31, 2002

Ms. Judith Saari
[redacted]

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

Dear Ms. Saari:

As you are aware, I have received your letter of January 4 in which you sought assistance in relation to your request made under the Freedom of Information Law to the Division of State Police. According to your letter and the correspondence attached to it, a request was made on July 30, and the Division acknowledged its receipt on August 10, indicating that you would "be notified upon completion of this review in approximately 60 business days." You indicated yesterday by phone that you had not received any further response.

By way of background, you wrote that you are the sister of Donna Payant, a former correction officer who was murdered while on duty at the Green Haven Correctional Facility in 1981. If my recollection is accurate, Lemuel Smith was convicted for the murder of your sister, thereby essentially closing the case years ago. In your request, you sought "all physical evidence" and "biological materials" retained by the State Police relating to the prosecution of Lemuel Smith for the murder of Donna Payant, as well as a variety of documents and information described in that letter.

In this regard, I offer the following comments.

First, although the Division could choose to make physical evidence and biological materials available for your review, I do not believe that those items fall within the coverage of the Freedom of Information Law. That statute is applicable 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."

It has been held that items of physical evidence (i.e., tools, clothing, etc.) do not constitute records and are beyond the scope of the Freedom of Information Law [Allen v. Strojnowski, 129 AD 2d 700; mot. for leave to appeal denied, 70 NY 2d 871 (1989)]. However, any documentary materials relating to the physical evidence would, in my view, be subject to rights conferred by 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..."

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*."

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable

> must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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, 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. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [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.).

Based on the direction given by the Court of Appeals in several decisions, records sought must be reviewed by an 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).

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.

The provision at issue in Gould, §87(2)(g) of the Freedom of Information Law, was cited in relation to complaint follow up reports prepared by police officers and enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data,

therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports or other interal governmental communications can be withheld in their entirety on the ground that they constitute

intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply.

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

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

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

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

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

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

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: Lt. Laurie M. Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13170

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 31, 2002

Mr. Adrian Trice
00-B-1484
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

Dear Mr. Trice:

I have received your letter in which you requested "records" and the addresses for "N.Y.S. overall", and for the "whole N.Y.S. system of 'internal affairs' agency."

In this regard, there is no general or overall address for State government, and there are many agencies that are involved in "internal affairs." Further, this office is responsible for providing advice concerning access to records; it does not maintain general custody or control of records.

To seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that you believe would maintain the records of your interest. The records access officer has the duty of coordinating the agency's response to requests for records. It is also noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, you should include sufficient detail to enable staff of the 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-1317

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Carmine Galarza
98-A-0922
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. Galarza:

I have received your letter in which you requested assistance concerning your facility's failure to honor your requests. You wrote that you have requested your misbehavior report, a decision rendered as a result of the superintendent's hearing, and the transcript of your disciplinary 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 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, other portions may be available.

A pertinent provision may be §87(2)(g) which enables an agency to withhold records that:

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

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

Also of potential relevance is §87(2)(e), which permits law enforcement agencies 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 consideration of the foregoing, it appears that a final determination by the Superintendent would be accessible under §87(2)(g)(iii), as would a transcript of a hearing during which you were present. Rights of access to the misbehavior report would, in my view, be dependent on its specific contents.

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-291
FOIL-AO-13172

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. James D. Hyde
[redacted]

The staff of the Committee on Open Government is authori- ...nions. The ensuing staff advisory opinion is based solely upon ...d in your correspondence, unless otherwise indicated.

Dear Mr. Hyde:

I have received your letters of January 13 and 15, as w... of material relating to them.

In the former, you referred to a request made under the Freedom of Information Law to the Office of the State Comptroller. Since you had not yet received a response granting or deny access, you asked that this office "contact OSC to have them decide to grant or deny these requests", and if they do not do so, you asked that I "issue a determination that they have constructively denied the requests." You also questioned the "sufficiency of a form-letter response with a fixed estimated response time as being in compliance with §89(c) [sic] of FOIA."

In this regard, it is emphasized at the outset that the primary function of the Committee on Open Government involves providing advice and opinions concerning access to government information. The Committee is not empowered to direct an agency to grant or deny access to records or render determinations that are binding. Nevertheless, in an effort to provide guidance, I offer the following comments.

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

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

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

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

In my opinion, if as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records within the same 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 substantial period, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for a lengthy delay in disclosure.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

Your second letter focuses on the Personal Privacy Protection Law, and you asked whether there is a "suggested format" concerning the notification given to data subjects pursuant to §94 when a state agency seeks to collect personal information from them. There is no particular format that has been recommended by this office, nor, to the best of my recollection, have there been any opinions prepared pertaining to the matter. While the law does not specify where the notification must be given, I believe that it typically appears on the record in which the information is sought or appended to such a record (see, for example, the personal income tax forms developed by the New York State Department of Tax and Finance).

In the third letter, you raised the following question:

> "Under the definition of 'personal information' as used in the Personal Privacy Protection Law (PPPL) are the last four digits of a Social Security Number (SSN) any different from the full SSN if an agency states '...the last four digits of a participating employee's SSN will be utilized as the employee's unique identifier...?"

Section 92(7) of the Personal Privacy Protection Law defines the phrase "personal information" 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."

From my perspective, there is a clear distinction between the two. While both may be characterized a personal identifiers, the four digit identifier can apparently be used only by the employer to confirm or establish the identity of its employees. The full social security number, however, is or can be used as an identifier in a variety of contexts. While disclosure of only four digits would likely be of no use to most persons or entities because they would not identify an individual, disclosure of the entirety of the social security number could result in any number of

unforeseen and potentially harmful uses concerning the person to whom the social security number relates.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Albert Wm. Brooks
Shelly Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13173

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

Mr. Antonio Mallett
99-A-5735
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. Mallett:

I have received your letter in which you sought assistance in obtaining records of a police officer who "was fired for corruption." You indicated that you have been unsuccessful in your attempt to obtain the records from the police department. Attached to your letter is an annotation to the Freedom of Information Law which cites an advisory opinion from this office, FOIL-AO-10896.

In this regard, I offer the following comments.

The advisory opinion cited above discussed the New York Civil Rights Law §50-a relative to the availability of certain records relating to police officers. Subsequently, the Court of Appeals, in Matter of Daily Gazette Company et al. vs. City of Schenectady et al., [93 NY2d 145 (1999)] interpreted that statute in conjunction with the Freedom of Information Law. Based on the thrust of the decision and its judicial interpretation, I do not believe that §50-a is applicable if an individual is no longer employed as a police officer.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, in reviewing the legislative history leading to its enactment, found that:

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

It was also determined that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568). In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

It is emphasized that the bar to disclosure imposed by §50-a deals with personnel records that "*are used to evaluate performance toward continued employment or promotion.*" Since the officer in question, according to your letter, has been fired, there is no issue involving continued employment or promotion; he is no longer an employee or a police officer. That being so, in my opinion, the rationale for the confidentiality accorded by §50-a is no longer present, and that statute no longer is applicable or pertinent. Notwithstanding the foregoing, depending on the nature of the records requested, provisions within the Freedom of Information Law may allow the police department to withhold portions of the records of your interest.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT PPPL-AL-34
FOIL-AO-1317

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

E-Mail

TO: Kiaran Johnson, Director of Personnel <M_Kiaran_Johnson@tax.state.ny.us>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Johnson:

I have received your communication in which you referred to a conversation between yourself and David Treacy of this office in which you sought confirmation of the opinion that he offered during your telephone conversation. The matter involved the authority of your agency, the Department of Taxation and Finance, to disclose the content of the personal history file of a deceased employee to that person's next of kin. You added that the question was precipitated by a request made by the widow of an employee who died in the attack on the World Trade Center.

In short, with one possible exception, I believe that the next of kin likely has rights of access to the deceased employee's personal history file. In this regard, I offer the following comments.

From my perspective, when a person can demonstrate that he or she is the next of kin of the deceased by means of documentary proof, he or she would acquire the rights of the deceased for purposes of rights of access to the records in question. Stated differently, I believe that the person would have the same rights of access to the personal history file as the deceased when the deceased was living.

Those rights would, in my view, be governed by the Freedom of Information Law and perhaps more significantly by the Personal Privacy Protection Law. The former generally pertains to rights of access conferred upon an individual as a member of the public; the latter deals with rights of access by the subject of records to records pertaining to himself or herself. Again, in this instance, assuming that the next of kin can demonstrate his or her relationship to the deceased, I believe that he or she would acquire the rights of the deceased.

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 you may be aware, §§87(2)(b) and 89(2) authorize an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." However, as a general matter, a person cannot invade his or her own privacy. Pertinent is §89(2)(c), which provides that unless there is a separate basis for a denial of access, "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...when the person to whom a record pertains consents in writing to disclosure" or "when presenting reasonable proof of identity, a person seeks access to records pertaining to him."

Similarly, the Personal Privacy Protection Law generally requires that state agencies disclose records about data subjects to those persons. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

Under §95 of the Personal Privacy Protection Law, a data subject 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.

In my experience, most of the contents of a personal history file pertaining to an employee would be available to that employee. The circumstances in which portions of the file might properly be withheld would involve situations in which the records identify others, and disclosure would constitute an unwarranted invasion of those other persons' privacy. For instance, if a member of the public has made a complaint about an employee, often the name or other details identifying the member of the public may often be deleted to protect that person's privacy. However, that kind of situation is relatively rare.

In sum, if it can be assumed that a person can demonstrate that he or she is the next of kin of the deceased, I believe that he or she would acquire the rights that the deceased had when he or she was living.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13175

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

Mr. Jerry Moore
[redacted]

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

Dear Mr. Moore:

I have received your inquiry in which you asked, in essence, whether the Freedom of Information Law requires that an agency make records available via email. In short, it has been advised that an agency may choose to do so, but that it would not be required to do so.

From my perspective, there is a distinction between an agency's responsibilities relative to the *format* in which records are made available and *the means by which they are transmitted.*

As you may be aware, the Freedom of Information Law pertains to existing 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 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.

A request to have records e-mailed or faxed does not involve the format in which the records are or may be kept. If a record can be made available on a computer disk, and an applicant pays a fee based on the actual cost of reproduction [see §87(1)(b)(iii)], I believe that an agency would be required to make the record available in that kind of information storage medium. However, your inquiry does not involve a request that records be made available in a particular information storage medium; rather, it relates to the means by which records would be *transmitted.* In my view, there is nothing in the Freedom of Information Law that requires that records be transmitted via fax or e-mail. An agency may choose to make records available via those methods of transmission, but there is no *obligation* to do so. An agency's responsibility under §§87(2) and 89(3) involves making records available for inspection and copying, and to make copies of records available upon payment of the appropriate fee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Carpenter
Michael J. Marcelle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13176

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

Mr. Matthew J. Reynolds
[redacted]

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

Dear Mr. Reynolds:

I have received your letter of January 16 in which you sought an opinion relating to the Freedom of Information Law.

By way of background, you wrote that the Village of Hamburg is seeking to sell 15 acres of "municipal parkland" to a developer and that the Village Attorney "gave a legal opinion to the Village Board stating that the 15 acres is not a park." According to your letter:

> "On October 1, 2001 Mayor John Thomas announced that the Village Board will hear the legal opinion on the 'park'. Mayor Thomas stated 'Bob Walsh (Village Attorney) has submitted a written legal opinion to the Village Board he will later on in this meeting publicly give his opinion'. Mr. Walsh gave his written opinion and cited many references to public documents. The minutes of the Board Meeting (see enclosed) showed a summery [sic] of what he stated."

Having asked to review the "written legal opinion" in a request made under the Freedom of Information Law, you were informed that "[t]here is no record of a written legal opinion of Bob Walsh regarding the 15 acres." You have sought my views on the matter, and I offer the following comments.

First, I point out that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. Therefore, if the opinion to which you referred does not exist in writing, the Freedom of Information Law would not apply. Nevertheless, if such a record has been prepared, the

physical possession by the Village of the records, or the absence thereof, would not necessarily be determinative of rights of access. The Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to include:

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

Based upon the foregoing, the definition of "record" includes not only documents that are physically maintained by an agency; it refers to documents are that are "kept, held, filed, produced or reproduced by, with or for an agency." While Village officials may not have physical possession of the attorney's opinion at Village offices, if the opinion exists in some physical form, and/or is kept by the attorney, I believe that it would constitute a Village record subject to rights conferred by the Freedom of Information Law, irrespective of its physical location.

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

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)].

If it exists in the form of a record, the opinion of the attorney, prepared at the request of the client, the Village Board of Trustees, would appear to fall within the scope of the attorney-client privilege. However, I believe that the privilege would have been waived insofar as the opinion was read aloud or otherwise disclosed at a meeting during which the public was present. While it has been held that an erroneous or inadvertent disclosure does not create a right of access on the part of the public [see McGraw-Edison v. Williams, 509 NYS 2d 285 (1986)], the disclosure in this case was apparently purposeful and intentional rather than inadvertent. If that is so, even though there

may have been a basis for withholding prior to a public reading disclosure of the record, that activity in my view would preclude the Village from withholding any portion of the document that was 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
David W. Fountaine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13177

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

Mr. Scott C. Wise
[redacted]

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

Dear Mr. Wise:

I have received your letter of January 14 in which you sought my views concerning a request made under the Freedom of Information Law to the Village of Bath.

According to your letter and the materials attached to it, you asked to inspect records in November in the nature of "complaints and reports made to the Bath Village Police Department which make reference to [you] and/or any resident" at your address, as well as "any or all reports or other documents produced by Bath Village Police relating to such complaints and reports." In a response by the Village Attorney, you were informed that the Village would "provide to you all information requested in the form of document copies from [its] computer system." He added that the fee would be twenty-five cents per page, and that there may be more than fifty pages. You appealed to the Mayor because you would like to inspect the records, and it is your contention that you may do so at no charge. As of the date of your letter to this office, you had received no response to the appeal.

In this regard, I offer the following comments.

First, as I understand the situation, Village has determined to grant access to the records sought and has not denied access. If that is so, I do not believe that records were withheld or, therefore, that you would have the right to appeal. An appeal, in my view, involves the situation in which a person requests records and the agency indicates that records or portions thereof will not be disclosed based on the assertion of one or more of the grounds for denial of access appearing in §87(2) of the Freedom of Information Law.

Second, when a record exists in a manner in which it can be inspected and is accessible in its entirety, I do not believe that an agency may charge a fee. In short, the Freedom of Information

Law does not authorize an agency to assess a fee for the inspection of accessible records. I note that if a record includes information that may be properly withheld, i.e., a social security number appearing on a record indicating a public employee's wages, the public would not have the right to inspect the record, for it includes information that the public has no right to see. In that situation, it has been advised that a photocopy can be prepared, from which appropriate deletions can be made. In that circumstance, I believe that a member of the public could be charged a fee for a photocopy.

In this instance, it may be that the information stored in the computer must be generated and cannot, therefore, be inspected before it is generated. If that is so, I believe that the Village may charge a fee based on §87(1)(b) of the Freedom of Information Law. In brief, under that provision, there are two standards for assessing a fee. First, when a record exists on paper and can be photocopied, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches. And second, when a record cannot be photocopied, i.e. because it exists in electronic form in a computer or has been recorded on tape, the fee is based on the actual cost of reproduction. "Actual cost" in my view is the marginal cost of preparing the record or a copy of the record. If, for example, a request involves a copy of a tape recording of an open meeting, it has been held that the actual cost would involve the price of a new cassette (see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978). If the request involves information stored electronically, the actual cost typically will involve computer time and the cost of the storage medium to which the information is transferred (see Schulz v. NYS Board of Elections, Supreme Court, Albany County, September 7, 1995), such as a computer tape or disk, or if the record produced is a printout, the cost of paper as well. I note that the regulations promulgated by the Committee on Open Government, which have the force of law, state in relevant part that the fees cannot include fixed costs of an agency, such as heat, lighting and employee salaries (21 NYCRR §1401.8).

In an effort to resolve the matter, copies of this opinion will be forwarded to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Warren Hopkins
David Wallace

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1378

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Jonah Nwaokocha
F.C.I. Fort Dix
P.O. Box 2000/East
Fort Dix, NJ 08640

Dear Mr. Nwaokocha:

I have received your letter in which you requested various records from this office pertaining to your case.

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning public access to government records in New York, primarily in relation to the state's Freedom of Information Law. The Committee does not maintain possession or control of records. In short, I cannot make available the records of your interest because this office does not have them.

I note that you referred to 5 USC 552 and 552a, which are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes apply only to records maintained by federal agencies. The provision dealing with rights of access to government agency records in New York is the New York Freedom of Information Law. That law 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."

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

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

Based on the foregoing, the Freedom of Information Law applies to police departments and offices of district attorneys; it does not apply, however, to the courts. This is not to suggest that court

records may not be available; often they must be disclosed pursuant to other provisions of law (see e.g., Judiciary Law, §255). When seeking court records, it is suggested that a request be made to the clerk of the court in which the proceeding was conducted, citing an applicable provision of law as the basis for the request.

When seeking records from an "agency", a request should be directed to the "records access officer" at the agency that maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests for records. I point out, too, that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records.

Lastly, although the federal Freedom of Information Act includes provisions regarding the waiver of fees, the state Freedom of Information Law contains no such provision. Further, it has been held that an agency may charge its established fee in response to request made under that law, even when the 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-13179

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

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 January 10. You attached a copy of a resolution adopted by the Genesee County Legislature that authorizes the County Sheriff to charge five dollars for a copy of a motor vehicle accident report and sought my opinion concerning the propriety of the resolution.

In this regard, by way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy 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. I note that it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute. In addition, in a case in which you were involved, Sheehan v. City of Syracuse [521 NYS 2d 207 (1987)], a fee in excess of twenty-five cents per photocopy for certain records was established by an ordinance, and the court found the ordinance to be invalid. More recently, a provision of a county code authorizing a fee of twenty dollars for an accident report was struck down, and it was determined that the agency could charge no more than twenty-five cents per photocopy [Gordon Schotsky & Rappaport v. Suffolk County, 221 AD 2d 339 (1996)].

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

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

Moreover, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given

effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

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

Similarly, §66-a of the Public Officers Law, a statute that deals with accident reports and certain other records maintained by the Division of State Police, provides in subdivision (2) that:

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

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

In the two instances cited above, those dealing with the Department of Motor Vehicles and the Division of State Police, statutes have been enacted that enable those agencies to charge fees different from those ordinarily applicable under the Freedom of Information Law. Those are the only situations, however, of which I am aware in which agencies may charge more than twenty-five cents per photocopy in response to requests for accident reports.

A copy of this opinion will be sent to the Clerk of the Genesee County Legislature.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carolyn P. Pratt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13150

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Tim 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 a copy of your letter to James Warren, Mayor of the Village of Sidney, in which you complained with respect to a delay on the part of the Village Fire Department in responding to your request for a certain record made under the Freedom of Information Law. At the end of that letter, you indicated that a copy would be sent to me, asking that I "take whatever action is appropriate as well as possibly forwarding a copy of the FOI Law to the Fire Chief."

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions concerning public access to government information. The Committee is not empowered to enforce the law or compel an agency to grant or deny access to records. However, in an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of the law and this response will be sent to the Mayor and the Chief.

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

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

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

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.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: Hon. James Warren
Chief John Gilmore

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1318

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

E-Mail

TO: Walter C. Ervin, Jr. [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. Ervin:

As you are aware, I have received your letter of January 17. You referred to an article appearing in the Elmira *Star Gazette* in 1999 in which my comments were reported concerning a not-for-profit corporation, the Southern Tier Economic Development Corporation ("STED"). That entity, according to your letter, "was given control" over a local hockey arena, which was constructed with eight million dollars in government funds, and its board of directors included several government officials. Notwithstanding the foregoing, you indicated that the STED does not abide by the laws that typically require government accountability.

In this regard, from my perspective, it is unclear whether STED is subject to the Freedom of Information Law. That statute applies to agencies, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, an agency typically is an entity of state or local government; not-for-profit and other corporate entities are generally not subject to the Freedom of Information Law.

There are judicial decisions, however, that indicate that a not-for-profit entity may be an agency, despite its corporate status, if there is substantial governmental control over its operations. For instance, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case

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, notwithstanding their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

More recently, in the case to which you referred, Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is

> substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

Your letter does not include detail concerning the creation of STED, i.e., whether it was created through the interest of the business community, or perhaps by government.

If STED is a creation of government or if government has substantial control over its operations, I believe that it would fall within the coverage of the Freedom of Information Law. For instance, if a majority of its board of directors consists of or is appointed by government officials, again, I believe that it would be subject to the Freedom of Information Law. However, if there is no substantial control, the conclusion may be different.

Lastly, even if STED is not subject to the Freedom of Information Law, records pertaining to it may nonetheless be available. That statute is applicable to agency records, and §86(4) defines the term "record" expansively to include:

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

Due to the breadth of the definition, when records involving STED come into the possession of a member of its board who serves due to his or her government position, I believe that they would constitute agency records that fall within the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

cc: Southern Tier Economic Development Corporation

From: Robert Freeman
To: [redacted]
Date: 2/6/02 2:21PM
Subject: Dear Mr./Ms. Hollman:

Dear Mr./Ms. Hollman:

I have received your letter in which you indicated that you serve as a member of the Town of LLoyd Environmental Commission and that the Town Supervisor has directed to the Town Planning/Zoning Department to provide copies to the Commission on request. Nevertheless, you wrote that when the Commission seeks records, the Department sometimes honors the request, but that "sometimes it is necessary to FOIL them." Also, when the Commission receives a copy of "a public document", you asked whether it is "barred from making another copy or from distributing it..."

In this regard, from my perspective, the issue involves the functions and duties of various Town officials. Under sections 63 and 64 of the Town Law, I believe that the Town Board has the authority to make rules or adopt policies or procedures concerning the operation of Town government. I do not believe that it is the function or the Planning/Zoning Department to determine which of its records should be available to the Commission when the Commission is seeking the records in the performance of its official duties.

With respect to copying or distributing records, the Commission in my view has no general responsibility or authority to distribute records Again, I believe that the authority to do so rests initially with the Town Board and thereafter with the Town's records access officer. The Town Board is required by the Freedom of Information Law to adopt procedures regarding the implementation of that statute. One aspect of those procedures involves the designation of one or more persons as "records access officers." The records access officer has the duty of coordinating the Town's response to requests for records. In addition, the clerk by law serves as the Town's records management officer. In most towns, the town clerk is the records access officer.

It is suggested that you discuss the matter with the records access officer, who is likely the Town Clerk, for the purpose of ascertaining which records, if any, may be distributed by the Commission either in response to a request or on its own initiative. For instance, since applications submitted by the public and resolutions adopted by the Planning Board are clearly available to the public, it might be established that the Commission is authorized to disclose or distribute those kinds of records. In other instances, those in which public rights of access are questionable, it might be established that requests for or to disseminate those records be transmitted to the records access officer.

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

FOIL-AO-1383

From: Robert Freeman
To: [redacted]
Date: 2/7/02 8:32AM
Subject: Dear Mr. Meyer:

Dear Mr. Meyer:

The Freedom of Information Law specifies that nothing in that law requires the disclosure of the name of an applicant for appointment to public employment. However, there is nothing that prohibits disclosure of that information. In short, although an agency may deny access to the name of an applicant, it is not required to do so.

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-13184

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 8, 2002

Mr. Terry Williams-Bey
99-A-6316
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. Williams-Bey:

I have received your letters in which you sought opinions on the availability of records maintained by the Office of the Chief Medical Examiner and your ability to obtain a collective bargaining agreement from your facility.

In this regard, I offer the following comments.

With respect to records of the Chief Medical Examiner, you "maintain that a municipality, including the city of New York, is subject to the provisions 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.

Relevant to the matter is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." If the autopsy was performed outside of New York City, §677 of the County Law would be pertinent. In brief, under that statute, autopsy reports and related records are available as of right only to the next of kin and a district attorney; others could only obtain such records by means of a court order. If the autopsy report was performed in New York City by the Office of the Chief Medical Examiner, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts records from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994]. I note that in Mitchell, the court found that autopsy reports and related records maintained by the Medical Examiner were subject to neither the Freedom of Information Law nor §677 of the County Law. The County Law does not apply to New York City. However, the court found that the applicant was "not making his request merely as a public citizen" under the Freedom of Information Law, "But, rather,

as someone involved in a criminal action that may be affected by the content of these records and thereby has a substantial interest in them." On the basis of Mitchell, it would appear that your ability to gain access to autopsy reports and related records in question would be dependent upon your capacity to demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

You also questioned the propriety of your facility directing you to submit a request for "the collective bargaining agreement or contract between the New York State Department of Correctional Services and the correction officers' union" to the Department of Correctional Services.

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

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

The agreement is a record that falls within the coverage of the Freedom of Information Law. In my opinion, if your facility maintains a copy of the agreement, it should be made available.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

PPPL-AO-293
FOIL-AO-13185

From: Robert Freeman
To: [redacted]
Date: 2/11/02 10:18AM
Subject: Dear Ms. Perry:

Dear Ms. Perry:

I have received your letter concerning access to complaints made against you.

In this regard, it has been advised, in general, that the substance of a complaint is accessible under the FOIL, but that those portions that identify the person who made the complaint may be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy [see FOIL, section 87(2)(b)]. I note, however, that a unit of local government, such as a town, is permitted to delete a name of a complainant, but that it is not required to do so. State differently, a town may choose to disclose the entirety of the complaint.

A state agency, such as DEC, is subject to another statute, the Personal Privacy Protection Law. That law prohibits state agencies from disclosing personally identifiable information in many instances.

Lastly, it would appear that you make a new request for records.

I hope that the foregoing serves to enhance 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-13186

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 11, 2002

Mr. Joseph Cosentino
91-A-5031
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. Cosentino:

I have received your letter in which you requested "intervention and assistance" with respect to unanswered Freedom of Information Law requests submitted to the White Plains 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 Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 13187

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 12, 2002

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 facts presented in your correspondence.

Dear Mr. Taylor:

I have received your letter in which you sought further assistance following my response to you of September 19, 2001. You enclosed approximately thirty-five (35) pages of various court related documents and requested an "in depth review" in relation to the alleged failure of the Williamson State Police to respond to your request for "statements given by an alleged victim."

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 addition to the comments provided in my letter of September 19th, I offer one additional point.

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

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

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and

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

As requested, I am returning the documents attached to your letter.

I regret that I cannot be of further assistance in this matter.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13188

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 12, 2002

Mr. Troy Galvan
92-A-2368
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. Galvan:

I have received your letter in which you sought an opinion regarding a $4.00 fee for "clerk time" charged by the Medical Records Department at your facility for copies of bloodwork results. The Fishkill Correctional Facility memorandum attached to your letter indicates that you were "charged .25 (Twenty-five cents) per page and an hourly rate based on the staff persons time involved in the review of and/or copying of these records."

In this regard, I offer the following comments

In my opinion, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for searching for records or to charge more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed.

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

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To

> remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

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

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute.

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,

David Treacy
Assistant Director

DT:jm

cc: Medical Records Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13189

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 12, 2002

Mr. Juan Saldana
93-A-3364
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. Saldana:

I have received your letter in which you requested "intervention" in relation to your request for the name of an individual who visited you at Upstate Correctional Facility in March or April of 2001. You wrote that you were told his name could not be provided unless you specified the date of the visit.

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.

If a list is maintained that pertains only to your visitors, I believe that it would be accessible. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, if such a list exists, none of the grounds for denial would be applicable.

If, however, no separate visitors list is maintained with respect to each inmate, rights of access may be different. For instance, if a visitor's log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the facility have the ability to locate portions of the log of your interest, I believe that those portions of the log would be available. If such records are not kept in plain sight and cannot ordinarily be viewed, it is my opinion that those portions of the log pertaining to persons other than yourself could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In short, the identities of those with whom a person associates is, in my view, nobody's business.

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

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

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

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

I am unaware of the means by which a visitors log, if it exists, is kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors, it would likely be easy to retrieve that information, and the request would reasonably describe the records. On the other hand, if there are chronological logs of visitors and each page would have to be reviewed in an effort to identify visitors of a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DMT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2941
FOIL-AO-13190

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 13, 2002

Mr. Thomas Morrow
98-A-5413
Cape Vincent Correctional Facility
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 information presented in your correspondence.

Dear Mr. Morrow:

I have received your letter in which you explained your unsuccessful attempts to "obtain a property clerk invoice from the New York City Police Department concerning property taken" from your home during your arrest. You also questioned your ability under the Personal Privacy Protection Law "to challenge and dispute erroneous and false allegations contained in two (2) documents generated by that agency [New York City Department of Probation]: [your] Pre-sentencing investigation report and [your] Probation Violation Summary."

In this regard, I offer the following comments.

First, with respect to your requests to the New York City Police Department, 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. In my opinion, if a record exists which indicates items "taken from your home", I believe that it would be accessible for none of the grounds for denial would be applicable.

Lastly, with respect to your ability to correct records maintained by the New York City Department of Probation under the Personal Privacy Protection Law, I point out that that statute is applicable only to state agencies. For purposes of that statute, §92(1) defines the term "agency" to mean:

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

Based on the foregoing, the Personal Privacy Protection Law excludes from its coverage "any unit of local government", including a city agency.

I note, too, that rights of access conferred by that statute would not apply to the kinds of records at issue, even if they were maintained by a state agency. Subdivision (7) of §95 states that rights of access granted by the Personal Privacy Protection Law do not apply to public safety agency records. Section 92(8) of the Personal Privacy Protection Law defines the phrase "public safety agency record" to mean:

> "a record of the commission of correction, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of parole, the crime victims board, the division of probation or the division of state police or of any agency or component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to sections eight hundred thirty-seven, eight hundred thirty-seven-a, eight hundred thirty-seven-b, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

As such, in terms of disclosure, the Personal Privacy Protection Law generally excludes law enforcement records from rights of access to individuals.

Lastly, with respect to access to a pre-sentence report and related records, pertinent is the first ground for denial, §87(2)(a), which 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 and memoranda.

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 records 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

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13191

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 13, 2002

Mr. Luis Nunez
00-R-5055
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

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

Dear Mr. Nunez:

I have received your letter in which you requested assistance in obtaining records from the New York City Police Department. You indicated that, in response to your Freedom of Information Law request, you were informed that records of your interest could not be located.

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, 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 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-13192

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 13, 2002

Mr. Theddis Radcliffe
91-B-0816
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. Radcliffe:

I have received your letter in which you requested assistance from this office regarding your unsuccessful attempts to obtain records from the Monroe 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 to compel an agency to grant or deny access to records. However, I offer the following comments.

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

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

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

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available

to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that a request for court records cite the applicable provisions of law and be directed to the clerk of the court.

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-13193

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 13, 2002

Mr. Salvatore LoVacco
93-A-0873
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. LoVacco:

I have received your letters in which you requested "intervention and assistance" regarding your requests for records from the Manhattan District Attorney's Office and 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, 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, in your letter, you referenced Moore v. Santucci [151 AD2d 677 (1989)]. That decision related to 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" (id., 679). 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 Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13194

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 13, 2002

Mr. Bill Sweeney
News Editor
Associated Press
50 Rockefeller Plaza
New York, NY 10020

The staff of the Committee 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. Sweeney:

I have received your letter of January 28, as well as the materials attached to it. You have sought an advisory opinion concerning the propriety of an agreement ("the agreement") between the City of New York and the Rudolph W. Giuliani Center for Urban Affairs Inc. ("the Center"). Attachment A, appended to the agreement describes a variety of records, both paper and other media, formerly maintained by the Office of the Mayor, as well those maintained by his chief of staff, deputy mayors and their chiefs of staff, that have been transferred to the Center by the New York City Department of Records and Information Services ("DORIS"). A news article regarding the agreement indicated that 2,114 boxes of records were transferred to the Center late in December.

You have asked whether, under the agreement, "public access and document preservation is ensured in accordance with state law", whether it is "legal...to give physical control of these records to a private third party", and whether "there is any legal precedent for such an arrangement." If it is my view that "the agreement violates state law", you asked that I "suggest what remedies might exist."

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. That statute does not include direction or requirements pertaining to the preservation or transfer of records. While I cannot offer advice relative to the retention or transfer of records, I note that the law concerning those issues is found in the New York City Charter ("the Charter"), Chapter 72, §§3000 to 3011.

Pursuant to §3000 of the Charter, a mayoral appointee, a commissioner, is the head of DORIS, and subdivision (1) of §3003 states that the commissioner "...shall be the chief archivist of the city and shall advise the mayor...on those matters concerning the preservation of the city's historical documentation." Subdivision (3) provides that the commissioner shall "establish standards

for proper records management in any agency or government instrumentality funded in whole or in part from local tax levy monies...", and subdivision (4) states that the commissioner has "the power to exercise or delegate any of the functions and duties vested in such commissioner by law." Subdivision (1) of §3004 states that the municipal archives shall perform the following functions:

> "a. develop and promulgate standards, procedures and techniques with regard to archives management;
>
> b. make continuing surveys of existing records to determine the most suitable methods to be used for the creating, maintaining, storing and servicing of archival material;
>
> c. preserve and receive all city records of historical, research, cultural or other important value;
>
> d. appraise, accession, classify, arrange and make available for reference all records which come into the possession of the archives; and
>
> e. establish and maintain an archives depository for the storage, conservation, processing and servicing of records."

It is noted that subdivision (3) of §3011 defines the phrase "records management" to mean:

> "...the planning, controlling, directing, organizing, training, promoting and other managerial activities involved in records creation, records maintenance and use and records disposition, including but not limited to, the management of correspondence, forms, directives, reports, machine readable records, microfilms information retrieval, files, mail, vital records, equipment and supplies, office copiers , word processing and source data automation techniques, records preservation, records disposal and records centers or other storage facilities..."

Subdivision (2) of that section defines the term "records" for purposes of the Charter to include:

> "...any documents, books, papers, photographs, sound recordings, machine readable materials or any other materials, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official city business."

Additionally, §1133(b) of the Charter, formerly §3006, pertains to the disposal of records and the duty to "establish standards for the preparation of schedules for the disposition of records, [and] providing for the retention of records and archives of continuing value..."

In short, the Charter confers a variety of powers and duties upon DORIS and its commissioner relative to the management of City records.

The introductory portion of the agreement indicates that the Center is required to store documents in an appropriate "facility", and Article 1, section G of the agreement states in part that "the City retains ownership of the Documents, and ultimate control of the Documents resides in the City and DORIS"; section H provides that it is the intent of the Center "to provide to the public the substance of the Documents for research and study purposes." Section I states that the Documents "shall be the property of the City for the purposes of Freedom of Information Law....and any request for access pursuant to such statute shall be responded to by the City in the manner provided by law, as if such documents or copies were in the custody and control of the City."

While the provisions of the agreement cited above do not appear to be contrary to law, other aspects of the agreement, in my view, are inconsistent with the Freedom of Information Law and the interpretation of that statute.

Section A of Article 1 states in part that "[i]f the Center determines that any Document delivered to the Facility is not a public document properly included within the Documents, it shall contact the City, and the Parties shall reach a determination as to the proper treatment of such document." And most importantly, section M provides that:

> "Whenever Rudolph W. Giuliani has a personal interest or right in a Document separate and apart from the interests and rights of the City, his approval shall be required before any such document may be released or disclosed by the Center to the public. Such approval shall be in addition to, and not in lieu of, the approval of the City."

In this regard, the scope of the Freedom of Information Law is expansive, for it encompasses all government agency records within its coverage. Section 86(4) of that statute defines the term "record" expansively to include:

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

Based upon the language quoted above, the "documents" referenced in the agreement need not be in the physical possession of a City agency to constitute agency records; so long as they are produced, kept or filed for an agency, the law specifies and the courts have held that they constitute "agency records", even if they are maintained apart from an agency's premises.

In a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University pursuant to a contract were kept on behalf of the University and constituted 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. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Also significant is the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", in which 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 may be "considerable crossover" in the activities of Mr. Giuliani as mayor and as a citizen.

Also pertinent is another decision rendered by the Court of Appeals in which 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).

The holding in Capital Newspapers is particularly relevant in consideration of Article 1, section A. Again, that provision states in part that "[i]f the Center determines that any Document

delivered to the Facility is not a public document....the Parties shall reach a determination as to the proper treatment of such document." From my perspective, *any* document or any information in some physical form transferred or delivered by a City agency to the Center constitutes a "record" that falls within the scope of the Freedom of the Freedom of Information Law. Any "prescreening" of a document to determine whether the document falls within the coverage of that statute would, in my view, conflict with the clear direction provided by the Court of Appeals and the language of the law itself.

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)].

Somewhat similar in some respects to the matter at hand is Kerr v. Koch (Supreme Court, New York County, NYLJ, February 1, 1988). Kerr involved a request by a reporter for the *Daily News* for the public and private appointment calendars of then Mayor Koch. Although it was contended by the City that various materials were not subject to the Freedom of Information Law or could be withheld under that statute, the Court disagreed, citing Capital Newspapers and an opinion rendered by this office and stated that:

> "...respondents base petitioner's exclusion from certain materials by saying that some of the appointment books contain both personal and business appointments created for the Mayor's convenience. That contention, of course, has little probative meaning here:
>
> '*** personal or unofficial documents which are intermingled with official government files and are being 'kept' or 'held' by a governmental entity are 'records' maintained by an 'agency' under Public Officers Law §86 (3), (4). Such records are, therefore, subject to disclosure under FOIL absent a specific statutory exemption' (Capital Newspapers v. Whalen, 69 N.Y. 2d 246, 248).
>
> "At the Appellate Division level of Capital Newspapers, it was ruled that papers of a personal nature were protected from disclosure under the FOIL and that the law was intended by the Legislature to subject to disclosure only those records that revealed the workings of government and that disclosure of private papers of a public office holder would not further the purpose of FOIL (113 App. Div. 2d 217, 220). It is that ratio decidendi that the Court of Appeals rejected in its unanimous ruling.
>
> "The Court then went on to re-state the appellate conclusion that FOIL 'is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the

> records of government' (citing Matter of Washington Post Co. v. New York State Ins. Dept., 61 N.Y. 2d 557, 564). Any narrow construction of FOIL, it was added, 'is contrary to these decisions and antagonistic to the important policy underlying FOIL' (p. 52 of Capital Newspapers, supra)."

In short, I reiterate that, in my view, *any* "document" transferred or delivered to the Center by any City agency would constitute a "record" that falls within the coverage of the Freedom of Information Law.

With respect to section M of Article 1, again, that provision prohibits the Center from disclosing a document to the public absent the approval of former Mayor Giuliani "[w]henever [he] has a personal interest or right in a document separate and apart the interests and rights of the City." From my perspective, since the documents are City records, and since all City records are subject to rights of access conferred upon the public by the Freedom of Information Law, the former mayor has no "right" to determine which documents are accessible to the public. On the contrary, the law serves as the basis for determining 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 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).

There is nothing in the Freedom of Information Law that authorizes a person or agency to claim, promise or engage in an agreement conferring confidentiality in the context of your inquiry.

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'."

Similarly, 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. In Washington Post v. Insurance Department [61 NY2d 557 (1984)], the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court of Appeals reversed a finding that the documents were not "records" subject to the Freedom of Information Law, 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)]. Moreover, it was determined that:

> "Respondent's long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'records' 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 (see *Matter of John P. v Whalen*, 54 NY2d 89, 96; *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571-572, *supra*; *Church of Scientology v State of New York*, 61 AD2d 942, 942-943, affd 46 NY2d 906; *Matter of Belth v Insurance Dept.*, 95 Misc 2d 18, 19-20). Nor is it relevant that the documents originated outside the government...Such a factor is not mentioned or implied in the statutory definition of records or in the statement of purpose..."

The Court also concluded that "just as promises of confidentiality by the Department do not affect the status of documents as records, neither do they affect the applicability of any exemption" (id., 567).

In a different context, in Geneva Printing Co. and Donald C. Hadley v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

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

In 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."

There are other aspects of the agreement that are troubling as well. For instance, section H of Article 1 states that "[i]t is the intent of the Center that it ultimately be able to provide to the public access to the substance of the Documents for research and study purposes." Aside from the considerations expressed in the preceding commentary, the purpose for which records are sought under the Freedom of Information Law is irrelevant. It has been held that when records are accessible under that statute, they are equally available to any person, regardless of status or interest

[see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)].

Further, although the "documents" may be in the physical custody of the Center, for reasons expressed earlier, I believe that they are in the legal custody of DORIS. If a request for those records is made under the Freedom of Information Law, DORIS, in my view, would be required to comply with that law, as well as the procedural regulations promulgated pursuant to that law. By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (see 21 NYCRR Part 1401). In turn, §87(1) requires each agency to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Under Mayor Koch, uniform rules and regulations for New York City were adopted and, to my knowledge, remain in effect. One element of the Committee's regulations involves the designation of one or more persons as "records access officer" (see §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records. Part of the duty to "coordinate" in my view would relate to the manner in which the Center responds to requests made under the Freedom of Information Law for records in its possession. When such a request is made, I believe that the Center would be obliged to grant or deny access in accordance with law and the direction given by the records access officer, or transmit the request to the records access officer, who would respond in a manner consistent with law.

One of the few instances in which the Freedom of Information Law requires the maintenance of a record relates to a "subject matter list" of records. Specifically, §87(3)(c) requires that each agency shall maintain:

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

The subject matter list is not required to identify every record maintained by an agency. However, it is required to indicate, by category, the kinds of records maintained by (or for, in this instance) an agency in reasonable detail. Whether DORIS maintains such a list separate from that attached to the agreement in a manner that satisfies §87(3)(c) is unknown to me. However, if no such list has yet been prepared, I believe that DORIS is required by that provision to do so.

Lastly, you asked what remedies might exist to rectify deficiencies in the agreement. Section B of Article 2 of the agreement provides in part that "[e]ither party may terminate this Agreement for any reason upon 90 days' written notice." That being so, the City could terminate the agreement or renegotiate to ensure that its terms are fully consistent with law. If neither of those actions is taken, I believe that you or any person could initiate a judicial proceeding to seek to invalidate those portions of the agreement that may be inconsistent with law.

In an effort to resolve the matter, a copy of this opinion will be forwarded to Michael A. Cardozo, Corporation Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael A. Cardozo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13195

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 14, 2002

Ms. Donna Lieberman
Mr. Arthur Eisenberg
Ms. Beth Haroules
New York Civil Liberties Union
125 Broad Street, 17th Floor
New York, NY 10004

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

Dear Ms. Lieberman, Mr. Eisenberg and Ms. Haroules:

As you are aware, I have received your letter in which you sought an advisory opinion concerning the propriety of "the procedural and substantive provisions set forth" in an agreement ("the agreement") between the City of New York and the Rudolph W. Giuliani Center for Urban Affairs Inc. ("the Center"). Attachment A, appended to the agreement describes a variety of records, both paper and other media, formerly maintained by the Office of the Mayor, as well those maintained by his chief of staff, deputy mayors and their chiefs of staff, that have been transferred to the Center by the New York City Department of Records and Information Services ("DORIS"). A news article regarding the agreement indicated that 2,114 boxes of records were transferred to the Center late in December, and you wrote that thousands of photos, audiotapes and videotapes have been transferred.

You have asked whether, under the agreement, "public access and document preservation is ensured in accordance with state law", whether it is "legal...to give physical control of these records to a private third party", and whether "there is any legal precedent for such an arrangement." If it is my view that "the agreement violates state law", you asked that I "suggest what remedies might exist."

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. That statute does not include direction or requirements pertaining to the preservation or transfer of records. While I cannot offer advice relative to the retention or transfer of records, I note that the law concerning those issues is found in the New York City Charter ("the Charter"), Chapter 72, §§3000 to 3011.

Pursuant to §3000 of the Charter, a mayoral appointee, a commissioner, is the head of DORIS, and subdivision (1) of §3003 states that the commissioner "...shall be the chief archivist of

the city and shall advise the mayor...on those matters concerning the preservation of the city's historical documentation." Subdivision (3) provides that the commissioner shall "establish standards for proper records management in any agency or government instrumentality funded in whole or in part from local tax levy monies...", and subdivision (4) states that the commissioner has "the power to exercise or delegate any of the functions and duties vested in such commissioner by law." Subdivision (1) of §3004 states that the municipal archives shall perform the following functions:

> "a. develop and promulgate standards, procedures and techniques with regard to archives management;
>
> b. make continuing surveys of existing records to determine the most suitable methods to be used for the creating, maintaining, storing and servicing of archival material;
>
> c. preserve and receive all city records of historical, research, cultural or other important value;
>
> d. appraise, accession, classify, arrange and make available for reference all records which come into the possession of the archives; and
>
> e. establish and maintain an archives depository for the storage, conservation, processing and servicing of records."

It is noted that subdivision (3) of §3011 defines the phrase "records management" to mean:

> "...the planning, controlling, directing, organizing, training, promoting and other managerial activities involved in records creation, records maintenance and use and records disposition, including but not limited to, the management of correspondence, forms, directives, reports, machine readable records, microfilms information retrieval, files, mail, vital records, equipment and supplies, office copiers , word processing and source data automation techniques, records preservation, records disposal and records centers or other storage facilities..."

Subdivision (2) of that section defines the term "records" for purposes of the Charter to include:

> "...any documents, books, papers, photographs, sound recordings, machine readable materials or any other materials, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official city business."

Additionally, §1133(b) of the Charter, formerly §3006, pertains to the disposal of records and the duty to "establish standards for the preparation of schedules for the disposition of records, [and] providing for the retention of records and archives of continuing value..."

In short, the Charter confers a variety of powers and duties upon DORIS and its commissioner relative to the management of City records.

The introductory portion of the agreement indicates that the Center is required to store documents in an appropriate "facility", and Article 1, section G of the agreement states in part that "the City retains ownership of the Documents, and ultimate control of the Documents resides in the City and DORIS"; section H provides that it is the intent of the Center "to provide to the public the substance of the Documents for research and study purposes." Section I states that the Documents "shall be the property of the City for the purposes of Freedom of Information Law....and any request for access pursuant to such statute shall be responded to by the City in the manner provided by law, as if such documents or copies were in the custody and control of the City."

While the provisions of the agreement cited above do not appear to be contrary to law, other aspects of the agreement, in my view, are inconsistent with the Freedom of Information Law and the interpretation of that statute.

Section A of Article 1 states in part that "[i]f the Center determines that any Document delivered to the Facility is not a public document properly included within the Documents, it shall contact the City, and the Parties shall reach a determination as to the proper treatment of such document." And most importantly, section M provides that:

> "Whenever Rudolph W. Giuliani has a personal interest or right in a Document separate and apart from the interests and rights of the City, his approval shall be required before any such document may be released or disclosed by the Center to the public. Such approval shall be in addition to, and not in lieu of, the approval of the City."

In this regard, the scope of the Freedom of Information Law is expansive, for it encompasses all government agency records within its coverage. Section 86(4) of that statute defines the term "record" expansively to include:

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

Based upon the language quoted above, the "documents" referenced in the agreement need not be in the physical possession of a City agency to constitute agency records; so long as they are

produced, kept or filed for an agency, the law specifies and the courts have held that they constitute "agency records", even if they are maintained apart from an agency's premises.

In a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University pursuant to a contract were kept on behalf of the University and constituted 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. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Also significant is the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", in which 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 may be "considerable crossover" in the activities of Mr. Giuliani as mayor and as a citizen.

Also pertinent is another decision rendered by the Court of Appeals in which 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).

The holding in Capital Newspapers is particularly relevant in consideration of Article 1, section A. Again, that provision states in part that "[i]f the Center determines that any Document delivered to the Facility is not a public document....the Parties shall reach a determination as to the proper treatment of such document." From my perspective, *any* document or any information in some physical form transferred or delivered by a City agency to the Center constitutes a "record" that falls within the scope of the Freedom of the Freedom of Information Law. Any "prescreening" of a document to determine whether the document falls within the coverage of that statute would, in my view, conflict with the clear direction provided by the Court of Appeals and the language of the law itself.

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)].

Somewhat similar in some respects to the matter at hand is Kerr v. Koch (Supreme Court, New York County, NYLJ, February 1, 1988). Kerr involved a request by a reporter for the *Daily News* for the public and private appointment calendars of then Mayor Koch. Although it was contended by the City that various materials were not subject to the Freedom of Information Law or could be withheld under that statute, the Court disagreed, citing Capital Newspapers and an opinion rendered by this office and stated that:

> "...respondents base petitioner's exclusion from certain materials by saying that some of the appointment books contain both personal and business appointments created for the Mayor's convenience. That contention, of course, has little probative meaning here:
>
> '*** personal or unofficial documents which are intermingled with official government files and are being 'kept' or 'held' by a governmental entity are 'records' maintained by an 'agency' under Public Officers Law §86 (3), (4). Such records are, therefore, subject to disclosure under FOIL absent a specific statutory exemption' (Capital Newspapers v. Whalen, 69 N.Y. 2d 246, 248).
>
> "At the Appellate Division level of Capital Newspapers, it was ruled that papers of a personal nature were protected from disclosure under

> the FOIL and that the law was intended by the Legislature to subject to disclosure only those records that revealed the workings of government and that disclosure of private papers of a public office holder would not further the purpose of FOIL (113 App. Div. 2d 217, 220). It is that ratio decidendi that the Court of Appeals rejected in its unanimous ruling.
>
> "The Court then went on to re-state the appellate conclusion that FOIL 'is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government' (citing Matter of Washington Post Co. v. New York State Ins. Dept., 61 N.Y. 2d 557, 564). Any narrow construction of FOIL, it was added, 'is contrary to these decisions and antagonistic to the important policy underlying FOIL' (p. 52 of Capital Newspapers, supra)."

In short, I reiterate that, in my view, *any* "document" transferred or delivered to the Center by any City agency would constitute a "record" that falls within the coverage of the Freedom of Information Law.

With respect to section M of Article 1, again, that provision prohibits the Center from disclosing a document to the public absent the approval of former Mayor Giuliani "[w]henever [he] has a personal interest or right in a document separate and apart the interests and rights of the City." From my perspective, since the documents are City records, and since all City records are subject to rights of access conferred upon the public by the Freedom of Information Law, the former mayor has no "right" to determine which documents are accessible to the public. On the contrary, the law serves as the basis for determining 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 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).

There is nothing in the Freedom of Information Law that authorizes a person or agency to claim, promise or engage in an agreement conferring confidentiality in the context of your inquiry.

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'."

Similarly, 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. In Washington Post v. Insurance Department [61 NY2d 557 (1984)], the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court of Appeals reversed a finding that the documents were not "records" subject to the Freedom of Information Law, 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)]. Moreover, it was determined that:

> "Respondent's long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'records' 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 (see *Matter of John P. v Whalen*, 54 NY2d 89, 96; *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571-572, *supra*; *Church of Scientology v State of New York*, 61 AD2d 942, 942-943, affd 46 NY2d 906; *Matter of Belth v Insurance Dept.*, 95 Misc 2d 18, 19-20). Nor is it relevant that the documents originated outside the government...Such a factor is not mentioned or implied in the statutory definition of records or in the statement of purpose..."

The Court also concluded that "just as promises of confidentiality by the Department do not affect the status of documents as records, neither do they affect the applicability of any exemption" (id., 567).

In a different context, in Geneva Printing Co. and Donald C. Hadley v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

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

In 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."

There are other aspects of the agreement that are troubling as well. For instance, section H of Article 1 states that "[i]t is the intent of the Center that it ultimately be able to provide to the public access to the substance of the Documents for research and study purposes." Aside from the considerations expressed in the preceding commentary, the purpose for which records are sought under the Freedom of Information Law is irrelevant. It has been held that when records are accessible under that statute, they are equally available to any person, regardless of status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)].

Further, although the "documents" may be in the physical custody of the Center, for reasons expressed earlier, I believe that they are in the legal custody of DORIS. If a request for those records is made under the Freedom of Information Law, DORIS, in my view, would be required to comply with that law, as well as the procedural regulations promulgated pursuant to that law. By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (see 21 NYCRR Part 1401). In turn, §87(1) requires each agency to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Under Mayor Koch, uniform rules and regulations for New York City were adopted and, to my knowledge, remain in effect. One element of the Committee's regulations involves the designation of one or more persons as "records access officer" (see §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records. Part of the duty to "coordinate" in my view would relate to the manner in which the Center responds to requests made under the Freedom of Information Law for records in its possession. When such a request is made, I believe that the Center would be obliged to grant or deny access in accordance with law and the direction given by the records access officer, or transmit the request to the records access officer, who would respond in a manner consistent with law.

Lastly, one of the few instances in which the Freedom of Information Law requires the maintenance of a record and to which you made specific reference relates to a "subject matter list" of records. Specifically, §87(3)(c) requires that each agency shall maintain:

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

The subject matter list is not required to identify every record maintained by an agency. However, it is required to indicate, by category, the kinds of records maintained by (or for, in this instance) an agency in reasonable detail. Whether DORIS maintains such a list separate from that attached to the agreement in a manner that satisfies §87(3)(c) is unknown to me. However, if no such list has yet been prepared, I believe that DORIS is required by that provision to do so.

In an effort to resolve the matter, a copy of this opinion will be forwarded to Michael A. Cardozo, Corporation Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael A. Cardozo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13196

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 14, 2002

Mr. Abelardo Ramos
99-A-4459
Franklin Correctional Facility
62 Barehill Road
P.O. Box 10
Malone, NY 12953

Dear Mr. Ramos:

I have received your letter in which you sought "guidelines" relating to certain judicial proceedings.

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 general custody or control of records, and we do not possess the records of your interest.

Since you sought records from a court under the Freedom of Information Law, I point out that that statute is applicable to agency records, and that §86(3) defines the term "agency" to mean:

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

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

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

Based on the foregoing, the courts are not subject to the Freedom of Information Law.

This is not intended to suggest that court records may not be accessible, for other provisions of law often provide broad rights of access to those records (see e.g., Judiciary Law, §255). It is

suggested that a request for court records be directed to the clerk of the court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13197

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 14, 2002

Mr. Paul Bouros
94-A-2268
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

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

Dear Mr. Bouros:

I have received your letter in which you sought an opinion regarding a "clerk fee" charged by the Medical Records Department at your facility for copies of lab results.

In this regard, I offer the following comments

In my opinion, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for searching records or to charge more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed.

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

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To

> remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

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

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute.

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,

David Treacy
Assistant Director

DT:jm

cc: Medical Records Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13198

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 14, 2002

Mr. Raymond Pineiro
00-R-6521
S Block c2-44T
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

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

Dear Mr. Pineiro:

I have received your letter in which you requested "assistance and guidance" in obtaining the name of a correction officer and having a "complaint logged" in correction officer's file.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law.

You indicated that your request for the name of a correction officer was denied by the "FOIL Officer" at your facility.

First, it is noted that a denial may be appealed in accordance 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 person designated by the Department of Correctional Services to determine is appeals is Anthony J. Annucci, Counsel to the Department.

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.

If you reasonably describe a record that indicates the name of a correction officer, I believe that it would be available, except to the extent that a ground of denial is applicable.

Lastly, with respect to "logging" a complaint about a correction officer, it is suggested that you contact the Department of Correctional Services.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13199

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 14, 2002

Mr. Gregory Rodriguez
98-A-4023
P.O. Box 8
Otisville, NY 10963

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

Dear Mr. Rodriguez:

I have received your letter in which you requested "assistance in compelling the Queens [County] District Attorney's Office" to comply with the Freedom of Information Law concerning your requests for records. You wrote that you have not "heard from" the District Attorney's Office since you were informed that the requested records would cost $39.00. You indicated that you sent the payment, but have not received the records.

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

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, there is no precise time period within which an agency must provide records after receiving payment that it requested from the applicant. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made and the like. In this instance, however, since the amount of the fee had been established, it

appears that the records had been located. If that is so, I believe that the records should be made promptly available upon payment of the requisite fee.

In an effort to assist you, a copy of this opinion will be forwarded to Ms. Rona Kugler.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Rona Kugler, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13200

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 14, 2002

Mr. Richard W. Dunnigan
90-B-3027/11-3-3
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5443

The staff of the Committee on Open 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:

This office has received many letters from you over the past several months in which you have sought opinions related to requests for records from various agencies. My letter of November 27, 2001 responded to most of the issues raised in your letters.

In an effort to provide assistance concerning your attempts to obtain correspondence between the Division of Parole and both the Canandaigua Police Department and the Ontario County District Attorney's Office, I note that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Since I am unfamiliar with the contents of the records of your interest, I cannot conjecture as to their availability. I note, however that several grounds for withholding records, or portions of records, may be pertinent. For instance, advice, opinions or recommendations 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.

Lastly, enclosed is a copy of the November 27, 2001 letter addressed to you.

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13201

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 15, 2002

Mr. William Merriman
98-R-5722
P.O. Box 8
Otisville, NY 10963

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

Dear Mr. Merriman:

I have received your letter in which you requested "assistance in urging the FOIL Officer at Otisville to comply with the law and respond to [your] request promptly."

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, 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 of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

FOIL AO-1[illegible]

From: Robert Freeman
To: [redacted]
Date: 2/15/02 8:58AM
Subject: Dear Kim:

Dear Kim:

I have received your inquiry in which you asked whether you can obtain from the NYS Labor Board to determine whether a particular individual has made complaints regarding racially motivated activity.

In this regard, having contacted the Department of Labor on your behalf, I was informed that there is no agency known as the "Labor Board." Further, in consideration of the nature of the subject, it is more likely in my view that the kinds of records in which you are interested would be maintained by the NYS Division of Human Rights.

In general, it has been advised under the Freedom of Information Law that if a charge, a complaint or an allegation has not been proven or substantiated, records may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." If, however, a person has been found to have engaged in or admitted to misconduct or a violation of law, a determination so indicating should be disclosed.

If you are interested in requesting records from the Division of Human Rights it is suggested that you contact Andrew Nitzberg, Records Access Officer, Division of Human Rights, 55 West 125th Street, New York, NY 10027-4516. That agency's website address is <www.nysdhr.com>.

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-13203

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 15, 2002

Mr. Reggie Brown
98-B-1811
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. Brown:

I have received your letters in which you requested that this office "look into" a matter concerning the failure of a chemist at the Buffalo Police Department to "affirm" that "he forwarded a (6) page Lab-Report to the District Attorney's Office in Buffalo."

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

I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request.

Therefore, agency officials in my view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive. In short, in the future, rather than seeking information or raising questions, it is suggested that you request existing records from the individual designated as the records access officer at the agency that maintains the records of your interest. Enclosed is "Your Right to Know", which explains the Freedom of Information Law and includes a sample letter of request that may be useful to you.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13204

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 19, 2002

Mr. Eugene Sidney
94-A-0600
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. Sidney:

I have received your letter in which you requested information regarding the procedure for responding to requests for information. You indicated that "local entities" have failed to acknowledge receipt of or respond to your requests for records.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13205

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 19, 2002

Mr. Timothy Thorsen
96-A-6811
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. Thorsen:

I have received your letter in which you requested assistance in obtaining "the procedural rules pertaining to the Rensselaer 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 to compel an agency to grant or deny access to records. However, 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."

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.

Lastly, as you may be aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. An area in which the distinction between agency records and court records may be significant involves fees. Under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute". In the case of fees that may be assessed by county clerks, §§8018 through 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, the fees may exceed those permitted by the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

In consideration of the foregoing, it is suggested that you contact the Rensselaer County Clerk to seek the records of your interest.

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-13206

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 20, 2002

Mr. Dennis G. O'Hara
O'Hara & O'Connell
Suite 100
200 Salina Meadows Parkway
Syracuse, NY 13212-4505

The staff of the Committee on Open 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'Hara:

I have received your correspondence in which you asked that I comment with respect to a lengthy and detailed request made under the Freedom of Information Law to a school district that you represent.

Having reviewed the request, I offer the following general comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. In several instances, the applicant likely sought records or information that may not exist. For instance, he requested various "lists" of items, "breakdowns" and "a complete account" of certain actions and activities. If no such lists, breakdowns or accountings exist, the District would not be obliged to prepare new records on his behalf.

Similarly, several aspects of the request involve "statements disclosing real or perceived conflicts of interest." From my perspective, that kind of request might not be a request for records as envisioned by the Freedom of Information Law, for a response might involve making a series of judgments based on opinions, some of which would be subjective or based on mental impressions. In a situation in which an individual sought provisions of law that might have been "applicable" in governing certain activity, it was advised that the request was inappropriate. Specifically, the request involved "copies of the applicable provisions and pages of the Civil Service Law and applicable rules promulgated by the Department of Civil Service which govern the creation and appointment of management confidential positions" (emphasis added). In response, it was suggested that:

> "...the foregoing is not a request for records. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions of law might be "applicable", and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 209 of the Civil Service Law", no interpretation or judgment is necessary, for sections of law appear numerically and can readily be identified. That kind of request, in my opinion, would involve a portion of a record that must be disclosed. Again, a request for laws that might be "applicable" is not, in my view, a request for a record as envisioned by the Freedom of Information Law."

In like manner, ascertaining which records relate to "real or perceived conflicts of interest" might involve an attempt to render a judgment regarding the use, utility, accuracy or value of records. As in the case of locating "applicable law", equally reasonable people, even those within the same agency, may reach different conclusions regarding which records may tend to reflect the information sought.

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

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

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

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing

or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the district, to extent existing records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. Further, in the context of the request, a real question involves, very simply, where district officials might begin to look for records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units, and that those units maintain their records by means of different filing and retrieval methods. If records are not maintained in a manner that enables staff to locate records sought with reasonable effort, but rather would involve a search for the needle in the haystack, based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13207

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 20, 2002

Mr. Michael O'Shea
[redacted]

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

Dear Mr. O'Shea:

I have received your letter, which reached this office on January 29.

You have sought assistance in obtaining records from the Oppenheim-Ephratah School District. The records sought, in brief, involve 4th and 8th grade reading and math test results, as well as PSAT and SAT test results, without any personally identifying details. You expressed the belief that the records sought "already exist."

In this regard, first the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a new record in response to a request.

Second, the Freedom of Information Law includes all agency records within its coverage, 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, as soon as records are prepared by or come into the possession of the District, they are subject to rights conferred by the Freedom of Information Law.

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. From my perspective, since your request involves statistics and test results without personally

identifying information, there would likely be no basis for withholding existing records falling within the scope of your request.

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.

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.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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

Glenn R. Bellinger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13208

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 20, 2002

Hon. Wendy Lukas
Trustee
Village of Schuylerville
77 Green Street
Schuylerville, NY 12871

The staff of the Committee on 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 Lukas:

I have received your letter of January 25, as well as the materials attached to it.

In brief, as I understand the matter, you have become involved in a controversy with other Village officials relating to your efforts to obtain information to enable you to carry out your duties as trustees. Following a request made under the Freedom of Information Law and your exchanges with the Village's records access officer, the Clerk/Treasurer, you were accused of harassing her.

You have sought an advisory opinion "on whether [your] FOIL request does in fact harass Clerk Pratt." You also asked "whether there would be a conflict of interest with one of the Trustees or a citizen of the Village...being appointed a Records Access Officer for the Village."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning rights of access to records. It is not empowered to advise with respect to harassment or conflicts of interest. As the matter relates to the Freedom of Information Law, however, I offer the following comments.

First, having reviewed your request, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency, such as a village, is not required to create or prepare a record in response to a request. In that vein, I note that the title of the reedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law.

Several aspects of your request do not involve existing records. For instance, your request that minutes and financial reports be given to trustees at certain times involves an issue of Village policy and procedure; it relates to records that, as yet, have not been prepared. In my view, the Freedom of Information Law is not the vehicle pertinent to the distribution of those records to trustees. It is suggested that you might consider drafting a policy or rule of procedure on the subject that could be considered and perhaps adopted by the Board of Trustees.

Similarly, in one aspect of the request, you asked to "know why" the Board was not informed of the resignation of an employee and raised a series of questions relating to the matter. In my opinion, although Village officials *may* provide information by answering questions, they are not obliged to do so by the Freedom of Information Law. Again, that statute pertains to requests for existing records.

Second, from my perspective, the Freedom of Information Law is intended to enable any member of 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, a 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.

Third, 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..."

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.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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 regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that the governing body of a public corporation, i.e., the village board of trustees in a village, designate one or more persons as "records access officer." The regulations do not include any restriction regarding who may be designated as records access officer. While I know of no instance in which a board member or member of the public has been so designated, there is no provision that would prohibit such a designation.

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-AL-13209

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 20, 2002

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 Dukie:

I have received your letter in which you sought guidance in your efforts in obtaining records from the New York City Board of Education.

In this regard, I offer the following comments.

Fist, pursuant to procedural regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency, such as the Board of Education, is required to designate one or more persons as " records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and requests should generally be directed to that person.

The records access officer for the Board is Mr. Patrick Boyd and requests addressed to Mr. Boyd may be sent to the Board of Education, 110 Livingston Street, Brooklyn, NY 11201.

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 new record in response to a request. Therefore, insofar as the Board does not maintain the records of your interest, the Freedom of Information Law would not apply.

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

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

Perhaps most pertinent with respect to access to contingency plans and other internal Board of Education communications would be §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.

To obtain a general summary of the Freedom of Information Law and a sample letter request, it is suggested that you click on to "publications" on our website, and then to "Your Right to Know."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13210

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 20, 2002

Ms. Paula A. Buckman
Town Clerk
Town of Ticonderoga
132 Montcalm Street
P.O. Box 471
Ticonderoga, NY 12883

The staff of the Committee on 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. Buckman:

I have received your letter of January 18, which reached this office in January 23. You have requested an advisory opinion concerning public rights of access to salary information pertaining not only to elected officials, but to all Town employees.

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 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 described above must be disclosed for the following reasons.

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

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

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

I note that, in general, the reasons for which a request is made or an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City. 642 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. However, §89(2)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses is relevant, and case law indicates that an agency can ask why a list of names and addresses has been requested [see Goldbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980).

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

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

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

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

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-13211

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 20, 2002

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 sought assistance in obtaining information indicating the current salaries of employees of the Hyde Park School District. You expressed a preference for receiving the information on a computer diskette.

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 District's existing computer programs and copied onto a disk, I believe that the District must do so. In that event, the fee would be based on the actual cost of reproduction. When 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.

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.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13212

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 20, 2002

Mr. James A. Parsons
[redacted]

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

Dear Mr. Parsons:

I have received your letter in which you complained with respect to the delay by the New York State Department of Health in responding to a request made under the Freedom of Information Law.

In this regard, it is emphasized at the outset that the primary function of the Committee on Open Government involves providing advice and opinions concerning access to government information. The Committee is not empowered to direct an agency to grant or deny access to records or render determinations that are binding. Nevertheless, in an effort to provide guidance, I offer the following comments.

As you may be aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. 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..."

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.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: James O'Meara, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3407
FOIL-AO - 13213

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 20, 2002

Ms. Kate Dunham
[redacted]

The staff of the Committee on 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. Dunham:

I have received your letter in which you criticized the Town of Chatham in relation to its process of filling a vacancy on the Town Board. When you expressed "disappointment in the closed process", the Town Supervisor indicated that " it would have been 'illegal' to make public any information about applicants for vacant board position because it is 'illegal' to make public any information about 'town employees'."

You have raised a series of questions pertaining to the matter, and I will address those that relate to the statutes within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law and the Open Meetings Law.

If you accurately represented the Supervisor's remarks, I believe that has misconstrued both laws cited above. In this regard, I offer the following comments.

First, there is a distinction in my view concerning access to information concerning those who run for elective office or those who have applied to fill a vacancy in an elective office, and those who seek to be appointed as employees of a government agency. Section 89(7) of the Freedom of Information Law specifies that the identities of persons who apply for appointment to public employment need not be disclosed. However, it has been held judicially that a public body, such as the Town Board, cannot conduct an executive session when considering filling a vacancy in an elective office.

By way of background, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public except to the extent that an executive session may appropriately be held. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

In my view, the only provision that might justify the holding of an executive session to discuss filling a vacancy in an elective office would be §105(1)(f) 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. That being so, it is clear that the names of those seeking to fill a vacancy in an elective office would not be secret. On the contrary, the court suggested that their identities must be made public.

With respect to public rights of access to records pertaining to public officers and employees, I note that there is nothing in the Freedom of Information Law that focuses specifically on "personnel records." The extent to which the records must be disclosed or may be withheld is dependent on their content and the effects of disclosure (Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980).

Further, based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official

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

I note that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

Additionally, in Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's public employment must be disclosed. The Committee's opinion stated that:

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

"The Opinion further stated that:

> "Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles

and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

In short, many aspects of personnel records must be disclosed, while others may be withheld to protect against an unwarranted invasion of personal privacy.

I point out that when records are "confidential", they cannot be disclosed, for a statute would forbid disclosure. In those instances, the first ground for denial, §87(2)(a), would apply, that provision pertains to records that " are specifically exempted from disclosure by state or federal statute." In contrast, there are other situations in which records *may* be withheld, but where there is nothing that would prohibit disclosure. As stated by the Court of Appeals, the state's highest court: "...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 sis so chooses" [Capitol Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

In the case of most personnel records, the Town may choose to disclose, even when the law authorizes a denial of access. In those cases, the records, in my view, could not be characterized as "confidential."

Lastly, the Open Meetings Law provides the public with the right to attend meetings of public bodies, to listen to their deliberations and to observe the performance of public officials. However, the law is silent with respect to public participation. Therefore, a public body may prohibit the public from speaking at meetings. Nevertheless, many public bodies have opted to permit the public to speak. When they authorize public participation, it has been suggested that they do so based on reasonable rules that treat members of the public equally.

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be forwarded to the Town Board

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13214

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 21, 2002

Mr. Craig Pettinger
City of Troy
City Hall
One Monument Square
Troy, NY 12180

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

Dear Mr. Pettinger:

As you are aware, I have received your letter of January 16, which reached this office on January 23. You have sought an advisory opinion concerning a request for records indicating the "names, addresses and amounts of Federal grants the city [of Troy] has distributed in the past 3 years."

Prior to receiving your request for an opinion, the person seeking the records contacted me by phone and said that analogous information had been disclosed in the past by the City, and I believe that she inferred that disclosures were made at the direction of the U.S. Department of Housing and Urban Development (HUD). After discussing the matter with you, you informed me that you contacted HUD, and that officials of that agency stated that there is no provision of federal law that governs rights of access to the records in question and that HUD does not maintain duplicates of the records sought.

From my perspective, if participation in a grant or loan program is based on an applicant's income, personally identifying details relating to that person may be withheld. Conversely, if participation is not based on income, but perhaps other factors, such as the location or age of property, there would likely be no basis for denial of access.

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.

I note that there is a decision that focused on the same kinds of records as those at issue, for it involved personal information contained in records concerning a HUD program, specifically, the "section 8" housing program. Tri-State Publishing, Co. v. City of Port Jervis (Supreme Court, Orange County, March 4, 1992) 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.

In my opinion, the identity of a landlord must be disclosed, for payments are made by governmental entities to the landlord. On the other hand, however, insofar as the records sought pertain to persons who participate based on an income qualification, I believe that the Freedom of Information Law and the holding in Tri-State Publishing authorize the City to withhold personally identifying details 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: Marcie Haskell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3215

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 20, 2002

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 requested assistance in obtaining the "name of chief executive officer and known address" of the "Dutchess County Task Force." You wrote that this task force, which is responsible for your "arrest and conviction", has changed its address and "is not in compliance with the Freedom of Information Law." You also requested assistance in obtaining 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. It is also noted that this office does not maintain a listing of names and addresses of all state agencies. 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)].

While I am unaware of an agency known as the Dutchess County Task Force, it is suggested that you direct requests for records of your interest to the records access officer at the Dutchess County Sheriff's office.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3216

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 20, 2002

Mr. Shawn Lainfiesta
95-A-2531
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. Lainfiesta:

I have received your letter in which you explained your unsuccessful attempt to obtain a "listing showing [your] outgoing privilege (sic) communication." You wrote that the records access officer responded that your "facility does not maintain a log on out-going privilege (sic) communication."

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

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13217

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 20, 2002

Mr. Gregory Love
95-A-3709
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. Love:

I have received your letter in which you explained that two months had passed since the Suffolk County Jail acknowledged receipt of your request for records, but you still had "not received any of the papers [you] requested nor a reason for the delay." You requested this office to "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.

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

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

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13218

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 22, 2002

Ms. Jean A. Black
[redacted]

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

Dear Ms. Black:

I have received your letter of January 29 concerning your efforts in obtaining salary information from the Sewanhaka Central High School District in an electronic format. In previous correspondence, it was suggested that you might accept the Superintendent's offer of a printout containing the information sought upon payment of a fee of $5.75, for the offer appeared to be reasonable. You asked by phone whether my view of the law had changed.

It has not. The suggestion was made merely as a means of resolving a controversy that involved a relatively small amount of information that would be made available at a relatively low cost. Nevertheless, as a means of confirming my opinion concerning the requirements imposed by the Freedom of Information Law, particularly in consideration of the judicial interpretation of that statute, I offer the following comments.

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

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

Based 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 recently 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. Some elements of the database were clearly public, while others clearly could be withheld to protect against the disclosure of intimate personal information.

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, the response to the request, 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 in an electronic storage medium, so long as you are willing to pay a fee based on the actual cost of reproduction [see Freedom of Information Law, §87(1)(b)(iii)].

In an effort to share the foregoing with District officials, copies of this opinion will be forwarded to the District's attorney and its Superintendent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Douglas E. Libby
Dr. G. Goldstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13219

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 22, 2002

Mr. Francis Endryck
[redacted]

Dear Mr. Endryck:

As you are aware, your letter of January 23 addressed to the Office of the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning rights of access to records of units of state and local government under the state's Freedom of Information Law.

According to the materials attached to your letter, you requested from the Village of Valatie "copies of all HUD monies disbursed/granted during the period of April 1, 1999 to present", as well as "a list of all delinquent persons & how many payments have been missed." In response to the request, you were informed that "the material that you requested does not exist", and that the "Village is not required to assemble a list or summary from documents that do exist."

In this regard, I offer the following comments.

First, I believe that the principle expressed by the Village in response to your request was accurate, that the Freedom of Information Law pertains to existing records, and that an agency, such as the Village, is not required to create a new record in response to a request [see Freedom of Information Law, §89(3)]. In short, if no list containing the information sought exists, the Village would not be required to prepare such a list on your behalf.

Rather than seeking a "list", it is suggested that in the future you seek records. For instance, you might request records containing the information sought, i.e., records indicating the manner in which monies received from HUD were disbursed or granted during a certain period, and records identifying persons or entities that have failed to make payments, including information indicating a failure by those persons or entities to make payments.

Second, insofar as records exist and 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.

From my perspective, if participation in a grant or loan program is based on an applicant's personal income, personally identifying details relating to that person may be withheld. Conversely, if participation is not based on income, but perhaps other factors, such as the location or age of property, there would likely be no basis for denial of access. Similarly, if a grant or loan is made to a business entity, the kinds of records of your interest would, in my opinion, 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.

I note that there is a decision that focused on personal information contained in records concerning a HUD program, specifically, the "section 8" housing program. Tri-State Publishing, Co. v. City of Port Jervis (Supreme Court, Orange County, March 4, 1992) 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.

If the records sought involve grants or loans to businesses, I do not believe that the exception concerning the protection of personal privacy would apply, because that provision pertains to records relating to natural persons. If a business enterprise has failed to make payments or is in arrears, I believe that records containing that information would be public, for none of the grounds for denial could, in my view, be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nancy Bryant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13220

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

February 25, 2002

Mr. Mike Goodwin
The Gazette Newspapers
2345 Maxon Road Extension
P.O. Box 1090
Schenectady, NY 12301-1090

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

Dear Mr. Goodwin:

I have received the materials that you transmitted relating to your request for a variety of records maintained by the Schenectady County Department of Probation. In brief, the County denied the request on the basis of the regulations promulgated by the New York State Division of Probation and Correctional Alternatives concerning conditional release and supervision of correctional releases. Specifically, subdivision (d) of 9 NYCRR §361.8 states in relevant part that: "accessibility to supervision case records is limited only to those authorized by law or Court order." Further, although the County Attorney wrote that the Freedom of Information Law "presumptively favors disclosure", he added that is so unless the release of records is "prohibited by law by statute."

From my perspective, the statement offered by the County Attorney is not entirely accurate, and the ability to rely on the regulations cited is, according to the Court of Appeals, state's highest court, questionable.

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

The first ground for denial of access, §87(2)(a), permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". It has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of an administrative code or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature of congress. Therefore,

I do not believe that regulations can be considered as a statute that would exempt records from disclosure or that an agency can rely upon regulations as a basis for withholding a record.

If indeed the regulations cited earlier represent the sole basis for denial and have been invalidly asserted, I believe that rights of access would be governed by the Freedom of Information Law. This is not suggest that all records that you requested must be disclosed, but rather that they must be made available or may be withheld in accordance with the direction provided in §87(2) of the Freedom of Information Law.

Several grounds for denial may be pertinent to an analysis of rights of access. For instance, §87(2)(b) authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." That provision might properly be cited to withhold records or portions of records that include personal or intimate details of individuals' lives. Also relevant, particularly with respect to internal reports and similar records, would be §87(2)(g). That provision authorizes an agency to deny access to records that:

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

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

In the context of your request, portions of reports pertaining to a person's compliance with conditional release program would appear to be "intra-agency materials", and those portions consisting of opinions, advice or recommendations, for example, could be withheld. On the other hand, if an individual was found to have engaged in violations, those portions of the records might be viewed as either factual information available under subparagraph (i) of §87(2)(g) or as a final determination available under subparagraph (iii).

In sum, for the reasons described above, I believe that the Freedom of Information Law, not the provisions of the regulations cited in response to your request, governs rights of access. Under that statute and the provisions of §87(2), the contents of the records and the effects of disclosure in my view serve as the criteria to be applied in determining the extent to which the records may be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stephen M. Signore
Mary Lolik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1321

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

February 25, 2002

Mr. Mark Pangburn
93-B-2465
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

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

Dear Mr. Pangburn:

I have received your letter in which you requested that this office contact the town government, court, clerk and judge of the Town of West Sparta to "inform them of their obligation to respond to information being sought."

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 is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

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

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

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255; Uniform Justice Court Act,

§2019-a) may grant broad public access to those records. It is recommended that a request for court records cite an applicable provision of law and be directed to the clerk of the court.

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)].

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-13222

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

February 25, 2002

Mr. Theodore Cook
99-A-1675
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051

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

Dear Mr. Cook:

I have received your letter in which you sought assistance in obtaining the "legal file and transcripts" of your criminal case from Fulton 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, I offer the following comments.

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

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

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

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public

access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

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

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13223

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

February 26, 2002

Mr. Richard Williams
91-A-3960
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. Williams:

I have received your letter in which you questioned the propriety of the Nassau County District Attorney's Office denial of your request "premised primarily on the lack of clarity in your request and the non-existence of any index to your file."

In this regard, I offer the following comments.

By way of background, as you are likely aware, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request for information. Similarly, an agency is not required to provide "information" in response to questions; its obligation is to provide access to existing records to the extent required by law. Therefore, if a request is made for an "index to [your] case file", and if the District Attorney's office does not maintain an index, it would not be obliged to review its records and compile a record on your behalf.

It appears that the issue may relate to the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals, the State's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Lastly, in a decision related to 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" (id., 678). Moore v. Santucci, 151 AD2d 677 (1989).

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13224

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

February 25, 2002

Mr. Jerald Miller
00-A-0607
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. Miller:

I have received your letter in which you questioned the obligation of an agency "to give an approximate date for compliance." You also inquired about the propriety of an agency charging twenty-five cents per page to review documents when portions have been redacted, and your ability to inspect 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.

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.

Second, when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there are often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the ground for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record.

Lastly, §87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying, and the regulations promulgated by the Committee on Open Government state in part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3). In my view, neither the Law nor the regulations require that records be transferred from their usual locations to accommodate an applicant at a site convenient to the applicant. In short, while inmates may be indigent or unable to travel, I do not believe that an agency is required to make records available at other than its designated or customary locations.

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13225

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

February 25, 2002

Mr. Mark Stewart
94-A-7612
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051

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

Dear Mr. Stewart:

I have received your letter in which you asked about your ability to obtain "legal documents from a court clerk.

In this regard, I offer the following comments.

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

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

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

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

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

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

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13226

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

February 26, 2002

Mr. Bill Sweeney
News Editor
Associated Press
50 Rockefeller Plaza
New York, NY 10020

The staff of the Committee 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. Sweeney:

I have received your letter of February 15 and the materials attached to it. You have requested an advisory opinion concerning the Archival Standards and Processing Plan ("the Plan") of the Rudolph W. Giuliani Center for Urban Affairs, Inc. ("the Center), particularly "as to whether public access is ensured in accordance with law." The Plan was developed pursuant to a contract between the Center and New York City ("the City") signed in December, 2001. You indicated that you received the advisory opinion prepared by this office on February 13 in which it was advised that certain provisions in the contract between the Center and New York City were, in my view, inconsistent with law, and you asked whether the Plan "addresses those irregularities, or whether those still exist."

As you are aware, in an effort to enhance understanding of and compliance with the Freedom of Information Law, a copy of the opinion rendered on February 13 was transmitted to Michael A. Cardozo, Corporation Counsel. Mr. Cardozo also sent a copy of the Plan to me, and in a letter addressed to Betsy Gotbaum, the City's Public Advocate, pertaining to the Plan, Mr. Cardozo stressed that "the City has in no way relinquished its control over any of the records held by the Center", and that the records held by the Center "will be disclosable in accordance with the provisions of the New York State Freedom of Information Law..."

Having reviewed the Plan, it is emphasized that the advisory jurisdiction of this office in the context of the matter presented is limited to issues relating to the Freedom of Information Law. While other provisions of law may be pertinent to or implicated by the Plan, they will not be addressed. From my perspective, two sections of the Plan relate to the operation of the Freedom of Information Law.

Section VII. entitled "Restricted Access or Private Material" states in relevant part that:

> "General access to all or some portions of certain record series may be restricted. The Archivist should seek the guidance of the Corporation Counsel for the proper handling of any such materials.
>
> 1) Records may deal with matters related to City security or law enforcement.
>
> 2) Records may be of a private nature. (See Section **IX. Access Policy.)**
>
> 3) Records may relate to current or anticipated litigation or otherwise be legally privileged."

For reasons to be considered in the ensuing commentary, item 2, the statement that records "may be of a private nature", is, in my view, inconsistent with law.

Perhaps most pertinent is Section IX. entitled "Access Policy." That series of provisions states that:

> "The documents which comprise the Center's collection are the property of the City of New York.
>
> "The Agreement between the City and the Center intends to ensure that provision is made for public access to the collection to the fullest extent provided by law. With regard to public access to records contained in the collection, the following therefore applies:
>
> - Records held by the Center may consist of both official documents of the City and private documents belonging to former Mayor Giuliani or another individual.
>
> - The City shall be the sole determiner of whether a record is an official document of the City or a private document belonging to Mayor Giuliani or another individual. Such determinations shall in each case be made by the Office of the Corporation Counsel.
>
> - In the case of a request for access to an official document of the City, the City shall be the sole determiner of whether and to what extent such access shall be granted.
>
> - In the case of a request for access to a private document contained in the collection but belonging to former Mayor Giuliani or another individual,

> (i) in the case of a request made under the Freedom of Information Law, the City shall be the sole determiner of whether and to what extent such access shall be granted. If the City determines pursuant to FOIL that release of a document would constitute an unwarranted invasion of the personal privacy of former Mayor Giuliani or another individual and that FOIL therefore does not require public access to the document, such document shall be released only with the approval of former Mayor Giuliani or such other individual;
>
> (ii) in the case of any other request for public access, (i.e., where the City has determined that a document is a private record and the request is not covered under [i] above), the Center may grant access only with the approval of former Mayor Giuliani or such other individual."

One of the areas of criticism expressed in the earlier opinion involved reference to section M of Article 1, which states that:

> "Whenever Rudolph W. Giuliani has a personal interest or right in a Document separate and apart from the interests and rights of the City, his approval shall be required before any such document may be released or disclosed by the Center to the public. Such approval shall be in addition to, and not in lieu of, the approval of the City."

The Plan, as indicated above, states in the provisions regarding "Access Policy" that "the City shall be the sole determiner of whether and to what extent such access shall be granted." Item (ii) above, however, refers to "private" records and the authority to disclose them "only with the approval of Mayor Giuliani or such other individual."

Still troubling, therefore, and, in my view, still inconsistent with law, are the references in the Access Policy quoted above to "a private document" or "a private record...belonging to former Mayor Giuliani or another individual." Based on judicial decisions rendered by the state's highest court that were cited in the opinion of February 13, no document or record that had been or is now maintained by any agency of City government may in my opinion be characterized as "private" or "belonging to" the former Mayor or any other person. On the contrary, I believe that every such document or record is the property and in the legal custody of the City and falls within the coverage of the Freedom of Information Law. This is not to suggest that each such document or record must in every instance be disclosed to the public, for it is likely that certain documents or records may be withheld in whole or in part. Rather, my opinion is that all such materials are presumptively available to the public under the Freedom of Information Law, and that access may be denied only in accordance with the grounds for denial of access appearing in §87(2) of that statute.

To reiterate the points offered in the opinion of February 13, first, the Freedom of Information Law includes within its scope any information in any physical form maintained by or for an agency. Therefore, even if a document addressed to an official is marked "personal", or even if a document is exempted from disclosure by statute, it would nonetheless constitute a "record"

subject to whatever rights exist under the Freedom of Information Law. Specifically, §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."

The term "agency" is defined in §86(3) to mean:

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

More than twenty years ago, the Court of Appeals found that the nature, the function or the origin of records are irrelevant in considering whether the records fall within the framework of the Freedom of Information Law. So long as information in some physical form is kept by or for an agency, it is a "record" subject to rights of access. The question that follows involves the extent, if any, to which an agency may deny access. In Westchester-Rockland Newspapers v. Kimball, the materials sought involved a lottery conducted by a volunteer fire company, which was found to be an "agency", and although that 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. 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" [50 NY2d 575, 581 (1980)].

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there may have been "considerable crossover" in the activities of Mr. Giuliani as mayor and as a citizen. That is of no moment in my opinion in considering whether documentary material is subject to the Freedom of Information Law.

The most significant decision in relation to the matter, a decision that focuses directly on the primary issue raised by the Plan in relation to the Freedom of Information Law, Capital Newspapers

v. Whalen, is especially relevant in view of its facts and the unanimous rejection by the Court of Appeals of the decision reached by the Appellate Division.

By way of introduction, in the decision rendered by the Appellate Division, it was found that:

> "The late Erastus Corning, II, was Mayor of the City of Albany for some 42 years until his death in 1983. During his later years in office he was also Chairman of the Albany County Democratic Committee. Over this historically lengthy tenure as Albany's chief executive, he collected and stored more than 900,000 documents and letters (the Corning papers) at his office in City Hall, including those relating to personal matters and to his activities as Democratic Committee Chairman. It is readily inferable from the record that Corning kept essentially exclusive control of his papers during his lifetime" [113 AD2d 217, 218 (1985)].

I prepared an opinion concerning the matter advising, in the words of the Court, that "all of the Corning papers, including those personal in nature and relating solely to Democratic Party activities, were accessible under FOIL unless covered by a specific statutory exemption", and that [I] "based this opinion on FOIL's definition of 'records'..." (id., 219). While the Supreme Court agreed with my opinion, the Appellate Division reversed, holding that:

> "Special Term and the State Committee on Open Government read the statute far too broadly in making Corning's personal and Democratic Party papers publicly accessible under FOIL. There is no basis to infer that any such farreaching public disclosure of non-governmental activities was intended by that legislation. The declared legislative policy underlying FOIL was to fulfill '[t]he people's right to know the process of *governmental decision-making* and to review the documents and statistics leading to determinations' by providing 'access to the records *of government*' (Public Officers Law § 84 [emphasis supplied]). The Governor's message of approval of the original FOIL enactment (L 1974, chs 578-580) similarly states that '[t]hese bills will provide, for the first time in New York State, a structure through which citizens may gain access to the records *of government* and thereby gain insight into *its workings*' (Governor's Memorandum, N.Y.Legis.Ann., 1974, at 392 [emphasis supplied]).
>
> "Thus, as radical a departure from governmental secrecy as FOIL represents, the available evidence does not faintly support the proposition that the law was expected to cover the private papers of public officers clearly having no relationship to their conduct as such, except perhaps in the historical sense that every activity or experience of a public figure bears in some way on what he or she does in office" (id., 220-221, emphasis added by the Court).

The Court referred to the contention offered by the newspaper seeking the records, stating that:

> "Its argument for access is entirely dependent on the theory that FOIL's broad definition of 'record' mandates disclosure because of the location of the papers at the facility of an 'agency' subject to the act. Again, however, nothing in the legislative history suggests that a governmental official's private or political party documents were to be made subject to disclosure merely because of the happenstance of their storage on public property."

The decision also cited the "omission" from the Freedom of Information Law of "public *office holders* from the definition of agency", which "necessarily implies that records which are clearly or concededly *not* produced, held or used in their official capacities are not subject to FOIL disclosure, again wherever their location" (id., 222, emphasis added by the Court).

In its review of the matter, the Court of Appeals framed the question as follows:

> "At issue in this appeal by petitioner's newspapers is whether two categories of documents in custody of respondent City of Albany should be held to be 'records' under FOIL: correspondence of a former Mayor of Albany, the late Erastus Corning, II, concerning matters of a personal nature and correspondence concerning the activities of the Albany County Democratic Committee. The narrow question of statutory construction presented arises from respondents' contention that although these papers are literally within the FOIL definitions as 'record[s]' being 'kept' or 'held' by an 'agency' (the City of Albany), they are, nonetheless, outside of the scope of FOIL because of the private nature of their contents. For reasons to be discussed, we disagree with respondents' contention and conclude that there should be a reversal" [69 NY2d 246, 249 (1987)].

In its discussion and unanimous rejection of the holding of the Appellate Division, the Court of Appeals determined that it could:

> "...find nothing to suggest that the Legislature intended that the definitions of 'record' and 'agency' should be given anything other than their natural and obvious meanings. On the contrary, respondents' narrow construction would be inimical to the public policy underlying FOIL and would conflict with the legislative intent which is apparent in the language of the statute as a whole and in the detailed procedures established in FOIL for designating documents which should properly be exempt. Moreover, the construction, if given effect, could, as a practical matter, frustrate the very purpose of the legislation.

> "It is settled that FOIL is based on the overriding policy consideration that 'the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government' (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571). Indeed, in enacting FOIL the Legislature specifically declared: 'that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.' (Public Officers Law § 84.) We have held, therefore, that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government (*see, Matter of Washington Post co. v New York State Ins. Dept.*, 61 NY2d 557, 564, citing *Matter of Fink v Lefkowitz, supra* at p 571). It is evident that the narrow construction respondents urge is contrary to these decisions and antagonistic to the important public policy underlying FOIL" (id., 252).

The Court also reiterated the principle expressed in Westchester-Rockland, supra, stating that:

> "...respondents seek to read into the definitions of 'record' and 'agency' a requirement that, for documents to be within FOIL's scope, their subject matter must evince some governmental purpose. There is, however, no language in the statute itself and nothing in the legislative history suggesting that the Legislature intended such content-based limitation in defining the term 'record'. On the contrary, we held in *Matter of Westchester Rockland Newspapers v Kimball* (50 NY2d 575, 581) that FOIL's scope is not to be limited based on 'the purpose for which the document was produced or the function to which it relates'. Such a limitation would be difficult to define, we explained, because of 'the expanding boundaries of governmental activity' and because '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., 252-253).

The Plan by its terms appears to attempt to distinguish those documents that are subject to the Freedom of Information Law from those that may be outside its coverage by referring repeatedly to "private documents belonging to former Mayor Giuliani or another individual." As suggested at the outset, none of the documents maintained by the City in my view "belong" to the former Mayor or any other person. In rejecting essentially the same scheme as described in the Plan, the Court of Appeals in Capital Newspapers determined that:

> "...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 FOIL, thereby, obviating the need to articulate a specific exemption and avoiding review of its action...
>
> "...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" (id., 253, 254).

In short, based on the foregoing, I believe that all records and documents that are or have been maintained by an agency of City government are subject to rights of access conferred by the Freedom of Information Law.

As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I note that the introductory language of §87(2) refers to the authority of an agency to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record may include both accessible and deniable information, and that an agency is obliged to review the record sought in its entirety to determine the extent, if any, to which one or more of the grounds for denial may properly be asserted.

By means of example, that a record may be characterized as "personal" or contain personal information does not remove it from the coverage of the Freedom of Information Law. Rather, in that kind of situation, the record might be withheld *in toto* or perhaps with personal details redacted

on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)].

Lastly, the Plan includes details concerning the appraisal and processing of records that are transferred to the Center. In this regard, the last paragraph of section IX. of the Plan, the Access Policy, states in part that: "[i]f a member of the public requests records of the Center with regard to which *processing has been completed*, the Center will transport the records in question to the offices of DORIS [the Department of Records and Information Services], where space will be made available for them to be viewed" (emphasis mine). In my opinion, a request made under the Freedom of Information Law by a member of the public must be answered in a manner consistent with that statute, irrespective of whether the records sought have been "processed."

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

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

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

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. Based on that decision, if records maintained by the Center can be located with reasonable effort, i.e., if they have been "reasonably described", the Center and DORIS would be required to retrieve the records for the purpose of making them available to the extent required by law, even if "processing" has not been completed.

I note in a related vein 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..."

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.

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.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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 offer guidance and to bring about a resolution of the issues, copies of this opinion will be forwarded to Mr. Cardozo and to City officials and others who may be interested in the matter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael A. Cardozo
Brian Andersson
Saul S. Cohen
Hon. Alan Gerson
Hon.Betsy Gotbaum
Hon. Bill Perkins
Donna Lieberman
Janet Linde

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13227

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

February 26, 2002

Mr. Rahkeem Bolden
99-A-6195
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. Bolden:

I have received your letter in which you indicated that your court appointed attorney has not responded to your request for records.

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.

Lastly, I am not aware of other "statutes and/or law" that would require private attorneys or associations to respond to your requests.

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-13228

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

February 26, 2002

Mr. Derrick Caldwell
93-A-4157
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. Caldwell:

I have received your letter in which you requested assistance in obtaining information from the New York City Police Department "concerning whether or not a police officer by the name of Sgt. Rice, of the detective division, was assigned to the 75th precinct in East New York section of Brooklyn, in November of 1991. [You] further requested the names and ranks of all police officers within the New York City's police department, by the last name of Rice for the year of 1991, where they were assigned and ranks."

You indicated your request was denied on the basis "that the information was personnel records and therefore exempt from disclosure under Civil Rights [Law] section 50A."

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." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. It has been found that the exemption from disclosure conferred by §50-a of the Civil Rights Law " was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross examination" [Capital Newspapers v. Burns, 67 NY 2d 652, 568 (1986)].

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

In consideration of the foregoing, it would appear that records of your interest would not be covered by the confidentiality provisions of §50-a, for they are not used to "evaluate performance toward continued employment or promotion."

Lastly, it is emphasized that 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. If the New York City Police Department does not maintain the records you have requested, the request would not involve existing records, and the Freedom of Information Law would not apply. However, if records containing information of your interest do exist, I believe that they must be disclosed, for none of the grounds for denial would be applicable.

I hope that the foregoing serves to clarify misunderstandings and that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Records Access Officer
Leo Callaghan, Records Access Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13229

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 27, 2002

Mr. Harvey Elentuck
[redacted]

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

Dear Mr. Elentuck:

I have received your memorandum of January 28 addressed to several persons, including myself. As it pertains to me, you referred to a request for records that was denied by Thomas Liese, the records access officer for the New York City Board of Education. You asked whether:

> "...if Mr. Liese generically denied public access pursuant to FOIL §87(2)(a), §87(2)(b}, and §87(2)(g) without having [your] FOIL request in front of him, without really knowing what specific records were requested, and without having examined each of the records being requested, would that have been either a violation of FOIL or the Committee's regulations?"

In this regard, first, this office never characterizes the actions of an agency or its personnel as a "violation", for the Committee on Open Government has no authority to issue determinations. Rather, as you are aware, the primary function of Committee involves providing advice and opinions relating to the Freedom of Information Law.

Second, there may be instances in which there may be no need or obligation to examine or become familiar with the specific contents of records prior to deciding to grant or deny access. For instance, if a class of records is "specifically exempted from disclosure by state or federal statute" and deniable under §87(2)(a) of the Freedom of Information Law, there would be no need in my view to examine records. In such a case, the records would, in their entirety, be beyond the scope of rights of access [see Short v. Board of Managers, 57 NY2d 399 (1982)]. Similarly, if a request is made, for example, for a list persons having a certain characteristic, i.e., a list persons with a certain disability, it is clear in my opinion that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b)", and examination of such a list would be unnecessary in determining rights of access.

In other situations, however, those in which it is possible or likely that portions of records may be both accessible and deniable, I believe that agency staff must review the records to determine which portions may justifiably be withheld. In Gould v. New York City Police Department 87 NY2d 267 (1996)], the Court of Appeals stated that a categorical denial of access to records in a circumstance of that kind 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), one of the exceptions cited in the denial of 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Liese

FOIL-AC-13330

From: Robert Freeman
To: [redacted]
Date: 3/4/02 4:57PM
Subject: Dear Mr. Cullen:

Dear Mr. Cullen:

I have received your letter in which you asked what the consequences may be when a person or agency engages in "deliberately withholding, destroying, or misrepresenting asked for under FOIL."

In this regard, I believe that there is a distinction between withholding and destroying records. When an agency withholds records, the applicant may appeal the denial of access, and if the appeal is also denied, the applicant may seek judicial review of that determination. When a record is requested and destroyed, section 89(8) of FOIL may be pertinent. That provision states that: "A person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation." Essentially the same language appears in the Penal Law, section 240.65.

With respect to "misrepresentation", I must admit that I do not understand what you mean in the context of FOIL. Under the statute, a government agency may be required to disclose a record, even though the content of the record may be inaccurate.

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-13231

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

Ms. Judith Saari
[redacted]

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

Dear Ms. Saari:

I have received your letter of February 6 in which you sought assistance concerning a request for records submitted to Special Prosecutor William Stanton. The request relates to the murder of your sister, a former correction officer at the Green Haven Correctional Facility, in 1981. Lemuel Smith was later convicted.

In this regard, I offer the following comments.

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

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

Section 86(4) defines the term "record" to include:

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

While I am unaware of Mr. Stanton's current status or role in relation to the matter, like the office of a district attorney, I believe that the office of a special prosecutor would constitute an

"agency" that falls within the framework of the Freedom of Information Law. Further, insofar as Mr. Stanton maintains records in conjunction with his functions as Special Prosecutor, I believe that they would maintained for a governmental entity and would fall within the coverage of that statute. On the other hand, if Mr. Stanton once had possession of records of your interest but no longer possesses them, the Freedom of Information Law would no longer be applicable. In short, only to the extent that Mr. Stanton maintains records falling within the scope of your request would the Freedom of Information Law be applicable.

Second, having reviewed your request, I note that it includes items such as "biological samples" and clothing. As indicated above, the Freedom of Information Laws pertains to information existing in some physical form, and it has been held that items of physical evidence do not constitute "records" [see Allen v. Strojnowski, 129 AD2d 700; motion for leave to appeal denied, 70 NY 2d 871 (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.

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*."

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

Fourth, 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. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [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.).

Based on the direction given by the Court of Appeals in several decisions, records sought must be reviewed by an 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).

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.

The provision at issue in Gould, §87(2)(g) of the Freedom of Information Law, was cited in relation to complaint follow up reports prepared by police officers and 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].

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: William Stanton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13232

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

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 requested that this office "conduct a thorough analysis" concerning a denial of your request for a "subject matter list" from the Troy 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, I offer the following comments.

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.

It is clear in my view that a subject matter list should be maintained and made available by each agency. By reviewing a subject matter list, you can ascertain the kinds of records maintained by an agency and thereafter, request records based upon your review of the list. I would conjecture that there may be no separate list for the Police Department, and the City's subject matter list may include reference to the Department's records.

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3409
FOIL-AO-13233

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

E-Mail

TO: Carol Thompson [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 Ms. Thompson:

I have received your letter of February 7. You raised a series of questions relating to the Open Meetings Law, particularly in relation to executive sessions held by a committee of the Oswego County Legislature.

In this regard, I offer the following comments.

First, when a committee consists solely of members of a public body, such as a county legislature, I believe that the Open Meetings Law is applicable, for a committee itself constitutes a "public body."

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in §102(2) to include:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a legislative body, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see General Construction Law, §41). Therefore, if, for example, the Board consists of twenty, its quorum would be eleven; in the case of a committee consisting of five, its quorum would be three.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice, openness, and the taking of minutes, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

Second, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law 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.

If more than one subject is to be discussed during an executive session, each subject should be identified in a motion. Further, if a public body has identified only one subject for consideration in executive session but has begun discussion of a new subject, I believe that it would be required to return to an open meetings.

It has been consistently advised and held that a public body cannot schedule or conduct an executive session in advance of or following 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.

Third, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that the subject falls within the grounds for entry into an executive session. Further, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered in executive session.

Since you referred to the executive sessions held to discuss personnel matters, 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, policy concerning the use of government vehicles, 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". Similarly, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. 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" (<u>Doolittle v. Board of Education</u>, 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.

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)].

Next, when action is taken by a public body, minutes must be prepared. Here 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, if a discussion during an executive session can be overheard, and if the subject is different from that cited in the motion for entry into executive session, you asked whether you can "walk into the room." In that circumstance, I would suggest that you knock on the door and express your belief that the subject of the initial discussion appears to have ended and that you believe that the public has the right to be present to observe the discussion of the subject now under consideration.

I hope that I have been of assistance.

RJF:jm

cc: Chair, Oswego County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13234

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

Mr. Janusz Muszak
[redacted]

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

Dear Mr. Muszak:

I have received your letter of February 1 in which you asked that I "inform" Howard Relin, the Monroe County District Attorney, "that in fact he and his office is a subject of the Freedom of Information Law."

In this regard, I am unaware of the nature of the records that you might have requested from Mr. Relin's office or whether his office maintains the records of your interest. Nevertheless, based on the terms of the Freedom of Information Law and judicial decisions, it is clear that offices of district attorneys are subject to the requirements of that statute.

The Freedom of Information Law is applicable 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."

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)].

While I believe that the District Attorney is aware of his responsibilities under the Freedom of Information Law, a copy of this response will be sent to him.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Howard Relin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13235

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

Mr. Clinton Small
89501 02586
18-18 Hazen Street
East Elmhurst, NY 11370

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

Dear Mr. Small:

I have received your letter and the attached "copies of various requests made to several agencies." You indicated that you have not received responses and requested assistance in obtaining the records of your interest.

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 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. It would not apply to a private entity or a not-for-profit corporation, for they would not be governmental entities. It would appear that you have requested records primarily from private entities or not-for-profit corporation that would not be subject to the Freedom of Information Law.

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

Third, 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 [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, with respect to obtaining 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 make specific reference to §18 of the Public Health Law when seeking medical records.

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-13236

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

Mr. Manuel Colon
90-A-1307
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. Colon:

I have received your letter in which you request advice concerning records that may be available from a district attorney's office and a police department. You indicated that you have not received responses to your Freedom of Information Law requests.

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 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, neither the Police Department nor an office of a district attorney can claim that complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

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

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

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

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

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

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

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

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

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 - 13237

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 5, 2002

Ms. Barbara Cleveland
Administrative Assistant
Finger Lakes Inn
4360 Lakeshore Drive
Canandaigua, NY 14424

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

Dear Ms. Cleveland:

I have received your letter in which you explained that the Finger Lakes Community College has not responded to either your initial "request under the Freedom of Information Act" or several follow up requests. You wrote that the "requested information was intended to help (the Finger Lakes Inn) determine an efficient and cost effective solution" to dealing with damage caused by a contractor employed by the Finger Lakes Community College.

First, I note that the Freedom of Information Act pertains to the availability of federal agency records. The New York Freedom of Information Law is applicable to records of state and local government agencies. Section 86(3) of that statute defines the term "agency" to mean:

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

It is clear in my opinion that the College is an "agency" subject to the Freedom of Information Law. According to the Education Law, §6301, community colleges are established and operated by one or more entities of local government, and it was held prior to the enactment of the Freedom of Information Law that records of a community college were required to be made available pursuant to §51 of the General Municipal Law, which pertains to the duty of municipal governments to disclose records [see Cline v Board of Trustees, 351 NYS 2d 81, affirmed 45 AD 2d 823 (1973)]. More recently, in 1993, the State's highest court, the Court of Appeals, confirmed that a community college is subject to the Freedom of Information Law. In its discussion of the matter, the Court:

> "reject[ed] the position of the intervenor-respondent Nassau Community College Federation of Teachers that the College is not an 'agency' within the scope of FOIL when it engages in its education function. Public Officers Law §86(3) defines an 'agency' as 'any * * * governmental entity performing a governmental or proprietary function'. Intervenor claims that the doctrine of academic abstention'

> and statutory construction compel the conclusion that the Legislature did not intend to extend FOIL's definition of an agency to a college's faculty committees and academic components when they perform education functions. To the extent that intervenor's argument is an invitation for us to delineate distinctions between the parameters of educational, proprietary and governmental functions, we decline to do so. We do hold that for the purposes of petitioner's FOIL inquiry, this public College constitutes an 'agency'. Nothing in the statute or legislative history requires a contrary holding, and the statutory language should be interpreted consistent with its natural and most obvious meaning" (Russo v. Nassau Community College, 81 NY 2d 690, 698).

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)].

Third, in general, the reasons for which a request is made or an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, including a litigant or potential litigant, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 642 NY2d 75 (1984) and Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976)]. Thus, your intention to use information to "determine" a solution should not affect the availability of records.

Lastly, since your correspondence does not specify the type of records you have requested, I cannot conjecture as to their availability. However, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the

extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In an effort to enhance compliance of the Freedom of Information Law, a copy of this opinion will be forwarded to Office of the President at Finger Lakes Community College.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Office of the President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13238

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 6, 2002

Ms. Susan Boice Wick
[redacted]

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

Dear Ms. Wick:

I have received your correspondence of February 5 concerning "the failure" of the Kingston School District to respond or provide access to certain records. Specifically, your letter and the materials attached indicate that you requested "proposed school board resolutions" and related records concerning the education of your children.

In this regard, first, the New York Freedom of Information Law generally deals with access to records maintained by agencies of state and local government, including records of school districts. While I believe that proposed resolutions and similar records in which agency officials offer recommendations or opinions may be withheld when the Freedom of Information Law governs rights of access [see Freedom of Information Law, §87(2)(g)], I note that §89(6) provides that when records are available under a different provision of law, nothing in the Freedom of Information Law can be asserted as a means of denying access. In this instance, it appears that a different law would require the disclosure of existing records maintained by the District that pertain to your children.

In brief, a provision of federal law, the Family Educational Rights and Privacy Act (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 and many private educational institutions. The focal points of the Act involve rights of access to education records by parents of minor students and the protection of privacy of students. It provides, in general, that any "education record", a term that is broadly defines, which is personally identifiable to a particular student is available to the parents of a student; concurrently, education records are confidential with respect to others, unless the parents of students waive their right to confidentiality.

I point out that even though a parent might not have custody of a child, that factor alone is not determinative of rights of access. The term "parent" is defined in the regulations adopted pursuant to FERPA by the United States Department of Education to mean a "parent" of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian" (34 CFR 99.3). Further, 34 CFR 99.4 states that:

> "An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been

> provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes those rights."

Based on the foregoing, in the case of divorce or separation, a school district must, in my view, provide access to both natural parents, custodial and non-custodial, unless there is a legally binding document that specifically removes a parent's rights under FERPA. I believe that a legally binding document would include a court order or other legal paper that prohibits access to educational records, or removes the parent's rights to have knowledge about his or her child's education. Further, it has been held judicially that a non-custodial parent enjoys rights conferred by the Act, even though the custodial parent signed a statement indicating that she did not authorize a school district to transmit records to the natural father [Page v. Rotterdam-Mohonasen Central School District, 441 NYS2d 323 (1981)]. The court specified that the natural parent has rights under the Act "unless such access is barred by state law, court order or legally binding instrument", none of which were present in that case (id. at 325).

Second, since the Freedom of Information Law deals with all records maintained by an agency, I believe that the District must comply with its procedural requirements, and that Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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: President, Board of Education
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13239

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 6, 2002

Mr. Anthony Tartaglia, 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. Tartaglia:

I have received your letter of February 6 in which you expressed concern that the Town Attorney for the Town of Northampton "accuse[d] you of criminal action in relation to your requests made under the Freedom of Information Law.

You wrote that you "never received" any of the information..requested" and that your request for copies of records that you inspected was rejected. The correspondence addressed to you by the Town Attorney, however, presented a different series of facts. He indicated that you inspected the records of your interest and "were provided with copies of documents as requested", except for three pages that would be made available upon payment of the requisite fee. He added that:

> "The Town has complied with your repeated FOIL requests. Any further repetitive requests by you for the Town to supply information in this matter will be deemed harassment. While the Town would prefer not to take civil or criminal action against you, they are prepared to if necessary."

In this regard, I offer the following comments.

First, having been involved in the implementation of the Freedom of Information Law since its enactment in 1974, I know of no situation in which a person has been penalized in a criminal or civil action brought based on the usage of the Freedom of Information Law.

Second, there is nothing in the Freedom of Information Law that deals directly with the number of times that records may be inspected. While it has been held that an agency must permit an applicant to review records throughout its regular business hours [see Murtha v. Leonard, 210 AD 2d 441 (1994)], I know of no provision or decision that deals with the number of times that a record

may be inspected or how long a request may be considered to be active. From my perspective, the principle of reasonableness should govern. If a request involves a great number of records, I do not believe that an agency can restrict inspection to a single day; rather, it should provide an opportunity to the applicant to review all of the records, perhaps on a piecemeal basis so as not to unduly interfere with the agency's ability to perform its duties. Similarly, I know of no limitation concerning the inspection of records. However, I do not believe that an agency must make the same records available over and over if such disclosure would unnecessarily interfere with its capacity to carry out its duties.

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

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

Third, if copies have been requested and you have not paid the fee, I do not believe that the Town is obliged to honor new or other requests until the proper fee is paid. If those fees have been paid and a request involves records that have not been requested or made available previously, I believe that the Town would be required to respond to the request in a manner consistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Michael J. Poulin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1320

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 6, 2002

Ms. Charlene M. Indelicato
County Attorney
Westchester County
Michaelian Office Building, Rm 600
148 Martine Avenue
White Plains, NY 10601

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

Dear Ms. Indelicato:

I appreciate having received a copy of your determination of an appeal by Bruce Golding of the *Journal News*, and I agree that the deletion of personal information appearing in the employment application or resume of a public employee may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [Freedom of Information Law, sections 87(2)(b) and 89(2)(b)]. However, it has consistently been advised that portions of such records indicating one's prior convictions must be disclosed.

As you are likely aware, government and private entities are in most instances precluded from asking an applicant for employment whether he or she has been *arrested*. Under section 160.50 of the Criminal Procedure, if a person is charged with a crime and the charge is later dismissed in favor of the accused, records relating to the event are sealed. In my view, the sealing requirement in that situation is intended to ensure that a charge that did not result in a conviction does not result in detriment or hardship to a person who did not admit his or her guilt or against whom the government could not prove guilt. In contrast, when a person is convicted, the conviction occurs during a public proceeding, and the record of one's conviction is accessible from a court (see e.g., Judiciary Law, section 255). That being so, I do not believe that disclosure of information indicating one's conviction would, if disclosed, constitute an unwarranted invasion of personal privacy. I note, too, that the Court of Appeals in Johnson Newspaper Corp. v. Stainkamp [94 AD2d 825, 61 NY2d 958 (1984)] held that records of arrest maintained by an agency were accessible, except in those instances in which they were sealed pursuant to section 160.50 of the Criminal Procedure Law.

Based on the foregoing, I ask that you reconsider the determination.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Bruce Golding

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3411
FOIL-AO-13241

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 6, 2002

Mr. Christopher W. Ryan
[redacted]

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

Dear Mr. Ryan:

I have received your letter "concerning the need for a public vote of [y]our school board on a proposal to re-district [y]our two elementary schools."

You wrote that:

> "At a school board meeting on 23 January 2002, several parents asked the superintendent and the board to explain the decision-making process that they will follow to reach a conclusion. I asked specifically whether the board will, in the end, conduct a vote among its members at a public meeting. Both the superintendent and the board president told me that they did not think a vote would be conducted. I felt their explanations were rather nebulous, but they seemed to indicate that after further deliberation (both public and private), the board would reach a consensus (I'm still not clear at to how) and then present its decision to the public."

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to issues relating to the Open Meetings and Freedom of Information Laws. You specific question appears to involve the powers and duties of a board of education, and whether the kind of action to be taken may only be taken by a board of education. Based on my understanding of the Education Law (see e.g., §1709), only the board would have the authority to determine the boundary lines within a school district regarding attendance at elementary schools. If that is so, I do not believe that action could be taken by "consensus"; on the contrary, I believe that action of that nature could be taken only by means of a vote by the Board.

In the regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies. Section 102(1) defines the term "meeting" to mean:

> "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body."

Section 102(1) 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, it is clear that a board of education, the governing body of public corporation, constitutes a "public body."

Second, since the definition of "public body" refers to entities that are required to conduct public business by means of a quorum, I note that 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 or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the 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 during which a quorum has physically convened or by means of videoconferencing.

Third, when action is taken by a public body, it must be memorialized in minutes, for §106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

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

In view of the foregoing, it is clear in my opinion that minutes must include reference to action taken by a public body.

Further, if a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

Therefore, if the Board reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. I note that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, any time final action is taken by a board of education, a record must be prepared indicating the manner in which each member cast his or her vote.

Lastly, you suggested that the Board's deliberations on the subject would be conducted in "public and private." Here I point out that the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of the Board must be conducted open to the public, except to the extent that an executive session may properly be held. Section 102(3) defines the term "executive session" to mean a portion of an open meeting during which the public may be excluded, and paragraphs (a) through (h) of §105(1) specify and limit the subjects that may validly be considered during an executive session. From my perspective, none of the grounds for entry into executive session could properly be asserted to discuss the redistricting proposal.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13242

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 6, 2002

Mr. and Mrs. 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 facts presented in your correspondence, unless otherwise indicated.

Dear Mr. and Mrs. Brixner:

I have received your letters of January 29, as well as the correspondence relating to them.

Both letters refer to "full agendas" provided to members of the Chili Town Board prior to its meetings, while "condensed" agendas are given to the public. Following your request for a full agenda, the Town Clerk denied access, stating that it "falls in the realm of inter-department correspondence and is not subject to freedom of information."

In this regard, I offer the following comments.

First 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.

Second, a written communication between or among Town officers or employees would constitute "intra-agency" material that falls within the scope of §87(2)(g). Although that provision represents a potential basis for a denial of access, due to its structure, the content of such a communication serves as the basis for determining the extent to which it may be withheld.

Specifically, §87(2)(g) permits an agency, such as the Town, withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

I am unaware of the contents of the full agendas. However, if they are detailed and include, for example, recommendations or advice concerning the Board's activities, I believe that those portions of the full agendas may be withheld.

Other grounds for denial may also be pertinent. For instance, if a full agenda identifies persons who have applied for employment with the Town, their names or other identifying details may be withheld in my view on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. If, for example, the Town is involved in ongoing collective bargaining negotiations and the agenda indicates its negotiation strategy or similar information, it likely that §87(2)(c) would be pertinent. That provision authorizes an agency to withhold records insofar disclosure would "impair present or imminent contract awards or collective bargaining negotiations."

In short, I believe that the content of the records in question determines the extent to which the Town may withhold them.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Richard J. Brongo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1332/3

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 6, 2002

Ms. Yvonne L. Thomas
[redacted]

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

Dear Ms. Thomas:

I have received your letter in which you sought a "ruling" concerning the ability of officials of the Yates County Sheriff's office to withhold a certain complaint. You wrote that you requested a copy of the complaint under the Freedom of Information Law and received no response. When you attempted to obtain a copy when you visited the Sheriff's office, you were given a copy of "the dispatcher's incident report." However, you wrote that the incident report is not the record that you requested.

In this regard, I offer the following comments.

First, I point out 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 issue a "ruling" or to compel an agency to grant or deny access to records.

Second, without additional knowledge of the nature or contents of the complaint, I cannot offer specific guidance. However, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In the context of the situation that you described, several of the grounds for denial may be pertinent. For instance, §87(2)(b) authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." That provision might apply in relation to information regarding suspects, witnesses, or perhaps others. Section 87(2)(e) permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The ability to deny access under the provision quoted above is dependent on the effects of disclosure in consideration of subparagraphs (i) through (iv). Also pertinent may be §87(2)(g), which enables an agency to withhold records that:

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

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

Lastly, notwithstanding the possibility that an agency may deny access to records or portions of records, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to a request. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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: Ronald Spike, Sheriff

From: Robert Freeman
To: [redacted]
Date: 3/8/02 8:40AM
Subject: Dear Ms. Ball:

Dear Ms. Ball:

I have received your inquiry concerning the application of the Freedom of Information Law.

First, that statute is generally applicable to entities of state and local government, "agencies", and the State Board of Elections is clearly an "agency" required to comply with the FOIL. County boards of elections also fall within the coverage of the law.

I am unaware of the manner in which the State Board of Elections maintains its records, and I suggest that you discuss your difficulties with the Board's records access officer. Every agency is required to designate one or more persons as "records access officer", and that person has the duty of coordinating the agency's response to requests for records. The records access officer for the State Board is Lee Daghlian, and he can be reached at (518)474-1953.

Second, the State Legislature is subject to the Freedom of Information Law, but the standards applicable to the Legislature are different from those that apply to agencies. As the law applies to agencies, it is based on a presumption of access. Stated differently, all agency records are available, except those records or portions of records that fall within a series of grounds for denial listed in section 87(2). As the law applies to the Legislature, section 88(2) lists categories of available records, and unless a record falls within those categories, there are no public rights of access. The full text of the law (as well as a variety of other material) is available via our website, and the website address is indicated below.

Lastly, our 2000 annual report is available on line. The 2001 report can be sent to you. If you provide your address, I will be happy to send it to you.

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

Ball. Anne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13345

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

March 12, 2002

Ms. Patricia Pagano
[redacted]

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

Dear Ms. Pagano:

I have received your letter and the materials attached to it. You have sought assistance once again concerning a request for records involving an audit pertaining to the Village of Manorhaven. As I understand the matter, there are two elements of the request. First, it is my understanding that you have sought records transmitted to the Village Attorney; and second, you have requested records that were used to support the findings described in the audit.

Assuming that my understanding is accurate, with respect to initial issue, the Village Attorney described the materials as "correspondence [that] came into the possession of the Inc. Village of Manorhaven via another communication clearly covered by attorney-client privilege." The materials were transmitted by an attorney for a town. In this regard, I must reiterate the view offered in the opinion addressed to you on December 6. In brief, if a communication is subject to the attorney-client privilege, I believe that it remains confidential and exempt from disclosure unless the privilege is waived. I note that if the Village of Manorhaven is a party in interest with the town in litigation, it would appear that the disclosure to the Village would not constitute a waiver of the privilege. However, if no such relationship exists, and if the Village as the recipient of the communication is not the client of the attorney for the town, I do not believe that the material in possession of the Village could be withheld on the basis of the assertion of the attorney-client privilege.

With respect to the request for records that might have been used in preparation of the audit, the Village Attorney wrote that:

> "...neither this office nor the Village itself were responsible for the preparation of the audit. As you well know, a firm contracted with by the Village for that purpose prepared the audit. Accordingly, it would be presumptuous of the Village to pick and choose from among records that may or may not physically be in the Village Hall and that

> may or may no '...support...', in the subjective sense, an audit that was not performed by any Village official or by the Inc. Village of Manorhaven itself."

One issue relating to the foregoing involves the scope of the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" to mean:

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

When audit or similar report is prepared by a private firm, that firm may subscribe to or acquire a variety of materials in performing its functions, including professional journals, reference materials and the like. In those instances, the materials in my opinion would not constitute records kept or produced for an agency, such as a village. On the other hand, insofar as a firm prepares records for an agency, I believe that they would constitute agency records subject to the Freedom of Information Law.

Further, from my perspective, a request for records that may support a statement may not be a request for records as envisioned by the Freedom of Information Law, for a response would involve making a series of judgments based on opinions, some of which would be subjective, mental impressions, the strength of one's memory, and perhaps research. For instance, in a situation in which an individual sought provisions of law that might have been "applicable" in governing certain activity, it was advised that the request was inappropriate. Specifically, the request involved "copies of the applicable provisions and pages of the Civil Service Law and applicable rules promulgated by the Department of Civil Service which govern the creation and appointment of management confidential positions" (emphasis added). In response, it was suggested that:

> "...the foregoing is not a request for records. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions of law might be "applicable", and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 209 of the Civil Service Law", no interpretation or judgment is necessary, for sections of law appear numerically and can readily be identified. That kind of request, in my opinion, would involve a portion of a record that must be disclosed. Again, a request for laws that might be "applicable" is not, in my view, a request for a record as envisioned by the Freedom of Information Law."

In like manner, ascertaining which records might tend to "support" an audit may involve an attempt to render a judgment regarding the use, utility, accuracy or value of records.

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

OML-AO- 3413
FOIL-AO- 13216

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

March 12, 2002

Ms. Margaret C. Menzies
[redacted]

The staff of the Committee on 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. Menzies:

I have received your letter of February 8 and the materials attached to it. In brief, you have sought assistance in relation to your efforts in gaining access to records of the Village of Fleischmanns in a timely manner. In this regard, I offer the following comments.

First, you referred to a request to obtain copies of records that had been read aloud at a meeting of the Board of Trustees. From my perspective, insofar as records as records are read aloud at an open meeting, they must be made available, for their disclosure would constitute a waiver of the ability to deny access to the public. While it has been held that an erroneous or inadvertent disclosure does not create a right of access on the part of the public [see McGraw-Edison v. Williams, 509 NYS 2d 285 (1986)], the disclosure, as you described it, was purposeful and intentional rather than inadvertent. If that is so, a public reading of records in my view precludes the Village from withholding any portion of the documentation that was disclosed.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, building permits and related records must be made available, for none of the grounds for denial would be pertinent or applicable.

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.

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

In my opinion, if as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records within the same 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 substantial period, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for a lengthy delay in disclosure. I would conjecture that building permits and similar records can be found readily.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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, there are separate provisions which specify the time within which minutes of meetings must be prepared and made available. Section 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."

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.

In an effort to enhance compliance with and understanding of the statutes referenced above, 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:tt

cc: Board of Trustees
Lorraine De Marfio, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13247

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

March 12, 2002

Ms. Candy Saxon
Labor Relations Specialist
CSEA - Western Region Office
482 Delaware Avenue
Buffalo, NY 14202

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

Dear Ms. Saxon:

I have received your letter of February 7, as well as the materials attached to it. You have sought assistance in relation to your request made to Niagara County under the Freedom of Information Law. Your organization, the CSEA, has made several requests pertaining to health insurance relating to County employees for certain years.

Based on a review of the materials, I offer the following comments.

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

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

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

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of

Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 109 AD 2d 292 (1985) aff'd 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

It is noted that in Matter of Wool, the applicant requested a list of employees of a town "whose salaries were subject to deduction for union membership dues payable to Civil Service Employees Association...". In determining the issue, the Court held that:

> "...the Legislature has established a scale to be used by a governmental body subject to the 'Freedom of Information Law' and to be utilized as well by the Court in reviewing the granting or denial of access to records of each governmental body. At one extreme lies records which are 'relevant or essential to the ordinary work of the agency or municipality' and in such event, regardless of their personal nature or contents, must be disclosed in toto. At the other extremity are those records which are not 'relevant or essential' - which contain personal matters wherein the right of the public to know must be delicately balanced against the right of the individual to privacy and confidentiality.
>
> "The facts before this Court clearly are weighted in favor of individual rights. Membership or non-membership of a municipal employee in the CSEA is hardly necessary or essential to the ordinary work of a municipality. 'Public employees have the right to form, join and participate in, or to refrain from forming, joining or participating in any employee organization of their choosing.' Membership in the CSEA has no relevance to an employee's on-the-job performance or to the functioning of his or her employer."

Consequently, it was held that portions of records indicating membership in a union could be withheld as an unwarranted invasion of personal privacy. Based on the Wool decision, it might be contended that whether a public employee is covered by a health insurance has no relevance to the performance of that person's official duties, and that, therefore, such information may be withheld.

From my perspective, such a conclusion would be overly restrictive. In Capital Newspapers v. Burns, supra, the issue involved records reflective of the days and dates of sick leave claimed by a particular police officer. The Appellate Division, as I interpret its decision, held that those records were clearly relevant to the performance of the officer's duties, for the Court found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus

> it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [109 AD 2d 92, 94-95 (1985)].

Perhaps more importantly, in a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals affirmed and found that:

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

Based on the foregoing, it might appropriately be contended that the need to enable the public to make informed choices and provide a mechanism for exposing waste or abuse must be balanced against the possible infringement upon the privacy of a public officer or employee. The magnitude of an invasion of privacy is conjectural and must in many instances be determined subjectively. In this instance, if a court found the invasion of one's privacy to be substantial, it might be determined that the interest in protecting privacy outweighs the interest in identifying employees receiving coverage. It is possible, too, that a court could find that the identities of employees receiving coverage should be disclosed, but that the cost of coverage, by named employee, thereby indicating the nature of coverage (i.e., individual as opposed to family coverage) may be withheld, and that the cost of coverage should be disclosed generically. On the other hand, in conjunction with the direction provided by the Court of Appeals in the passage quoted earlier, it might be determined that the information sought should be disclosed in its entirety in view of the public's significant interest in knowing how public monies are being expended.

In consideration of the factors that have been discussed, it is my view that a disclosure indicating that a public officer or employee is covered by a health insurance plan at public expense would not represent or reveal an intimate detail of one's life. Arguably, the record reflective of the dates of sick leave claimed by a public employee found by the courts to be available represents a more intimate or personal invasion of privacy. However, if a disclosure of the cost of coverage for a particular employee indicates which plan that person has chosen or whether his or her plan involves individual or dependent coverage, such a disclosure may potentially result in the revelation of a number of details of a person's life and an unwarranted invasion of personal privacy. For instance, an indication of cost might reveal whether the coverage involves medical treatment routinely provided by a clinic, as opposed to a primary care physician; it also may indicate the nature of coverage, i.e., whether coverage is basic or includes catastrophic care. Again, the cost may also reveal whether coverage is for an employee alone or for that person's family or dependents.

Most appropriate in my opinion would be a disclosure of costs of health care coverage by category in terms of plans that are offered or available to officers or employees. A separate disclosure should identify those officers or employees who receive coverage. However, in conjunction with the preceding commentary, I do not believe that the County would be required to disclose the type of coverage an officer or employee has chosen or which specific dependents are covered under the plan.

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, 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 (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting,

denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

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 an effort to resolve the matter, copies of this opinion will be forwarded to County officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul Oates
Ralph A. Boniello, III
Bruce Fenwick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1324/8

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

March 12, 2002

Trustee Dean M. Lach
Village of Sloan Trustee
223 Wagner Street
Sloan, NY 14212

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

Dear Trustee Lach:

I have received your letter of January 22, which, for reasons unknown, did not reach this office until February 22. You have sought assistance concerning the denial of your requests for "payroll sheets."

In this regard, I do not recall exactly which opinions were sent to you. Nevertheless, it is clear that key items within payroll records must be disclosed. When a person is denied access, he or she has the right to appeal. With respect to the duty to respond to requests for records, the Freedom of Information Law provides direction concerning the time and manner in which an agency must do so. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 your capacity as Trustee, you might want to express your frustration to residents of the Village or perhaps to members of the news media. Shedding light on a situation often leads to appropriate results and recognition of the need to comply 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

FOIL-AO-13249

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

March 12, 2002

Mr. Thomas E. Bower
[redacted]

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

Dear Mr. Bower:

I have received your letter of February 5 and the correspondence attached to it. You have sought an advisory opinion concerning rights of access to "a case file compiled by the Allegany County Sheriff's Department regarding a complaint by the William P. Brooks Hose Company, Inc. (a volunteer fire corporation) alleging the theft and subsequent return of one of its ambulances by a company member", who you named. The County denied access, and it was stated that no determination had yet been made "as to whether or not criminal charges will be placed", that the "matter is still ongoing", and that disclosure at this time "would interfere with a law enforcement investigation." As such, the request was denied pursuant to §87(2)(e)(i) of the Freedom of Information Law.

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

The Court of Appeals, 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, 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)].

The provision referenced as the basis for denial indicates that an agency may withhold records or portions thereof that:

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

The ability to assert §87(2)(e)(i) appropriately is dependent on the facts and the effects of disclosure. Insofar as disclosure would in fact interfere with a law enforcement investigation, a denial of access in my view would be proper. However, when an investigation has ended, it is unlikely that that provision could properly be asserted.

Notwithstanding the County's reliance on the provision referenced above, a different exception may be more pertinent. Section 87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective, if a person is a suspect or is the subject of an unproven charge or allegation, records relating to the matter may be withheld in whole or in part, depending on the contents of the records, to protect that person's privacy. In addition, in the context of an investigation that remains open, to the extent that records identify witnesses or confidential sources, it is likely that they may be withheld to protect against an unwarranted invasion of their privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: John E. Margeson
Daniel J. Guiney
Brenda Hotchkiss

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13250

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

March 12, 2002

Mr. and Mrs. Ronald Leone
[redacted]

Ms. Theresa C. Valada
Walton Town Clerk
129 North Street
Walton, NY 13856

The staff of the Committee 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. and Mrs. Leone, and Ms. Valada:

I have received correspondence from you, Mr. and Ms. Leone, dated February 11, and from you, Ms. Valada, dated February 15. Since the materials involve the same or related issues, I am responding to you concurrently.

Ms. Valada asked that I advise her of "the section of law governing the duties of the Town Clerk regarding mail addressed and directed to the town." Mr. and Ms. Leone referred to frustration that they have experienced in their efforts in gaining access to Town records and "friction" between Ms. Valada and Joe Hanley, the Town Supervisor. Specifically, they wrote that:

> "Ms. Valada says very few official records ever cross her desk. She reports that Mr. Hanley has instructed most writers to address mail to him, and he has instructed her to never open envelopes bearing his name, or envelopes addressed to the Walton Town Board. We believe these policies obstruct our ability to properly observe the actions of our government. We discourage you from relying merely on our reiteration of these policies, and instead encourage you to contact Ms. Valada directly to hear the full scope of the records management policies of the Town. We presume that State laws dictate the management of records, and that the Supervisor is not free to establish local methods."

In consideration of the foregoing and the materials sent to this office, I offer the following comments.

First, §30 of the Town Law, entitled "Powers and duties of town clerk", states in relevant part that "The town clerk of each town....Shall have the custody of all the records, books and papers of the town." Therefore, I believe Ms. Valada, as Town Clerk, has legal custody of all Town records, irrespective of where they may be kept or to whom they may be addressed. Similarly, §4-402 of the Village Law states that the clerk shall "...have custody of the...records, and papers of the village."

Second, the Freedom of Information Law is applicable to all records maintained by or for an agency, such as a town, and §86(4) defines the term "record" expansively to include:

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

In a case in which an agency contended, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that claim. As stated by the Court of Appeals:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the

> FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

In short, when information existing in some physical form is maintained by or for the Town, I believe that it constitutes a "record" that falls within the framework of the Freedom of Information Law, again, regardless of the location where the records are kept or the characterizations of records as "official" or otherwise.

Third, 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 records sought under the Freedom of Information Law, it is reiterated that §30 of the Town Law indicates that the town clerk is the 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, and that the village clerk is so designated in a village.

In my view, the failure to share the records or to inform the clerk of their existence may effectively preclude the clerk from carrying out her duties as records management officer, or if she or someone else is so designated, as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if the records access officer does not know of the existence or location of Town records, or cannot obtain them, that person may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law.

Next, 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. 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 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 (or a village board in a village) 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. If the Town Clerk has been designated to serve as records access officer, I believe that she is required to act as coordinator, and in relation to that function, that other Town officials and employees are required to cooperate with the records access officer in an effort to enable her to carry out her official duties.

With respect to the timeliness of a response to a request for records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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, 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."

In an effort to enhance compliance with and understanding of the provisions referenced in the preceding commentary, copies of this opinion will be forwarded to municipal officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Board of Trustees
Virginia L. O'Dell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3414
FOIL-AO-13251

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 18, 2002

E-Mail

TO: Anne C. Fullam [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, unless otherwise indicated.

Dear Ms. Fullam:

As you are aware, I have received your letter of February 12 in which you raised a series of issues relating to the Open Meetings and Freedom of Information Laws, as well as other matters. In addition, you asked by phone whether a member of a board of education may be excluded from an executive session and indicated that matters of your concern pertain to the Averill Park School District.

In this regard, it is noted at the outset the advisory jurisdiction of the Committee on Open Government involves issues relating to the statutes cited above. Some of the issues that you raised (i.e., the manner in which the budget is presented) are not relevant to those statutes, and no comment will be made. With respect to those that are within the jurisdiction of this office, I offer the following remarks.

First, you wrote that "[e]xecutive sessions are held before every meeting." In this regard, by way of background, 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..."

In consideration of the foregoing, it has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because

a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested. Rather than scheduling an executive session, a public body on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. When the intent is to be considerate to the public, by indicating that an executive session is likely to be held (rather than *scheduled*), the public would implicitly be informed that there may be no overriding reason for arriving at the beginning of a meeting.

Second, you referred to executive sessions held to discuss "personnel matters." 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" (<u>Doolittle v. Board of Education</u>, 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, I point out that an executive session serves as one of two vehicles that might be employed as a means of closing a meeting. Section 108 of the Open Meetings Law pertains to "exemptions", and if an exemption is applicable, the Open Meetings Law is not; it is as if the Open

Meetings Law does not exist. That provision is pertinent in my view in relation to two of your areas of inquiry.

You referred to discussions relating to students being characterized as "privileged." Relevant is §108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law."

Here I direct your attention to the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) and the regulations promulgated pursuant to FERPA by the U.S. Department of Education. In brief, FERPA applies to all educational agencies or institutions that participate in funding or grant programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over, a so-called "eligible student", similarly waives his or her right to confidentiality. The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

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

Based upon the foregoing, disclosure of students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law. Further, the term disclosure is defined in the regulations to mean:

> "to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic means."

In consideration of FERPA, if the Board discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would deal with a matter made confidential by federal law that would be exempt from the Open Meetings Law.

The other situation relates to the alleged exclusion of a member of the Board of Education from an executive session. From my perspective, a member of a public body, such as a board of

education, clearly has the right to attend an executive session. Section 105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Based on the foregoing, I believe that the only persons who have the right to attend executive sessions of the Board are members of the Board.

Of possible relevance is the same provision as that cited above, §108(3) concerning matters made confidential by law. When an attorney-client relationship has been invoked, the communications made pursuant to that relationship are considered confidential under §4503 of the Civil Practice Law and Rules. Consequently, if an attorney and a client establish a privileged relationship, the communications made pursuant to that relationship would in my view be confidential under state law and, therefore, exempt from the Open Meetings Law.

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1989); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

In a judicial determination that described the parameters of the attorney-client relationship and the conditions precedent to its initiation, it was 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 proceedings, 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)].

Therefore, insofar as a public body or members of a public body seek legal advice from their attorney and the attorney offers legal advice, the communications would, in my opinion, be confidential and outside the coverage of the Open Meetings Law. Further, it has been advised that when a member of a public body is a litigant or potential litigant who has initiated or may initiate a lawsuit against the public body, those other members of the public body may engage in attorney-client communications in private, and outside the coverage of the Open Meetings Law. While a member of a public body has the right to attend an executive session, in the context of the situation described in the preceding sentence, I do not believe that that person, as a litigant or potential litigant, would enjoy the same right to attend a gathering of the other members with their attorney during which the communications are subject to the attorney-client privilege.

The foregoing in my view is consistent with the judicial interpretations of the Open Meetings Law covering discussions regarding litigation. Section §105(1)(d) of the Open Meetings Law 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 passage quoted above, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors.

When a member of a public body has sued or is likely to sue that body and is its legal adversary, I believe he or she could validly be excluded from a gathering between the other members and their attorney in which the attorney-client privilege is properly invoked. The member-adversary in that instance would not be the client, and that person's exclusion would, in my view, be consistent with the thrust of case law concerning the intent of §105(1)(d), the litigation exception for litigation. In that situation, the gathering would be exempted from the Open Meetings Law insofar as the attorney-client privilege applies. However, if a member of a public body is not an adversarial or potential adversarial party in litigation (but perhaps a dissenter or person with a minority view), I believe that he or she would have the right under §105(2) of the Open Meetings Law to attend an executive session.

Next, you referred to the release of "internal memos." In this instance, the governing statute is the Freedom of Information Law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Most pertinent with respect to the records in question is §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it may require 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 ground for denial could appropriately be asserted. Concurrently, those 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, too, that the Freedom of Information Law is generally permissive. Although an agency *may* withhold records in accordance with the grounds for denial, there is no obligation to do so, unless a different statute (i.e., FERPA) prohibits disclosure. If, for example, §87(2)(g) is the only basis for a denial of access, there would be no prohibition against the disclosure of the entirety of the record.

In a related vein, you wrote that "Board members are forbidden to discuss board matters w/anyone, esp. the press." In short, I do not believe that any such prohibition, if indeed there is one, would be enforceable.

Lastly, you indicated that you "doubt that minutes are taken at all the executive sessions." In this regard, if the Board is acting in a manner consistent with judicial decisions, rarely would there be minutes of executive sessions.

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."

As suggested above, 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 is derived from a record that is personally identifiable to a student, FERPA 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, those records, insofar as they are identifiable to students, may in my opinion, be withheld.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

From: Robert Freeman
To: jgroff@hh.org
Date: 3/18/02 3:45PM
Subject: Dear Mr. Groff:

Dear Mr. Groff:

I have received your inquiry concerning the inclusion of cause of death of persons buried in the Village of Horsehead cemetery on the Village's website.

In this regard, access to death records is not governed by the Freedom of Information Law, but rather by the Public Health Law, section 4174. In brief, that statute provides that death records, which would include the cause of death, are only available in specified circumstances and are not subject to the Freedom of Information Law. It is noted that the Commissioner of Health has promulgated rules and guidelines pertaining to the disclosure of genealogical records. As I understand those provisions, death records are available 75 years after the death. At that point, I do not believe that there would be an issue concerning the cause of death. However, until that time, it is suggested that cause of death, like other aspects of death records, be made available to the extent specified in section 4174 of the Public Health 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

CMI. AO - 3017
FOIL-AO-13253

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

March 20, 2002

Ms. Dione Goldin
[redacted]

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

Dear Ms. Goldin:

I have received your letter of February 14 labeled "Confidentiality" in which you raised a series of questions concerning plans by the Wappingers Central School District "to redistrict the school district." You indicated that information concerning the plan "has been kept confidential and was 'sprung' on the community..." You have raised the following questions in relation to the foregoing.

> "1. May this information (for example, a map of the proposed new school districts; a detailed plan for implementation; schedules, etc. regarding the plan) be labeled 'Confidential'"?
>
> 2. May the subject of redistricting be discussed in an executive session, to which the public has been excluded?
>
> 3. May the superintendent of the school district talk about the redistricting plan to members of the board of education in executive session if he is the doing the talking, the board is doing the listening, and there is no 'discussion'?
>
> 4. May the superintendent tell members of the board of education to keep the information 'quiet' until the plan is finalized?"

In this regard, first, labeling or marking a record as "confidential" is all but meaningless. 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 Court of Appeals, the state's highest court, has held on many occasions that records may be withheld only to the extent that one or more of the grounds for denial of access may clearly be asserted [see e.g., Doolan v. BOCES, 48 NY 2d 341, 347, Gould v. New York City, 89 NY 2d 267 (1996), Matter of Fink v. Lefkowitz, 47 N.Y. 2d, 567 (1979)].

From my perspective, only one of the exceptions to rights of access would be pertinent to an analysis of rights of access to the kinds of records described in your letter. However, due to the structure of that provision, it often requires substantial disclosure. Specifically, §87(2)(g) enables an agency to withhold records that:

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

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

One of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter

> of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould, supra, 276).

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

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I point out that the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing

> requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

Lastly, in my view, although the official information privilege or its equivalent might be properly asserted in other contexts, it does not exist with respect to the ability to withhold records under the Freedom of Information Law. As stated by the Court of Appeals in 1979: "[T]he common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed" [see Doolan v. BOCES, supra, 347]. In short, either records or portions thereof fall within the grounds for denial appearing in §87(2) of the Freedom of Information Law or they do not; if they do not, there would be no basis for denial, notwithstanding a claim of privilege or an assertion of "confidentiality."

Second, assuming that the plans are discussed at meetings of the Board of Education, even though portions might justifiably be withheld under the Freedom of Information Law, it is likely that those portions would be discussed in public if the Board is complying with the Open Meetings Law. Like the Freedom of Information Law, that statute is based on a presumption of openness. Meetings of public bodies, such as boards of education, must be conducted open to the public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly considered in executive session. Based on a review of those provisions, I do not believe that any could validly be asserted to enter into executive session to discuss redistricting.

Third, in my view, if the Board gathers to "listen" to the Superintendent, that would not change or enlarge the grounds for entry into executive session, in short, the subject matter under consideration serves as the critical factor in determining whether the extent to which an executive session may properly be held; who "is doing the talking" in my opinion has no bearing on the authority to enter into executive session.

Lastly, I know of no law that would preclude a superintendent from "tell[ing] members of the board of education to keep information 'quiet'..." However, there is no law of which I am aware that would require board members to do so or that would prohibit them from discussing the matter with district residents or others.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13254

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

March 20, 2002

Mr. Peter R. Wunsch
Accounting & Financial Consulting
39 Mitchell Avenue
East Northport, NY 11731

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

Dear Mr. Wunsch:

I have received your letter of February 15 and the materials attached to it. You have sought assistance in relation to a denial of access to records by the Commack Union Free School District.

Having requested copies of "incident reports filed by the Security Force about any of the board members since January 1 of this year, you were informed that the records would be withheld "because these are intra-agency communications." Following an appeal, the Superintendent affirmed the denial of access.

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

The provision to which District officials alluded concerning "intra-agency communications" may, due to its structure require the disclosure of records, either in their entirety or in part. Specifically, §87 (2)(g) enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

One of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals, the state's highest court, was that certain reports could be withheld because they are not final and because they related to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

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

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal

> government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I point out that the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

The foregoing is not intended to suggest that statistical or factual information contained within the records in question must be disclosed in their entirety, for grounds for denial other than §87(2)(g) may be pertinent to an analysis of rights of access. For instance, insofar as a record is identifiable to a student, the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) would prohibit disclosure without the consent of a parent. Similarly, for example, if an incident report includes names of witnesses or members of the public, it is possible that identifying details could be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law §87 (2)(b)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: James H. Hunderfund
Mary Jane Budde

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13255

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

March 20, 2002

Mr. Dennis Crowley
[redacted]

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

Dear Mr. Crowley:

I have received your letter of February 18 and the materials attached to it. You have sought assistance in relation to a request for records of the New York Convention Center Operating Corporation. The request involves " a complete copy of my personal file, all work call records since the start of my employment, all days and dates of any alleged 'no shows', and any other records pertaining to my work history."

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 [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)].

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

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

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

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

While I am unfamiliar with the recordkeeping systems of the Corporation, 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, insofar as the records sought can be found with reasonable effort, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 you have requested records pertaining to yourself, it is unlikely that any of the grounds for denial could be asserted.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Gerald T. McQueen
John Dillon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13256

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

March 20, 2002

Mr. Nicholas Evanchik
[redacted]

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

Dear Mr. Evanchik:

I have received your letter and the correspondence attached to it. You have sought an advisory opinion concerning rights of access to "an outside appraisal for a property located within" a Village of Briarcliff Manor parking lot that was prepared "[s]ometime prior to October 2000."

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, two of the grounds for denial are relevant to an analysis of rights of access.

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

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the

successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

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

When there is no inequality of knowledge between or among the parties to negotiations, or if records have been shared or exchanged by the parties, it is questionable and difficult to envision how disclosure would "impair present or imminent contract awards", (see Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Further, if an agreement has been reached or a transaction has been completed, any impairment that might have existed prior to the consummation of an agreement would essentially have disappeared. In that event, §87 (2)(c), in my opinion, would not be applicable as a basis for a denial of access.

The other provision of relevance is §87(2)(g), which pertains to the authority to withhold "inter-agency or intra-agency materials." If an appraisal or survey is prepared by agency officials, it could be characterized as "intra-agency material." Further, the Court of Appeals has held that appraisals and other reports prepared by consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of §87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

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

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

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

appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 A2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v. Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

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

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

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial [i.e., §87(2)(c)] could properly be asserted. Therefore, if §87(2)(c) does not apply, insofar as an appraisal includes statistical or factual information, those portions of the appraisal would appear to be accessible.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mr. Michael S. Blau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3419
FOIL-AO - 13257

Committee Members

Randy A. Daniels
Mary O. Donohue
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

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

March 20, 2002

Ms. Anita Broast
[redacted]

The staff of the Committee on 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. Broast:

I have received your letter of February 15. You indicated that you serve as a member of the Germantown School Board, and you raised questions concerning three "situations."

You wrote that the first situation involved:

> "...a negotiations meeting which was held at Castleton Questar III for the Germantown Board to work on an agreement with the school administrators. The members were informed by a letter from the superintendent dated January 18. The meeting was to be held less than a week from that date on January 23. (Copy of the letter is enclosed.)
>
> "I received the letter in the mail on Tuesday, January 22. There wasn't any mail delivery on Monday because of Martin Luther King holiday. The meeting was held at 10 a.m. during a work day. Three members of the board have full-time jobs and could not attend the meeting. The four other board members attended the meeting. At this meeting the four board members signed a memorandum of agreement with the administrators. The three of us who could not attend the meeting weren't given a chance to comment on this agreement before it was signed... The three not in attendance were opposed to a large raise for the group at a previous meeting."

In this regard, because a majority of Board gathered to conduct public business, I believe that the gathering clearly constituted a "meeting" [see Open Meetings Law §102(2)] required to have been held in accordance with the Open Meetings Law. That being so, I believe that notice was required to have been given pursuant to§104 of that statute. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be

> conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Separate from the duties imposed by the Open Meetings Law but perhaps pertinent in consideration of the facts as you described them is §41 of the General Construction Law, which deals with quorum requirements. That statute, which is entitled "Quorum and majority", states in relevant part 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, gathered together in the presence of each other or though the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty."

Based on the foregoing, before a public body, such as a board of education, may conduct a valid meeting, reasonable notice must be given to all the members. From my perspective, in consideration of the date that notice of the meeting was mailed and the fact there would be no mail delivery on either Sunday or the following Monday due to the Martin Luther King holiday, it is questionable whether "reasonable notice" was given to Board members. Under the circumstances, it appears that reasonable notice would have involved not only the mailing of notice, but perhaps also notice given by phone or email to members having the capacity to receive email.

The second situation pertained to:

> "...the reading of a letter to the board during the general session. The letter was sent by parents of a kindergartner who wasn't happy with the way a faculty member was dealing with their child. The board clerk stated, 'It is required by law that I read the letter out loud.'"

I know of no requirement that letters received by or addressed to a board of education must be read aloud at a meeting. Moreover, in this instance, it appears that the Board may have been prohibited from disclosing or having the letter read in public without the consent of the parents of the student. When 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, or in the situation that you described), 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)]. I note that "disclosure" in defined in federal negotiations to include the verbal disclosure of information contained in a record identifiable to a student (see 34 CFR §99.3). 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.

With respect to the third situation, you wrote that it:

> "...involves the legality of statements that can and cannot be made by board members. I wanted to make some comments why I was not in favor of the administrators contract during the open session. I started to talk about a specific job position. The superintendent informed me, 'This cannot be discussed because it could get us in trouble.' I wanted to talk about the amount of the raise for the head custodian specifically. She informed me that the amount of money could not be discussed until the contact was signed by both sides."

Whether it is wise or appropriate to make statements, offer comments or otherwise disclose information regarding the matters described is separate, in my opinion, from whether it is legal to do so, or whether you or others may be prohibited from doing so.

Both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals, the state's highest court, that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I am unaware of any statute that would prohibit a Board member from disclosing the kinds of information at issue. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

An example of a situation in confidentiality may be required would involve the kind of matter discussed earlier in which federal law prohibits disclosure .

Although there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive

session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

From: Robert Freeman
To: Richard.Parenti@banking.state.ny.us
Date: 3/22/02 8:50AM
Subject: Dear Mr. Parenti:

Dear Mr. Parenti:

I agree with your basic contention that the Department has flexibility in adopting regulations pursuant to FOIL. It is clear that regulations must be promulgated by every agency. As you are likely aware, section 87(1)(b) specifies that "Each agency shall promulgate rules and regulations...pursuant to such general rules and as may be promulgated by the committee on open government in conformity with the provisions of this article..." In short, based on the foregoing, each agency is required to promulgate regulations consistent with the FOIL and the Committee's regulations.

Each agency is required to do so because, in certain respects, every set of regulations is different. For example, the records access officer in one agency might be administrative director; in another, it might be PR person. The regs are also required to indicate the locations where records can be inspected, the regular business hours of the agency, and the fees to be charged. Those elements differ from one agency to the next.

For your information, the Committee long ago prepared model regulations that can be used by agencies by essentially filling in the appropriate blanks. If you feel that the model would be useful, let me know, and a copy can be transmitted to you.

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: christine.tomczak@banking.state.ny.us

From: Robert Freeman
To: Janet Mercer
Date: 3/25/02 11:32AM
Subject: Re: Fwd: Permissible Fees

Dear Mr. Doyle:

I have received your inquiry concerning fees charged for copies of reports made available by volunteer fire companies.

In this regard, first, despite their status as not-for-profit corporations, the state's highest court found in 1980 that volunteer fire companies are subject to the Freedom of Information Law.

Second, section 87(1)b)(iii) of that statute states that the maximum that can be charged for a photocopy up to nine by fourteen inches is twenty-five cents. No fee can be charged for search, administrative costs or personnel time.

To obtain more detailed information, the text of the Freedom of Information Law is available on our website under "publications". In addition, in the index to opinions under the Freedom of Information Law, you might want to look at advisory opinions by clicking on to "v" and scrolling down to "volunteer fire company" and to "f", where several topics relate to fees.

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

From: Robert Freeman
To: Janet Mercer
Date: 3/25/02 4:01PM
Subject: Re: Fwd: Military Discharges

Dear Mr. Hanno:

I have received your inquiry in which you asked whether a request to have a DD-214 sealed must be made at the time that the record is filed with the County Clerk.

The statute that deals with foregoing, section 79-g of the Civil Rights Law, 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 open for public inspection."

As I interpret the language quoted above, there is no requirement that a request to have a certificate of honorable discharge sealed must be made at the time that such document is filed with a county clerk. While that language is not entirely clear, there is nothing specifying that a request to have the certificate sealed can only be made at the time of filing.

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-13261

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Terrence Evans
98-B-2208
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. Evans:

I have received your letter in which you requested assistance from this office "in reminding the records access officer of the Syracuse Police Department of his or her duty and obligation" 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 Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13262

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Feliz LaPorte
86-A-2761
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. LaPorte:

I have received your letters in which you requested assistance from this office following a denial of access to records by the records appeals officer of a district attorney's office. You indicated that you received a letter from this office dated October 4, 2001.

You are seeking a further response from this office "to show that [you] made every possible effort and exhausted all of the state (sic) remedy made available to [you]", in order to proceed to court.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. However, there is no requirement that a person seek an opinion from this office prior to initiating a court challenge. The provision pertaining to the right to seek a judicial determination, §89(4)(b) of the Freedom of Information Law, states in relevant part that:

> "a person denied access to a record in an appeal determination...may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules..."

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13263

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Gjelosh Rukaj
98-A-3155
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. Rukaj:

I have received your letter in which you requested intervention and assistance from this office relating to your request for a subject matter index listing pertaining to 14 categories of records. The Mt. Pleasant Police Department responded that it "does not have in its possession a subject matter index listing."

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. However, an exception 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.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13264

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Christopher Battee
81-C-0653
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. Battee:

I have received your letter and attached material in which you requested this office to "investigate" a denial of your request for your "Parole Violator Reappearance Worksheet." The Collins Correctional Facility Parole Office denied your request on the grounds that "this is a worksheet that is used by the Parole Commissioners that contains evaluative material and is considered confidential."

Since I am unfamiliar with the contents of a "Parole Violators Reappearance Worksheet", I cannot conjecture as to its availability. However, I offer the following comments.

I point out initially that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce 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.

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 potential relevance is §87(2)(e) which allows an agency to deny access to records or portions thereof that:

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

Lastly, under §87(2)(f), access to records may be denied insofar as disclosure would endanger the life or safety of any person.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13265

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Cisero Murphy
93-A-8565
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. Murphy:

I have received your letter in which you requested assistance in obtaining a response to your Freedom of Information Law appeal to 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 been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13266

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Joseph Alexander
92-A-5493, A2-29
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. Alexander:

I have received your letter in which you referred to a denial of a Freedom of Information Law appeal. You sought to obtain a "Parole violators reappearance worksheet and minutes of the internal deliberations of the board after it had conducted [your] parole release interview."

Since I am unfamiliar with the contents of these records, I cannot conjecture as to their availability. However, 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 potential significance is §87(2)(g), which permits an agency to withhold records that:

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

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

If, for example, a district attorney offered an opinion or recommendation to the Parole Board concerning the possibility of parole, the portions of the transcript reflective of that kind of advice or opinion could in my view be withheld under §87(2)(g).

Also, of potential relevance is §87(2)(e) which allows an agency to deny access to records or portions thereof that:

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

Lastly, under §87(2)(f), access to records may be denied insofar as disclosure would endanger the life or safety of any person.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13267

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Carlos Weeks
95-A-4115
Upstate Correctional Facility
309 Barehill 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 facts presented in your correspondence.

Dear Mr. Weeks:

I have received your letter in which you raised a variety of questions concerning your attempt to obtain records from the Kings County District Attorney's office. You are interested in records related to an attempted suicide by an individual while in police custody. That person committed suicide a year later in 1994. You further indicated that the District Attorney's office responded that records of your interest do not exist.

First, you questioned whether the District Attorney's office is a "governmental entity." 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."

Since an office of a district attorney is a "governmental entity" that performs a "governmental function" for the state, 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 .

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.

Third, the Freedom of Information Law pertains to existing records and generally does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such..."

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, I do not believe a records access officer is assigned to each police precinct in New York City. Requests for records from the New York City Police Department should be directed to the records access officer at One Police Plaza.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13268

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Carl Young
00-B-0574
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

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

Dear Mr. Young:

I have received your letter in which you requested assistance in obtaining records related to your case. You explained that the City of Buffalo Police Department and the Erie County District Attorney's office have 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 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
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3424
FOIL-AO-13269

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Elliot Bernstein
[redacted]

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

Dear Mr. Bernstein:

I have received your letters of February 22 and March 16. In brief, you have asked whether "records compiled during the quasi-judicial executive sessions" by officials of the Village of Scarsdale during a certain hearing should be disclosed. In response to your request for those records, the Deputy Village Manager wrote that your request was "overly broad", that you must "identify specifically what memorandum you wish to inspect", and that "the FOI Law was not intended for and can not be used as a discovery device."

In this regard, I offer the following comments.

First, irrespective of how or where records are compiled, they are subject to rights conferred by the Freedom of Information Law. That statute pertains to all records of an agency, such as a village, 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."

Based on the foregoing, notes taken by Village officials in relation to the performance of their duties, whether taken during sessions open to the public or closed, would, in my view, clearly constitute "records" that fall within the coverage of the Freedom of the Freedom of Information Law.

Second, I do not believe that you can be required to "identify specifically" the records of your interest. By way of background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant seek "identifiable" records. That standard often resulted in the kind of problem that you encountered, i.e., that you may be unaware of the particular records that exist and therefore cannot identify them. Nonetheless, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought, and 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)].

From my perspective, it is likely that a request for notes pertaining to a specific subject during a session held at specific time would "reasonably describe" the records.

Third, there is nothing in the Freedom of Information Law that forbids its use as a substitute for discovery. As stated by the Court of Appeals, the state's highest court, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the CPLR. Specifically, it was found that:

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

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, or the ability of an agency to withhold records sought under the Freedom of Information Law in accordance with the grounds for denial appearing in §87(2) of that statute.

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.

In good faith, I direct your attention to Kline v. County of Hamilton [235 AD2d 44, 663 NYS 2d 339 (1997)], which involved a request made under the Freedom of Information Law for tape recordings and transcripts of executive sessions. 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).

With due respect to the Appellate Division, 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 a 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.

The foregoing is not intended to suggest that the records of your interest must be disclosed, for it appears that one of the grounds for denial of access is particularly relevant to the matter. 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 short, insofar as §87(2)(g) or any other exception to rights of access may properly be asserted, I believe that the Village may deny access to the records sought.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
John N. Crary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13270

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Stephen Lisson
[redacted]

The staff of the Committee 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. Lisson:

As you are aware, I have received a variety of materials from you concerning your efforts in obtaining information from the New York State Teachers' Retirement System. In addition, I have spoken with staff regarding your requests.

In consideration of the foregoing, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law, each agency is required to designate one or more persons as "records access officer" [21NYCRR §1401.2]. The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person.

According to staff at the System, you have been informed that requests must be made to John Cardillo, Records Access Officer, and you have not done so. It is suggested, therefore, that any requests for records made under the Freedom of Information Law be directed to Mr. Cardillo.

Second, §89(3) of the Freedom of Information Law states that an agency may require that a request be made in writing, and that an applicant is obligated to "reasonably describe" the records sought. It is possible that some elements of your requests may not have met that standard. For instance, in a letter of July 31 addressed to the Executive Director, you requested "all...internal or external information presented to a board or any committees within [a certain] period, dealing with the private equity portion of the portfolio." 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 System, to extent that the records sought can be located with reasonable effort, I believe that a request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, a request would not in my opinion meet the standard of reasonably describing the records.

Third, I was informed that much of the information that you requested has been made available to you, but that other aspects of the material would be withheld under §87(2)(d).

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 provision referenced above 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."

While the System as a state agency is not typical of commercial enterprises, my understanding is that, in many respects, it carries out many of its duties as an entity in competition with private entities and that disclosure regarding possible transactions could affect the price of securities. 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, since the Fund is engaged in competition with private firms engaged in the same area of commercial activity, I believe that §87(2)(d) would serve as a basis for a denial of access.

The question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity. The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the

> matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of record, the area of commerce in which an entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Also relevant to the analysis is a decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury" in Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale [87 NY2d 410(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same

> industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

Because the System is a major trader in securities, it is likely that it could properly assert §87(2)(d) as a basis for withholding records when disclosure would have an impact on the price or value of securities or adversely affect its position vis a vis other purchasers or sellers of securities.

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

Robert J. Freeman
Executive Director

RJF:tt

cc: George M. Philip
John Cardillo
Lisa Schwartz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13271

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Sal DeRuggiero
94-A-8693
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

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

Dear Mr. DeRuggiero:

I have received your letter and attached materials in which you explained that you have not received a response to your request for records from the Records Coordinator at your facility. You indicated that it had been two months since you received a letter acknowledging receipt of your request and stating that a response would be sent within ten business days.

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)].

For your information, Mr. Anthony J. Annuci, Counsel to the Department of Correctional Services, has been designated as the records appeals officer for the Department.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13272

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

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 facts presented in your correspondence.

Dear Mr. Valentine:

I have received your letter in which you requested assistance from this office in relation to the failure of the Fishkill Correctional Facility to respond to 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 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 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,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13273

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Joseph Hutzler
00-B-0938
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. Hutzler:

I have received your letter in which you requested assistance in obtaining information from the Erie County District Attorney's Office and the New York State Comptroller's Office. You indicated that you have not received records from either 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)].

In regard to your request to the District Attorney's Office "for any and all information relative to [your] indictments", as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 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.

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).

Lastly, regarding your request to the Comptroller's Office for a rebate, I note that the Freedom of Information Law guarantees rights of access to records, except to the extent that a ground for denial is applicable. Any right you may have to a rebate would not be governed by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13274

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. David Zaire
83-A-2242
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 facts presented in your correspondence.

Dear Mr. Zaire:

I have received your letter in which you questioned the propriety of a response to your request to the New York County District Attorney's office for "(A)complete copy of the contents of your agency's file for the people of the State of New York v. David Zaire, Indictment Number 5369/82, as presently maintained by your Closed Cases Unit."

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

Second, based 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).

Based on the foregoing, insofar as the records sought can be located and identified with reasonable effort, I believe that the request would "have reasonably described" the records.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13275

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Jose Ramos
97-A-4506
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. Ramos:

I have received your letter in which you requested assistance in relation to a Freedom of Information request for a "disciplinary tape." You wrote that your facility has not "honored" 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.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 as the appeals officer is Mr. Anthony J. Annucci.

Since I am unfamiliar with the contents of the record of your interest, I cannot conjecture as to its 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 you were present during a proceeding that was recorded, I do not believe that any grounds for denial of access would apply.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13276

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Frederick M. Wooten, Jr.
96-B-1321
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. Wooten:

I have received your letter in which you requested this office to follow up on denials of your requests by the access officer at your facility and records appeals officer, Anthony J. Annucci. You requested information related to "roofing materials used on the print shop roof" and the companies involved with the project. You also indicated that you have not received responses to your requests for a "written certificate of proof that a diligent search for these records (was) performed."

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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires the disclosure of information per se; rather, it is a vehicle that pertains to rights of access to existing records. Similarly, while that statute may require an agency to disclose records, it does not require that an agency provide answers in response to questions. In a related vein, §89(3) of the Law states in part that an agency is not required to create a record in response to a request, unless otherwise specified in §87(3). In one of your requests, for instance, you sought a list

of persons who performed "walk through assessments" on particular dates. If no list exists, the facility would not be obliged to create a list, a new record, containing the information requested.

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."

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Insofar as the records sought exist and are maintained by your facility or another unit of the Department of Correctional Services, it appears that they would be accessible, with the exception of names of persons employed by private organizations.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13277

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Chaka Mosi Zulu
74-B-3395
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. Zulu:

I have received your letter in which you explained that the Geneva Free Library has not responded to your request under the Freedom of Information Law.

In this regard, while many "public libraries" are subject to the Freedom of Information Law, some may not be covered by that statute.

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

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

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

Based on §253 of the Education Law and judicial interpretations concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school

> library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

Lastly, this office has not received a copy of your appeal or appeal determination from the Department of Correctional Services.

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 OML-AO-3425
FOIL-AO-13278

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 28, 2002

Ms. Lena Bishop
[redacted]

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

Dear Ms. Bishop:

I have received your letters in which you raised questions concerning access to records of the Village of Endicott and its implementation of the Open Meetings Law.

The initial issue relates to access to bills to be approved by the Board of Trustees. Although the public had in the past been given the opportunity to review the bills prior to meetings of the Board, you wrote that the Village Attorney issued a "directive", prohibiting review of the bills until they are approved. From my perspective, the bills are accessible under the Freedom of Information Law when they come into the possession of the Village. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to 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, as soon as bills or other documents are prepared by the Village or come into the possession of the Village, I believe that they constitute "records" that fall within the coverage of the Freedom of Information Law.

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

grounds for denial could properly be asserted to withhold the bills from the public, irrespective of whether the bills have been approved.

As your inquiry relates to the Open Meetings Law, you referred to a meeting of the Board of Trustees held on February 26 and a motion made to go into executive session to discuss "contracts". You wrote that no vote was taken on the motion, but that the Board entered into executive session nonetheless. Following adjournment of the meeting, the Mayor (a republican) and three trustees (all democrats) met in the Mayor's office, and "the door was shut."

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 it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Although some issues relating to "contracts" might qualify for consideration in executive session, I point out that the only provision that deals directly with contract negotiations, §105(1)(e), pertains to collective bargaining negotiations between a public employer and a public employee union under Article 14 of the Civil Service Law, which is commonly known as the Taylor Law. A different ground for entry into executive session that may, depending upon the nature of the discussion, be asserted to discuss certain matters pertaining to contract negotiations. Section 105(1)(f) authorizes a public body to enter into executive session to discuss:

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

In some instances, a public body's discussion might focus on the financial or credit history of a particular corporation. To the extent that a discussion involves such matters, I believe that an executive session could properly be held. However, it is emphasized that the ability to discuss "contracts" in executive session is limited.

Lastly, with respect to the gathering in the Mayor's office, I note that §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, 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, stated that:

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

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

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

Based upon the direction given by the courts, if a majority of the Board gathers to discuss Village business, collectively as a body and in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

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

FOIL-AO-13279

From: Robert Freeman
To: DeMers Danielle
Subject: Re: question

Dear Ms. DeMers:

Please excuse the brevity of this response....I have to leave soon.

First, if there are merely notes but no transcript, the Town would not be obliged to prepare a transcript in response to a request made under the Freedom of Information Law. Section 89(3) of that statute provides in part that an agency need not create a record in response to a request. Rights of access, at least for the time being, would relate to the notes. Whether the reader could interpret them is not relevant.

Second, if you want to prepare a transcript, since the Town would be acting beyond its responsibilities imposed by the Freedom of Information Law, you could negotiate a contract and charge what the market will bear. My suggestion, however, is that the charge be based on the actual cost, i.e., the cost to the Town to pay a stenographer to prepare a transcript based on his or her hourly rate.

If you would like to discuss the matter, I expect to be in the office on Friday afternoon. If not, happy Easter!

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13280

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 28, 2002

Mr. Charles Moye
99-R-0161
Wallkill Correctional Facility
Route 208
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. Moye:

I have received your letter in which you requested this office "to find out why [several] agencies are not complying with the 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 Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13281

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 28, 2002

Mr. Dana Ricard
99-B-2809
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. Ricard:

I have received your letter and the attached materials in which you requested that this office "investigate" the failure of your correctional facility to respond to 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, 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
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13282

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 28, 2002

Mr. Raymond Rodriguez
99-R-2690
Upstate Correctional Facility
P.O. Box 2000
Malone, NY 12953

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

Dear Mr. Rodriguez:

I have received your letter in which you requested assistance in obtaining a "chain of custody form" pertaining to your urine sample. You explained that you sent the Elmira Correctional Facility a letter and disbursement form for $0.25, but you have not received a response.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13283

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 28, 2002

Mr. Robert Wesolowski
95-A-2405
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. Weslowski:

I have received your letter in which you requested "intervention into a matter regarding the denial of public records." You indicated that the Southport and Elmira Correctional Facilities have not responded to your requests for a variety of records. You also wrote that you "submitted an appeal to the New York State Attorney General, assuming they had jurisdiction to hear Freedom of Information Law appeals."

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 acknoweldges

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

The person designated to hear appeals in this intance is Anthony J. Annuci, Counsel to the Department of Correctional Services.

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 requests, 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).

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 Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13284

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 28, 2002

Mr. Lawrence Devers
00-A-5790
Five Points Correctional Facility
State Route 96, 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 facts presented in your correspondence.

Dear Mr. Devers:

I have received your letter in which you requested assistance in obtaining records related to your case from the New York City Police Department. You explained that the "Freedom of Information Law department is denying that the records [you] seek even exist.'

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

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13285

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 28, 2002

Mr. Miguel Perez
98-A-2051
Woodbourne Correctional Facility
99 Prison Road
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 facts presented in your correspondence.

Dear Mr. Perez:

I have received your letter and the correspondence attached to it. You requested assistance in obtaining search warrants and "invoices" detailing property "that was contained in [your] Bodega." The Office of the Special Narcotics Prosecutor for the City of New York responded that the office is "not in receipt" of the requested items.

First, the Freedom of Information Law pertains to existing records maintained by or for an agency. Therefore, if the agency to which your request was made does not maintain the records, the Freedom of Information Law would not apply. However, 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."

Second, assuming that you are referring to warrants related to your arrest, I point out that §120.80(2) of the Criminal Procedure Law states in part that:

> "[U]pon request of the defendant, the police officer must show him the warrant if he has it in his possession. The officer need not have the warrant in his possession, and, if he has not, he must show the defendant upon request as soon after the arrest as possible."

As such, it would appear that copies of warrants would be available to you from either the police department that made the arrest or the court in which the warrant was introduced in a proceeding.

Lastly, it is suggested that you submit your request for a property invoice directly to the records access officer at the New York City Police Department.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13286

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 1, 2002

Mr. Michael DeMasi
The Gazette Newspapers
P.O. Box 1090
Schenectady, NY 12301-1090

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

Dear Mr. DeMasi:

I have received your letter of February 25 in which you sought an advisory opinion concerning rights of access to personnel records pertaining to persons who had been but are no longer employed as police officers by the City of Schenectady.

In denying your request, Mayor Jurczynski wrote:

> "...as I reflect upon the purpose of the Freedom of Information Law, it was clearly to contain an exception for the private type of material that would be contained in personnel records. To say that persons who are terminated or retired from service will lose the expectation of privacy for their personnel records is also unfair, since the invasion of privacy will still occur.

He added that:

> "...under the limitations of Civil Rights Law section 50-a, I am constrained to deny your request on a separate basis. The men may be called to testify in pending proceedings, or at retrials after appeal, or may be ordered by a court or arbitrator to be reinstated after an appeal. Although they are not currently employed by the City, they might or may be employed as police elsewhere in the future. The purpose of 50-a was to guard against indiscriminate use of police officer personnel files in court proceedings."

From my perspective, the Mayor's view of the scope of §50-a of the Civil Rights Law and the exceptions to rights of access appearing in the Freedom of Information Law are unduly broad. In this regard, I offer the following comments.

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

The Court of Appeals, the state's highest court, expressed its general view of the intent of the Freedom of Information Law in 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 records characterized as 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 to which the Mayor alluded 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.).

There is little doubt that *some* aspects of personnel records may properly be withheld. I believe, however, that it is clear that the City cannot withhold those records *in their entirety*.

Before focusing on particular grounds for denial of access pertinent to an analysis of rights of access, I note that each of the police officers named in your correspondence has been the subject of criminal charges and judicial proceedings and that each has either been found or pleaded guilty. While I am unaware of whether or the extent to which personnel records pertaining to those officers became part of the court record, I point out that it has been held that records that have become public through disclosure in judicial proceedings "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)]. Therefore, insofar as the records in question have been made public via judicial proceedings, I believe that the City would have lost its ability to deny access, notwithstanding the provisions of the Freedom of Information Law or §50-a of the Civil Rights Law.

Second, some of the records sought might have been withheld in accordance with the decision rendered in Daily Gazette Company. V. City of Schenectady [93 NY2d 145 (1999)]. As you are aware, that case dealt with reprimands of 18 City of Schenectady police officers and a determination that records reflective of the names of those persons could be withheld. 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 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 prior to the Daily Gazette decision, in reviewing the legislative history leading to its enactment, found that:

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

It was also determined that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to

embarrass officers during cross-examination" (id. at 568). In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

It is emphasized that the bar to disclosure imposed by §50-a deals with personnel records that "*are used to evaluate performance toward continued employment or promotion.*" Since the officers in question are no longer employed as police officers, there is no issue involving continued employment or promotion; they are no longer employees or police officers. That being so, in my opinion, the rationale for the confidentiality accorded by §50-a is no longer present, and that statute no longer is applicable or pertinent.

Further, acceptance of the Mayor's contention that the officers whose records are the subject of your request "might or may be employed as police officers elsewhere in the future" would, in my opinion, unnecessarily extend the application of §50-a beyond its legislative intent and conflict with judicial decisions rendered by the Court of Appeals regarding the intent of the Freedom of Information Law. Again, the Court has determined on several occasions that exceptions to rights of access should be narrowly construed. Under the Mayor's construction, an exception would be expansively applied. Even if §50-a remains applicable, not all personnel records are used to evaluate performance toward continued employment or promotion; many have little or nothing to do with the evaluation of performance.

Third, assuming that my opinion is accurate and §50-a no longer applies, the Freedom of Information Law would serve as the vehicle for determining rights of access, and the following remarks are based on that assumption.

In my view, the suggestion by the Mayor that personnel records may generally be withheld is inaccurate. 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.

I believe that two of the grounds for denial are relevant in considering rights of access to personnel records.

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.

I note that the Mayor referred to an "invasion of privacy." There are numerous instances in which disclosure of records may result in an invasion of privacy. However, there are others in which

records or portions of records must be disclosed, for disclosure would not involve items so intimate or personal that disclosure would result in an *unwarranted* invasion of privacy. Moreover, in consideration of the intent of the Freedom of Information Law and societal values associated with the accountability of government, it is clear that various aspects of personnel records of public employees must be disclosed.

While the standard in the Freedom of Information Law 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].

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.

The first two examples of unwarranted invasions of privacy appearing in §87(2)(b) include reference to medical information, and it is clear in my view that information of that nature found within personnel records may be withheld. One of those examples refers to the ability to withhold one's employment history. Nevertheless, because the fact of a person's public employment is itself public, it has been held that portions of records indicating public employment must be disclosed [see Kwasnik, cite]. In another decision, which also dealt with records identifiable to police officers, it was found that one's general educational background is public, for disclosure would not rise to the level of an *unwarranted* invasion of personal privacy [see Ruberti, Girvien & Ferlazzo v. NYS Division of State Police, 641 NYS2d 411, 218 AD2d 494 (1996)].

An area of personnel records to which the Mayor referred involves "evaluative" records. It has been advised that performance evaluations, for example, are likely both available and deniable in part. While the contents of performance evaluations may differ, I believe that a typical evaluation contains three components.

One involves a description of the duties to be performed by a person holding a particular position, or perhaps a series of criteria reflective of the duties or goals to be achieved by a person holding that position. Insofar as evaluations contain information analogous to that described, I believe that those portions would be available. In terms of privacy, a duties description or statement of goals would clearly be relevant to the performance of the official duties of the incumbent of the position. Further, that kind of information generally relates to the position and would pertain to any person who holds that position. As such, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In terms of §87(2)(g), a duties description or statement of goals would be reflective of the policy of an agency regarding the performance standards inherent in a position and, therefore, in my view, would be available under §87(2)(g)(iii). It might also be considered factual information available under §87(2)(g)(i).

The second component involves the reviewer's subjective analysis or opinion of how well or poorly the standards or duties have been carried out or the goals have been achieved. In my opinion, that aspect of an evaluation could be withheld, both as an unwarranted invasion of personal privacy and under §87(2)(g), on the ground that it constitutes an opinion concerning performance.

A third possible component is often a final rating, i.e., "good", "excellent", "average", etc. Any such final rating would in my opinion be available, assuming that any appeals have been exhausted, for it would constitute a final agency determination available under §87(2)(g)(iii), particularly if a monetary award is based upon a rating. Moreover, a final rating concerning a public employee's performance is relevant to that person's official duties and therefore would not in my view result in an unwarranted invasion of personal privacy if disclosed.

In the context of disciplinary matters, I believe that a final determination indicating misconduct or a record in which misconduct is admitted would be accessible, for it would represent a final agency determination, and as suggested earlier, it would clearly be relevant to the performance of one's official duties. Similarly, if an agency and an employee engage in a settlement agreement, or if a record includes an employee's admission of misconduct, I believe that those records generally must be disclosed.

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

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

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

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

Potentially relevant is a decision in which the subject of a settlement agreement with a town that included a confidentiality clause brought suit against the town for disclosing the agreement under the Freedom of Information Law. In considering the matter, the court stated that:

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

> "Although exceptions to disclosure are provided in §§87 and 89, plaintiff has not met his burden of demonstrating that the financial provisions of this agreement fit within one of these statutory exceptions (see Matter of Washington Post v New York State Ins. Dept. 61 NY2d 557, 566). While partially recognized in Matter of LaRocca v Bd. of Education, 220 AD2d 424, those narrowly defined exceptions are not relevant to defendants' disclosure of the terms of a financial settlement (see Matter of Western Suffolk BOCES v Bay Shore Union Free School District, ___AD2d___ 672 NYS2d 776). There is no question that defendants lacked the authority to subvert FOIL by exempting information from the enactment by simply promising confidentiality (Matter of Washington Post, supra p567).
>
> "Therefore, this Court finds that the disclosure made by the defendant Supervisor was 'required by law', whether or not the contract so provided" (Hansen v. Town of Wallkill, Supreme Court, Orange County, December 9, 1998).

While I believe that a settlement agreement or a determination indicating a finding of misconduct must 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, the records relating to such allegations may, in my opinion, be withheld, for disclosure would constitute 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 an effort to resolve the matter, a copy of this opinion will be sent to Mayor Jurczynski.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Albert P. Jurczynski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3427
FOIL-AO-13287

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 1, 2002

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 facts presented in your correspondence.

Dear Mr. Baker:

I have received your letter in which you sought my views concerning a response to request for minutes of a meeting of the City of Rensselaer Board of Public Safety.

You wrote that meeting in question was held on February 6, that the Board entered into executive session, and that a statement was given to the news media following the meeting indicating that the Chief of Police had been place on administrative leave and that the decision to do so was "by majority vote of the board." The minutes that you received were "heavily censored" and they do not "show how each member voted."

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

In this instance, since the matter involved a police officer, I do not believe that details concerning the matter would have been required to have been disclosed. As you may be aware, §50-a of the Civil Rights Law prohibits the disclosure of personnel records pertaining to police officers that are used to evaluate performance toward continued employment or promotion. That being so, the Board in my view was justified in deleting information from the minutes involving the action taken regarding the Chief.

Second, notwithstanding the foregoing, I point out that since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although that statute generally pertains to existing records and ordinarily does not require that a record be created or prepared [see Freedom of Information Law, §89(3)], an exception to that rule involves voting by agency members. Specifically, §87(3) of the Freedom of Information Law has long required that:

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

Stated differently, when a final vote is taken by members of an agency, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Further, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "[t]he use of a secret ballot for voting purposes was improper", and that the Freedom of Information Law requires "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987), aff'd 72 NY 2d 1034 (1988)].

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. From my perspective, disclosure of the record of votes of members of public bodies, such as the Board of Public Safety in this instance, represents a means by which the public can know how their representatives asserted their authority. Ordinarily, a record of votes of the members appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Public Safety

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13288

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 1, 2002

Hon. Maureen Nardacci
City Clerk
City of Rensselaer
City Hall
505 Broadway
Rensselaer, NY 12144

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

Dear Ms. Nardacci:

As you are aware, I have received your letter of March 1 in which you requested an advisory opinion concerning rights of access to "statements and/or transcripts from any officer or person regarding the alleged conduct of Chief Frederick Fusco on or about the evening of January 25, 2002...." One request was made by the attorney for Chief Fusco; the other was made by a reporter for the *Times Union*.

It is noted at the outset that the matter that is subject of your inquiry and the requests for records have been widely publicized in local newspapers, and on radio and television. Further, it has been determined since you prepared your letter that the allegation that Chief Fusco was intoxicated while at the scene of a murder investigation was unfounded. Reference to information that has become known to the public will be made where appropriate, and I offer the following comments regarding the matter.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, if, for example, statements were made that were not recorded in any way, the City would not be obliged to prepare a new record on behalf of an applicant. It is emphasized, however, that the term "record" is defined 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, insofar as the information sought exists in some physical form (i.e., a tape or video recording, a written report or transcript, etc.), I believe that it 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.

Although the Freedom of Information Law generally grants the same rights of access to any person, regardless of one's status or interest [see Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976); M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)] in this instance, because one of the requests was made by an attorney representing the Chief, that request must, in my view, be distinguished from that of the reporter. The reporter, in my opinion, has the same rights as the public generally.

Relevant to the matter is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law, which prohibits an agency from disclosing personnel records relating to a police officer that are used to evaluate performance toward continued employment or promotion, unless the police officer consents in writing to disclosure or a court orders disclosure.

From my perspective, based on §50-a, the City cannot disclose the records in question to the reporter or the public generally absent the written consent of the Chief. However, since the Chief as the subject of the records has the right to waive the confidentiality conferred by that provision, arguably, he has the right to gain access to records exempt from disclosure to the public, because they pertain to him. While a police officer who is the subject of a record may have the right to consent to disclosure, it does not necessarily follow, in my opinion, that he or she necessarily has rights of access to the entirety of every record that falls within the coverage of §50-a. For instance, in numerous situations in which a member of the public has complained regarding the actions of a public employee, it has been advised that portions of a record identifiable to the complainant or perhaps a witness to an event may be withheld under §87(2)(b) of the Freedom of Information Law on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." In that circumstance, the provisions of the Freedom of Information Law would serve as the statute that determines rights of access.

Assuming that §50-a does not confer rights of access upon a police officer and that the Freedom of Information Law is used to determine a police officer's rights of access, I believe that the Chief or his attorney would have the ability to gain access substantial portions of the records in question. While the example offered in the preceding paragraph focused on the privacy of a member of the public, based on news reports, it is my understanding that statements regarding the Chief's conduct were made by City police officers and State troopers. If that is so, I believe that portions of records indicating their identities would be accessible to the Chief or his attorney.

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, 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, when a police officer or State trooper offers information acquired in the performance of his or her official duties, that person is acting in his or her governmental capacity. If that is so, portions of statements, reports or other records falling within the scope of the request would be accessible to the Chief or his representative, for disclosure would not involve items of a "personal" nature and would be relevant to the performance of the duties of those officers or employees named in the records.

Another ground for denial of possible significance, §87(2)(g), pertains to communications between or among officers or employees of state and local government. Due to its structure, however, it often requires substantial disclosure. 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. Concurrently, those 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: Brian D. Premo
Bob Gardinier

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OMC-AO-3128
FOIL-AO-13289

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

E-Mail

TO: Richard Vogan [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. Vogan:

I have received your letter in which you raised a series of questions relating to a survey in which you are attempting to ascertain how well or poorly school districts are complying with and implementing the Freedom of Information Law. I will attempt to deal with each of them.

First, under §89(3) of the Freedom of Information Law, an agency may require that a request be made in writing. From my perspective, any request made in writing, irrespective of the means by which it is transmitted, should ordinarily be accepted. On occasion, particularly in the case of law enforcement agencies, a fax machine may be dedicated to a particular use (i.e., use in emergencies or to communicate only with other law enforcement agencies), and it has been suggested in that kind of circumstance that requests made by fax may be prohibited.

It has been advised that a member of the public cannot he required to use a form prescribed by an agency. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee on Open Government (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of 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.

Second, you asked whether records must be made available "in electronic format." In this regard, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

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

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. 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 is a decision 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 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 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.

Third, a request to have records e-mailed or perhaps faxed does not involve the format in which the records are or may be kept. If a record can be made available on a computer disk, and an applicant pays a fee based on the actual cost of reproduction [see §87(1)(b)(iii)], I believe that an agency would be required to make the record available in that kind of information storage medium. However, your third area of inquiry does not involve a request that records be made available in a particular information storage medium; rather, it relates to the means by which records would be *transmitted.* In my view, there is nothing in the Freedom of Information Law that requires that records be transmitted via fax or e-mail. An agency may choose to make records available via those methods of transmission, but there is no *obligation* to do so. An agency's responsibility under §§87(2) and 89(3) involves making records available for inspection and copying, and to make copies of records available upon payment of the appropriate fee.

Fourth, with respect to the use of a personal photocopier or scanner, as a general matter, an agency has the ability to adopt rules to implement and govern the manner in which it carries out its duties. So long as those rules are reasonable and not inconsistent with law, I believe that they would be valid. In a decision concerning a situation in which a village adopted rules prohibiting requesters from using their own photocopiers, it was held that the rules "constitute a valid and rational exercise of the Village's authority under Public Officers Law §87(1)(b)" [Murtha v. Leonard, 620 NYS 2d 101,102; 210 AD2d 411 (1994)]. In my opinion, the decision was based upon the reasonableness of the rules in view of attendant facts and circumstances. In situations in which an agency does not have sufficient resources or cannot carry out its duties effectively due to the use or presence of a personal scanner or copier without disruption, it might be found, as indicated in Murtha that a prohibition against the use of personal photocopiers or scanners would be valid.

There may be circumstances in which, due to the nature of the records sought, their volume, their location, the workload of agency staff and similar factors, the use of one's own photocopier or scanner may be disruptive. In that instance, it is likely in my view that an agency could validly prohibit an individual from using his or her own scanner or photocopier. There may be other instances, however, in which the attendant facts suggest that the use of those devices might not be disruptive. In those cases, it may be unreasonable to prohibit their use.

Fifth, it appears that you are referring to the records retention and disposal schedules developed by the State Archives, a unit of the State Education Department. I believe that they are accessible via the Department's website, which is <www.nysed.gov>.

With regard to the disclosure of minutes of meetings, §106(3) of the Open Meetings Law specifies minutes of meetings of public bodies be prepared and made available within two weeks of meetings. 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, 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.

Next, I believe that materials shown during an open meeting by means of an overhead projection or a powerpoint presentation must be made available. In short, an agency would have effectively waived its capacity to withhold them. Further and more importantly, that a budget has not been adopted does not give an agency the ability to withhold all records prior to the adoption of a budget.

Based on the definition of the term "record" cited earlier, 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. With regard to materials relating to the development of a budget, two of the grounds for denial may be pertinent.

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.

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

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

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

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

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

The remaining provision of possible significance, §87(2)(c), states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations. If a proposed expenditure refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, it would appear that those portions of the records could be withheld.

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

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

Lastly, while there is no requirement that a request for records refer to or cite the Freedom of Information Law, I believe that it is wise to do so.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13290

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Bill VanAllen
[redacted]

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

Dear Mr. VanAllen:

I have received a copy of your letter to commissioners of boards of elections in which you sought monthly updates of voter lists.

In this regard, it has consistently been advised that an agency is not required to honor an ongoing or prospective request for records. As you may be aware, the Freedom of Information Law pertains to existing records [see §89(3)]. Consequently, I do not believe that an agency has the ability or is required to grant or deny access to records that do not yet exist. Additionally, in my view, there is nothing in the Freedom of Information Law that requires that records be transmitted via e-mail. An agency may choose to make records available via that method of transmission, but there is no obligation to do so. An agency's responsibility under §§87(2) and 89(3) involves making records available for inspection and copying, and to make copies of records available upon payment of the appropriate fee.

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

FOIL-AO-13291

From: Robert Freeman
To: [redacted]
Date: 4/3/02 8:17AM
Subject: Dear Mr. Goris:

Dear Mr. Goris:

I have received your letter in which you sought guidance concerning the process for seeking records under the Freedom of Information Law from the Aviation Services section of the NYSDOT.

In this regard, the regulations promulgated by this office (which are available on our website under "publications"; 21 NYCRR Part 1401) require that each agency is required to designate one or more persons as "records access officer". The records access officer has the duty of coordinating an agency's response to requests for records, and requests generally should be sent that person.

I believe that DOT has designated a records access officer in each of its regional offices, and it is suggested that you might attempt to find out who the access or FOIL officer is at the Buffalo regional office by calliing 847-3238. If that does not lead to results, I suggest that you contact John Dearstyne, the Department's records access officer at headquarters in Albany. His number is (518)485-8046. He would either deal with a request directly or inform you of the name of the person to whom a request should be made.

When making a request, the applicant is required to "reasonably describe" the records. That means that you would not have to name or identify the records that you want; the law does require, however, that you include sufficient detail to enable staff to locate the records of your interest. If you want to inspect the records, you should so indicate, and I note that inspection of accessible records is free. If you want copies, you should so state, and the Department can charge up to 25 cents per photocopy up to 9 by 14 inches.

A sample letter of request is included in our guide to the Freedom of Information Law, "Your Right to Know", which is available on our website under "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
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT PPPL-AO-295
FOIL-AO-13292

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Darryl Morgan
88-A-3526
Eastern Correctional Facility
P.O. Box 0338
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. Morgan:

I have received your letter in which you sought assistance in obtaining records from the Queens County District Attorney's Office and minutes maintained by the Legal Aid Society, a parole agency and a 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 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, you are interested in obtaining records from the District Attorney's Office related to a "particular fund that is paid to any that aided law enforcements in [your] arrest & conviction." Further, you "would like to know if records is maintained on how the money is paid out, by whom, and how much, and the reasoning for doing so."

In this regard, it is emphasized at the outset that the Freedom of Information Law pertains to existing records. Insofar as the items of your interest do not exist in the form of a record or records, the Freedom of Information Law would not apply.

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

In considering the records falling within the scope of your requests, relevant is a decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

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

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

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

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

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory

role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City

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

Based on the foregoing, the agency could not claim that the complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

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

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

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

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

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

I note htat 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).

Second, with respect to your request to the Legal Aid Society for minutes, the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, pertains to records maintained by agencies. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

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

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

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

Third, with respect to the availability of records from a "parole agency", it is likely that the primary issue in terms of rights of access involves the extent to which disclosure would constitute "an unwarranted invasion of personal privacy" with respect to both the inmate and perhaps others, such as those associated with victims.

As noted earlier, §87(2)(b) of the Freedom of Information Law enables an agency to withhold records insofar as disclosure would result in an unwarranted invasion of personal privacy, and §89(2)(b) provides a series of examples of such invasions of privacy.

Also potentially relevant is the Personal Privacy Protection Law, which deals in part with the disclosure of records or personal information by agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of that statute, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves when a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". It is noted, too, that §89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Therefore, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law.

Section 96(1) of the Personal Privacy Protection Law limits the circumstances under which state agency may disclose personally identifiable information. The only provision in my opinion that would permit the Division of Parole to disclose information identifiable to an individual would involve §96(1)(c), which authorizes disclosure when personal information is available under the Freedom of Information Law, i.e., when disclosure would <u>not</u> constitute an unwarranted invasion of personal privacy.

While I am unfamiliar with the contents of the minutes, information regarding an individuals's medical or mental condition would in my view constitute an unwarranted invasion of personal privacy if disclosed [see Freedom of Information Law, §89(2)(b)(i) and (ii)]. There may be other intimate details concerning the individual that could be withheld in accordance with the privacy provisions. Those provisions would also be applicable with respect to references to victims, their families and others affected by the crime. The extent to which they would apply would in my opinion be dependent on the specific nature of the information.

Also of potential significance is §87(2)(g), which was discussed above. If, for example, a district attorney offered an opinion or recommendation to the Parole Board concerning the possibility of parole, that kind of record could in my view be withheld under §87(2)(g).

Lastly, with regard to access to court minutes, again, it is emphasized that the Freedom of Information Law is applicable to agency records, and the definition of "agency" excludes the courts. Therefore, 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 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-13293

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Ray Mack
98-A-2221
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

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

Dear Mr. Mack:

I have received your letter in which you explained your difficulty in obtaining records related to your case from your "defense counsel" and the New York County District Attorney's Office.

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

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

Based on the foregoing, the Freedom of Information Law applies, in general, to records of entities of state and local government in New York. It would not apply to a private attorney or private organization.

Second, 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.

Lastly, in has been 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 AD 2d 677, 678(1989)].

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-13294

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Robert Lanza
00-A-2226
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. Lanza:

I have received your letter in which you requested assistance from this office concerning the "failure" of the Columbia County Task Force and District Attorney's Office "to comply [with] the FOIL."

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, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknoweldges 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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-13295

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Mr. Darrell Jones
93-A-1836
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. Jones:

I have received your letter in which you requested assistance from this office in obtaining a particular police officer's "police voucher" from the New York 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, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknoweldges 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It does not appear that the grounds for denial are applicable with respect to the records of your interest. If that is so, I believe that it should be disclosed.

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-13296

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

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 of February 28 and the materials attached to it. Having requested contracts or agreements between the Shoreham-Wading River School District and a particular individual, the District denied access and wrote that the record is subject to the "Personnel Exemption."

You have sought an advisory opinion concerning the propriety of the rejection of your request, and in this regard, I offer the following comments.

First, there is no "personnel exemption" in the Freedom of Information Law, and the term "personnel" appears nowhere in that statute. The nature and content of so-called personnel records may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

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

From my perspective, contracts, bills, vouchers, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff or outside contractors must generally be disclosed, for none of the grounds for denial could appropriately be asserted to withhold those kinds of records. Likewise, in my opinion, a contract between a coach, for example, and a school district or board of education clearly must be disclosed under the Freedom of Information Law.

In analyzing the issue, the provision of greatest significance in my opinion is §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

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

In a discussion of the intent of the Freedom of Information Law by the state's highest court in a case cited earlier, the Court of Appeals in Capital Newspapers, supra, found that the statute:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (67 NY 2d at 566).

In sum, I believe that a contract between a school district and an individual, like a collective bargaining agreement between a public employer and a public employee union, must be disclosed, for it is clearly relevant to the duties, terms and conditions reflective of the responsibilities of the parties.

In an effort to enhance compliance with law, copies of this response will be forwarded to the District.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Patrick Perpignano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OMLAO-3433
FOIL-AO-13297

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

Mr. Frederic C. Guile
[redacted]

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

Dear Mr. Guile:

I have received your letter of March 1 in which you sought assistance in obtaining records relating to the Slate Valley Museum and the Slate Valley Museum Foundation. You indicated that the Museum "is owned by the Village of Granville and the Foundation was set up by the Village 'to support' the Museum."

Based on the assumption that your statement is accurate, I offer the following comments.

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

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

While the status of the Foundation as an "agency" has not been determined judicially, it is clear that the Village is an "agency" required to comply with the Freedom of Information Law.

Pertinent with respect to rights of access is §86(4), which defines the term "record" expansively to include:

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

Based on the foregoing, the Court of Appeals, the state's highest court, found that documents maintained by a not-for-profit corporation providing services for a 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 issue that you raised, irrespective of whether the Foundation is an "agency", its records appear to be maintained for the Village. If that is so, the records 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 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 an institution of the City University of New York 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 Foundation, would not exist but for its relationship with the Village. Due to the similarity between the situation you have described and that presented in Eisenberg, it appears to be subject to the Freedom of Information Law.

Third, 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, it appears that each condition necessary to a finding that the Board of the Foundation 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 Village, it appears to conduct public business and perform 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).

Lastly, with respect to minutes of meetings, 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 I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Granville
Board of Directors, Slate Valley Museum Foundation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13298

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

Mr. Michael Vlahoff
01-B-1890
Groveland Correctional Facility
P.O. Box 46
Sonya, 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. Vlahoff:

I have received your letter in which you requested assistance from this office in obtaining "transcripts" from "FYI Health Services" pertaining to treatment that you received at the Erie County Medical Center. You explained that payment was sent to FYI Health Services, but you have not received your medical reports.

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, I offer the following comments.

While the Erie County Medical Center is clearly a governmental agency subject to the Freedom of Information Law, the nature of FYI Health Services is unclear. If it is not a governmental entity, the Freedom of Information Law would not apply. 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.

When it is applicable, 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 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 or private entity. As such, that statute may provide greater access to medical records than the Freedom of Information Law.

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

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

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13299

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 4, 2002

Mr. Carl Young
00-B-0574
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556

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

Dear Mr. Young:

I have received your letter in which you explained that the Office of the Erie County District Attorney and an attorney at a private law firm have "refused to send needed information pertaining to [your] case." 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 acknoweldges 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

Second, 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. However, in the event that your counsel was acting in the capacity of a public defender, the following is of potential relevance.

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.

Third, 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.

Lastly, it has been 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" [see Moore v. Santucci, 151 AD 2d 677, 678 (1989)].

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-13300

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 8, 2002

Ms. Kathy Scurka
[redacted]

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

Dear Ms. Scurka:

I have received your letter of March 5 in which you sought an advisory opinion concerning your right to obtain copies of certain records.

According to your letter, having requested records from the Putnam County Health Department pertaining to a septic system for a house being built across the street from your home, you were given the opportunity to copy most of the records in the file. However, when you were nearly done copying, the County's Senior Public Health Engineer "stopped" you and indicated that the plans for the septic system are, in your words, "the property of the engineer and copies could be made and because people had 'stolen plans before and failed to pay the engineer.'" You added that the plans are "the subject of litigation."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all records maintained by an agency, such as a county department, and §86(4) defines the term "record" broadly to include:

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

Based on the foregoing, irrespective of their use or origin, the plans in question are, in my view, clearly County records as soon as they come into the possession of the County, and are, therefore, 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. From my perspective, particularly in consideration of the fact that you were given the opportunity to inspect the plans, there would be no basis for a denial of access. Further, §87(2) specifies that records accessible under the law are available for inspection and copying, and §89(3) states that an agency must provide copies of accessible records upon payment of the requisite fee.

In short, I believe that the plans constitute a "record" that falls within the scope of rights conferred by the Freedom of Information Law.

Lastly, that 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.

As you requested, a copy of this opinion will be forwarded to Mr. Bruce R. Foley, the County's Public Health Director.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce R. Foley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1330

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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 8, 2002

Mr. James Karo
93-A-4244
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Karo:

I have received your letter in which it appears that you are requesting the names, titles and salaries of all officers or employees of the legislative, judicial and executive branches of state government.

In this regard, it is noted that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office does not maintain possession or control of records generally, and we do not maintain records containing the information of your interest.

To the best of my knowledge, there is no single agency that maintains the kind of information that you are seeking. If you are interested in a particular entity, it is suggested that you transmit a request under the Freedom of Information Law to that entity's "records access officer." The records access officer, according to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), has the duty of coordinating an agency's response to requests for records. In this instance, it appears that you are interesting in obtaining payroll records required to be maintained pursuant to §87(3)(b) of the Freedom of Information Law. That provision states that "Each agency shall maintain...a record setting forth the name, public office address, title and salary of each officer or employee of the agency..." A similar provision appears in §88 of the Freedom of Information Law with respect to State Senate and Assembly.

I note that §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy or the actual cost of reproducing other records (i.e., those that cannot be photocopied, such as computer tapes or disks). I point out, too, that it has been held that an agency may require payment in advance before making copies available (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982) and that an agency may charge its established fee even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-13302

From: Robert Freeman
To: Alan Kozlowski
Date: 4/8/02 5:12PM
Subject: Re: Deed Access

Dear Mr. Kozlowski:

As you are aware, deeds have long been available for inspection and copying. Once they have been disclosed, I believe that the recipient of a copy may do with the copy as he or she sees fit.

Further, many situations have arisen in which several government agencies may have copies of the same record. Each would have the same responsibility to honor a request for that record if a request is made under the Freedom of Information Law. That statute is applicable to all records maintained by an agency, irrespective of the function, use or origin of the record. If a town, for example, has a copy of a deed acquired from a county clerk, and if a request is directed to the town for a copy of the deed, the town, in my view, would be obliged to make the deed available for inspection and copying, even though it is not the originator or original custodian of the deed.

I hope that I have been of assistance. If you need additional commentary, 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-13303

Committee Members

Randy A. Daniels
Mary O. Donohue
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

41 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, 2002

Ms. Kate Andreatta
National Education Association
of New York
Vestal Service Center
400 Plaza Drive, Suite D
Vestal, NY 13850

Dear Ms. Andreatta:

I have received your letter of March 6 and the correspondence attached to it. You have sought an advisory opinion relating to a request for records made to the Dryden Central School District.

According to the materials, on January 30, you sent a request to the District seeking "all vouchers, checks, receipts, cancelled checks, payment records, ledgers and vendors' audits" pertaining to particular named employees of the District for school years beginning in 1996-1997. The Superintendent responded on February 11, stating that she "would like to know for what purpose you need this information and if you have an alternative source for obtaining this information which is stored in our school district vault." You considered her response to be a denial of access and you appealed on February 15. She wrote, however that she did not deny the request and wrote that the she would "evaluate your request" when you provide the information that she requested. I assume that she was referring to an indication of the purpose of your request and whether you may have an "alternative source" for obtaining the information.

From my perspective, the Superintendent's response was inconsistent with law. In this regard, I offer the following comments.

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

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose

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

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

In short, I do not believe that Superintendent may condition responding to your request or determining to grant or deny access upon an indication of your purpose for seeking the records. Further, whether there is an "alternative source" of the information is also irrelevant. Insofar as the District maintains the records of your interest, I believe that it is required to disclose them to the extent required by law.

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. In my opinion, only one of the grounds for denial is pertinent to an analysis of rights of access to those kinds of documents. While that provision might permit that certain aspects of the records in question may be withheld, I believe that the remainder must be disclosed.

Specifically, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and subject to a variety of interpretations, the courts have provided direction through their review of challenges to agencies' denials of access. In brief, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, it has been held that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official

duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In the context of the records at issue, I believe that they are clearly relevant to the performance of the official duties District employees. Consequently, with the exception of personal details, they must in my view be disclosed. Examples of the kinds of personal details that could be deleted prior to disclosure of the remainder of the records would be such items as home addresses, social security numbers and personal credit card numbers. It also noted that although the front side of cancelled checks have been found to be public, it has been held that the back of the checks may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. The court found, in essence, that inspection of the back of a check could indicate how an individual chooses to spend his or her money, which is irrelevant to the performance of that person's duties(see Minerva v. Village of Valley Stream, Supreme Court, Nassau County, May 20, 1981).

In conjunction with the preceding remarks concerning access to records, I direct you to a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals, the State's highest court, 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 foregoing, I believe that the need to enable the public to make informed choices and provide a mechanism for exposing waste or abuse can be balanced against the possible infringement upon the privacy of present or former public officers or employees in a manner consistent with the preceding commentary.

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

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

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

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

While I am unfamiliar with the recordkeeping systems of the District, 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 an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be sent to the Superintendent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Patricia Archambault

FOIL-AO-13304

From: Robert Freeman
To: peter_ostwald@tax.state.ny.us
Date: 4/10/02 10:11AM
Subject: Dear Mr. Ostwald:

Dear Mr. Ostwald:

I could go into more detail regarding your questions, and certainly you can call to discuss them any time. But in brief, there is virtually no case law dealing with the use of FOIL or the PPPL as a means of harassment, and there is nothing in the law that limits the number of requests that may be made or the volume of records that may be requested [see Farbman v. New York City, 62 NY2d 75]. However, case law indicates that if copies of records have been made available to a person in the past, an agency is not required to honor a second request for the same records, unless the applicant can prove that neither he nor his attorney, for example, continues to have possession of the records [see Moore v. Santucci, 151 AD2d 677]. With respect to the time for responding to requests, it has been advised and held judicially that when an agency acknowledges the receipt of a request and offers and approximate date for granting or denying access that is reasonable in consideration of the facts and circumstances (i.e., the volume of the request, the need to search, the time to evaluate the contents of records, etc.), the agency would be acting in compliance with law. In other words, there is no specific time within which an agency must grant or deny access to records.

Again, if you would like to discuss the issues that you raised more fully, please feel free to call.

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-13305

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 10, 2002

Mr. Reuben Avent
01-A-5796
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. Avent:

I have rece xplained difficulty in obtaining your parole hearing transcripts, pre-se n the Inmate Records Coordinator at your facility. You also questio endant's trial transcript.

In this re; ittee on Open Government is authorized to provide advice concerning the Freedom ... 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 acknoweldges 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 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.

Third, while I am unfamiliar with the contents of your parole hearing transcripts, information regarding victims, their families and others affected by the crime would in my view constitute an unwarranted invasion of personal privacy if disclosed [see Freedom of Information Law, §89(2)(b)(i) and (ii)]. There may be other intimate details that could be withheld in accordance with the privacy provisions. The extent to which they would apply would in my opinion be dependent on the specific nature of the contents of the records.

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

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

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

If, for example, a district attorney offered an opinion or recommendation to the Parole Board concerning the possibility of parole, the portions of the transcript reflective of that kind of advice or opinion could in my view be withheld under §87(2)(g).

Another provision of potential relevance is §87(2)(f), which allows records or portions of records to be withheld if disclosure would endanger the life or safety of any person.

It is suggested that you resubmit your request for your parole hearing transcripts to the records access officer at the Division of Parole.

Fourth, with respect to your attempt to obtain your pre-sentence report, §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.

Fifth, in relation to the availability of your co-defendant's trial transcript, it is emphasized that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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

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

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

It is suggested that you resubmit your request to the clerk of the court, citing an applicable provision of law as the basis for your request.

Sixth, assuming that a copy of the warrant used in your case is maintained by the office of a district attorney or a police department, for example, because they are agencies, the Freedom of Information Law would apply. 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. It is suggested that you resubmit your request to the appropriate agency.

Lastly, with respect to your ability to obtain records "free of charge", there is no provision in the New York Freedom of Information Law that authorizes agencies to waive fees. Therefore, an agency subject to the New York Freedom of Information Law may charge its established fee, 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

FOIL-AO-13306

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. William W. Roe
[redacted]

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

Dear Mr. Roe:

I have received your letter in which you wrote that "recall that some years ago municipalities were denying FOIL requests concerning assessed values in cases in which the municipalities were using a consultant for reassessments", but that "those denials were subsequently challenged successfully." You included a copy of an "Assessment Disclosure Notice" sent to you, apparently by a consultant retained by a town in which you own property.

From my perspective, the kind of record attached to your letter generally must be disclosed, whether it is prepared by the staff of a municipality or a consultant retained by a municipality. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records prepared or maintained by or *for* an agency, such as a town. Section 86(4) of that statute defines the term "record" to include:

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

Based on the foregoing, if a consultant is retained by an agency and prepares records for the agency, those records, irrespective of where they may be kept, are subject to rights conferred by the Freedom of Information Law [see e.g., Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University, 87 NY2d 410 (1995)].

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.

Third, it has been determined that records prepared by a consultant for an agency should be treated in the same manner as those prepared by agency employees, and that those records constitute "intra-agency materials." While those kinds of records fall within §87(2)(g), which is one of the grounds for denial, significant portions of those records, due to the structure of that provision, frequently must be disclosed.

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.

In a discussion of the issue of consultant reports, 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, 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, inter-agency or intra-agency materials or records prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on their contents. In my view, insofar as the records in question consist of advice, recommendations or opinions, they could be withheld. However, to the extent that they consist of statistical or factual data, for example, I believe that they would be available, unless a different ground for denial could be asserted.

It is possible that your recollection involves particular records prepared in the assessment process. In this regard, in general, the reasons for which a request is made and an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 62 NYS 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. 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, 95 NY2D 758 (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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13307

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

To: Jim Flateau

April 15, 2002

From: Bob Freeman

Subject: Requests for FOI requests

As in all other cases in which requests for records are made under the Freedom of Information Law (FOIL), a request for requests and an agency's response to them should be analyzed in terms of that statute's presumption of access. In short, as you are aware, FOIL is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, with the exception of portions of certain kinds of requests, the records at issue are accessible under the law.

In my view, the only instances in which requests or responses may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see FOIL, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy. Similarly, if an inmate seeks records concerning his medical care relating to a particular condition or disease, I believe that his or her name and other identifying details may be deleted to protect his or her privacy.

In the words of the Court of Appeals, the exception in the FOIL pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In many instances, a request or the correspondence between the agency and the applicant for records may not include personal or intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a community board, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. When a request of that nature is made by an individual in a personal capacity, I believe that his or her home address could be deleted prior to disclosure of the remainder of the record.

Requests are frequently made by firms, associations, or persons representing business entities, i.e., professional journalists. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, Nay 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991), and the requests would likely be available in their entirety.

Agencies have in some instances denied access because the records in question do not reflect a final agency determination. That kind of consideration might arise in the context of §87(2)(g), which pertains to "inter-agency or intra-agency materials." I do not believe that it is pertinent in this context, because the records are neither inter-agency nor intra-agency materials; they consist of communications between members of the public or persons representing business entities or interest groups, none of which constitute agencies [see definition of "agency", §86(3)]. As such, §87(2)(g) would not in my opinion serve as a basis for a denial of access.

I hope that the foregoing is useful to you. If you have additional questions, please do not hesitate to call.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13308

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Richard Trivino
97-A-1868
Bare Hill Correctional Facility
P.O. Box 20, Cady Road
Malone, NY 12953

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

Dear Mr. Trivino:

I have received your letter in which you requested an opinion on the availability of your "tape recorded Tier III hearing record", and various facility library logs that would indicate the users of the library.

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 Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in a response to a request. It is also important to note, however, that §86(4) of the Law defines the term "record" to include:

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

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law.

If a "tape recorded Tier III hearing record" exists, in my view, it would be available to you. None of the grounds for denying the record would appear to applicable.

In regards to your request for various facility library logs, pertinent with respect to materials identifying patrons is §87(2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §4509 of the Civil Practice Law and Rules, which states that:

> "Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database searches, interlibrary loan transaction, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute."

Based on the foregoing, insofar as library records identify users of a library's services, I believe that the records must be withheld. Further, even if §4509 does not apply, I believe that records identifiable to the users of a library could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3439
FOIL-AO-13309

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Hon. Carole A. Clearwater
Town Clerk
Town of Hyde Park
P.O. Box 311
Hyde Park, NY 12538

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

Dear Ms. Clearwater:

I have received your letter of March 11 in which you sought an advisory opinion concerning your role as Town Clerk and the responsibilities of the Hyde Park Town Board.

As I understand the matter, the Board entered into an executive session, and you were not permitted to attend. Although a vote was a taken during the executive session, you wrote that "they did not want to tell [you] what they voted on or what the vote was."

In this regard, as you are aware, §30(1) of the Town Law states in relevant part that the town clerk:

> "Shall have the custody of all the records, books and papers of the town. He shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting..."

In my view, §30 was likely intended to require the presence of a clerk to take minutes in situations in which motions and resolutions are introduced and in which action is taken. When action is taken, I believe that minutes must be prepared in accordance with §106 of the Open Meetings Law. That provision states that:

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

You also asked what your role should be in a situation in which the Board might want to take action during an executive session. As you may be aware, §105(2) of the Open Meetings Law permits the Board to enable you to be present during an executive session. However, you have no right to attend, because you are not a member of the Board.

To give effect to both the Open Meetings Law and §30 of the Town Law, which imposes certain responsibilities upon a town clerk, it is suggested that there may be three options. First, the Town Board could permit the clerk to attend an executive session in its entirety. Second, the Town Board could deliberate during an executive session without the clerk's presence. However, prior to any vote, the clerk could be called into the executive session for the purpose of taking minutes in conjunction with the duties imposed by the Town Law. And third, the Town Board could deliberate toward a decision during an executive session, but return to an open meeting for the purpose of taking action.

Lastly, since its enactment in 1974, three years prior to the effective date of the Open Meetings Law, the Freedom of Information Law has included what some have characterized as an "open vote" requirement. Specifically, section 87(3)(a) of that statute requires that any time a final vote is taken, a record must be prepared indicating the manner in which each member cast his or her vote. I note, too, that an indication of each member's vote must be prepared, whether the vote is taken in public or during an executive session [see Smithson v. Ilion Housing Authority, 130 AD2d 965 (1987); affirmed 72 NY2d 1034 (1988)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-13310

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

E-MAIL

TO: Jennifer and Seain Pinkowski [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. and Ms. Pinkowski:

I have received your letter in which you sought assistance in relation to requests made under the Freedom of Information Law to the Hudson City School District.

In a letter to the District's business office sent last December, you requested "the statistics of phone calls placed by the Hudson City School District to Children's Protective Services (CPS)", as well as " a break down of each school that made the calls and the results of phone calls (meaning if the case was founded or unfounded)." You specified that you do not want names, and that you are interested in statistics for the past five years and the names of District staff who made the calls. In response to your request, the District's records access officer indicated that the District does not maintain the information sought.

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, such as a school district, is not required to create a record in response to a request. Therefore, if the District does not maintain or has not prepared "statistics" containing the information of your interest, there would be no obligation imposed on the District to create statistics on your behalf, and the Freedom of Information Law would not apply. Similarly, District staff would not be required, as you suggested, to "count" certain reports and provide figures for each school by school year.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law.

RJF:jm

cc: Daniel Barrett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13311

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Bill VanAllen
[redacted]

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

Dear Mr. VanAllen:

I have received a copy of a request for records addressed to several agencies' records access officers. You requested a variety of records covering a period of ten years pertaining to "the former 'Town of Hurley Library Association' now known as the 'Town of Hurley Special Tax District.'" The records sought include "board of directors minutes, budgets, all contracts, personnel transfer agreements, interagency correspondence, public legal notices, appointment calendars and long distance phone bills."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records maintained by an agency, and agencies may dispose of most records in less than ten years. In short, insofar as the records of your interest no longer exist or were never maintained by an agency, the Freedom of Information Law would not apply.

Second, it is my understanding that the institution that is the subject of your request had been a not-for-profit corporation that was separate and distinct from government, but that legislation was recently enacted that created a special library district. If that is so, prior to its creation as a special library district, it would not have been an "agency" [see Freedom of Information Law, section 86(3)], and it would not have maintained "interagency correspondence."

Third and perhaps most significantly with respect to most of the entities to which your request was made, a key issue 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. 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 entities to which your request was sent, to the extent that the records sought can be located with reasonable effort, I believe that it 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, the request would not in my opinion meet the standard of reasonably describing the records. Further, in the context of the request, a real question involves, very simply, where staff of certain of those entities might begin to look for records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within an agency, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding the Hurley library, since the beginning of its existence, in a single file, it may be a simple task to locate the records. If, however, records are not maintained in that manner, but rather are kept by other means, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Shelley Brown, NYS Comptroller Office
Nellie Perez, NYS Education Department
RAO, Library Development
RAO, Ulster County Board of Elections
RAO, Kingston City School District
Sharon Walsh, NYS Assembly
Steven M. Boggess, Secretary of the Senate
RAO, Town of Hurley Library
RAO, Town of Hurley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13312

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. David Breland
00-R-2781
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. Breland:

I have received your letter in which you requested an opinion concerning the propriety of a response to your Freedom of Information Law request and advice on "future action to take." You submitted a request to the Freedom of Information officer at your facility for "copies of Unit Log book entries for housing unit's AS-5 and BN-2 on the day of August 11, 2001- 7AM to 3PM Tour", to "establish if an officer...was assigned to that unit." You further wrote that the response to your request indicated that you would "receive word, one way or another" after the Freedom of Information Law officer receives clarification on "whether you can have the requested documentation."

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

The designated appeals officer for the Department of Correctional Services is Mr. Anthony Annucci, Deputy Commissioner.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, records indicating whether a particular officer was assigned to a housing unit on a specified date would be available, because none of the grounds for denial would appear to be applicable.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13313

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Earl Bennett
97-B-2151
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 indicated that the Office of the Niagara County Public Defender has not responded to your requests for your "trial file."

In this regard, first, in my opinion, 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.

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 obtain or prepare records on your behalf.

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 acknoweldges 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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-13314

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Anthony Bennett
96-B-1530
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

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

Dear Mr. Bennett:

I have received your letter in which you explained that the Lockport Police Department has not responded to your requests for records. You have asked this office to provide you with the name of the person to whom you could send an appeal.

In this regard, it is noted that this office does not maintain a listing of agency records appeals officers. 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 [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

In consideration of the foregoing, you may appeal the constructive denial of your Freedom of Information Law request to the "Records Appeals Officer" at the Police 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

FOIL-AO-13315

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Shannon Martin LaFrance
Rapport, Meyers, Whitbeck, Shaw & Rodenhausen, LLP
110 Main Street
Poughkeepsie, NY 12601-3083

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

Dear Ms. LaFrance:

As you are aware, I have received your letter of March 7 and the materials relating to it. You have sought an advisory opinion concerning your contention that the billing records of the Dover Town Engineer, "including his itemizations", are subject to the Freedom of Information Law. The attorney for the Engineer, which is apparently a firm with which the Town contracted, disagreed, stating that "an architect or engineer hired by a municipality is not considered an 'Agency' under Public Officers Law §86 and therefore is not subject to any of the requirements of Public Officers Law...." He cited the case of Sea Crest Construction Corp. v. Stubing, 82 AD2d 546 (1981)] as the basis for his contention and added that "to the extent that the Town may be in possession of some of the requested documents, such documents arguably fall within the inter-agency exemption."

If I understand that attorney's contentions accurately, I believe that he has misconstrued the Freedom of Information Law. I agree that a private firm retained by a municipality is not an "agency" as that term is defined in §86(3) of the Freedom of Information Law. Nevertheless, whether such a firm is itself subject to that statute is not determinative; on the contrary, the application of the law in this instance involves whether records were produced or are kept for a municipality.

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, the documentation at issue need not be in the physical possession of an agency to constitute Town records; so long as they are produced, kept or filed for an agency, such as a town, 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, 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 a person or firm retained by a municipality prepares or maintains records for the municipality, they constitute agency records that fall within the coverage of the Freedom of Information Law.

I note that records prepared by consultants retained by consultants for an agency have been found by the Court of Appeals to consist of intra-agency materials that fall within the scope of the exception to which the attorney alluded, §87(2)(g). While that provision 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).

From my perspective, the kinds of documents at issue, billing statements, including itemizations of charges, clearly constitute statistical or factual information that must be disclosed if they are maintained by or for the Town.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Braden Farber

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13316

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

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 asked for assistance in obtaining a variety of records from the Division of Criminal Justice Services. You wrote that you have not received responses 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 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

Lastly, some of the records of your interest may be available from the court in which you appeared. In this regard, it is emphasized that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

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

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

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

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

You may wish to resubmit your request to the clerk of the court, citing an applicable provision of law as the basis for your request.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13317

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Lawrence Billing
#4410102542
G.R.V.C. (Beacon)
09-09 Hazen Street
East Elmhurst, NY 11370

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

Dear Mr. Billing:

I have received your letter in which you requested assistance in obtaining a variety of records from 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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

Lastly, the Freedom of Information Law pertains to existing records and §89(3) of that statute states in part that an agency is not required to create or prepare a record in response to a request. Therefore, if your facility does not maintain the records of your interest, there would be no obligation on its part to obtain or prepare records on your behalf.

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-13318

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Norris J. McLaurin
92-B-0772
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. McLaurin:

I have received your letter in which you requested "intervention and an advisory opinion regarding the failure of the Office of Alcoholism and Substance Abuse Services (OASAS) to respond in a timely manner [to your] Freedom of Information Law (FOIL) 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.

In my opinion, the Office of Alcoholism and Substance Abuse Services 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.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Jennifer Sandu, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13319

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Shaun V. Stolfi
00-A-5661
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. Stolfi:

I have received your letter and attached copies of various requests for records that you have directed to the Inmate Records Coordinator at your facility. You requested assistance from this office to "prevent any further violations of 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13320

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Edward Nelson
95-R-2256
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

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

Dear Mr. Nelson:

I have received your letter in which you requested an advisory opinion concerning the propriety of a response from the Westchester County Attorney's Office and the Division of Criminal Justice Services indicating that "requested records are not in their possession." You also asked several other questions that are not related to the operations of this 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, in relation to responses to your request for records "indicating the actual time" a file was submitted to the Division of Criminal Justice Services, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. If there is no record indicating the actual time that a file was submitted, the Freedom of Information Law would not apply.

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

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

FOIL-AO-13321

From: Robert Freeman
To: [redacted]
Date: 4/18/02 9:42AM
Subject: Dear Mr. Newton:

Dear Mr. Newton:

I have received your inquiry concerning the procedure for increasing or decreasing a public employee's salary.

In this regard, the function of the Committee on Open Government involves providing guidance concerning public access to government information, primarily under the state's Freedom of Information and Open Meetings Laws. I am unfamiliar with the requirements relating to changing a public employee's salary, and it is suggested that the issue might be raised with the Office of the Comptroller. Its public information office can be reached at (518)474-4015.

With respect to the roll call vote, section 87(3)(a) of the Freedom of Information Law requires that a record be prepared indicating how each member cast his or her vote when a final action is taken. Therefore, it essentially requires a roll call vote or the equivalent. It is also noted that the courts have held that a record of votes of each member must be prepared and disclosed whether action is taken in public or during an executive session.

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-13320

From: Robert Freeman
To: pvw3@ewsh-lawfirm.com
Date: 4/18/02 9:07AM
Subject: Dear Mr. Webb:

Dear Mr. Webb:

I disagree with the position taken by the Zoning Board.

Once a record comes into the possession of a government agency, the Freedom of Information Law governs. As you may be aware, that statute is applicable to all agency records, and section 86(4) defines the term "record" to mean any information, in any physical form whatsoever, kept, held, filed, produced or reproduced by, with or for an agency. Therefore, as soon as the transcript came into possession of the municipality, it constituted an agency record subject to the Freedom of Information Law.

Under that statute, an agency can charge a maximum of twenty-five cents per photocopy up to nine by fourteen inches, unless a different fee is prescribed by statute. The term "statute" has been interpreted by the courts to mean an act of the State Legislature. In the context of your inquiry, there would be no statute that would authorize the assessment of a fee of higher than twenty-five cents per photocopy.

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

FOIL-AO-13323

From: Robert Freeman
To: hurleydirector@hvc.rr.com
Date: 4/18/02 10:53AM
Subject: Hi Jennifer:

Hi Jennifer:

I'd like to offer a comment and a suggestion regarding your inquiry concerning Mr. VanAllen's request.

First, this office has consistently advised that an applicant for records cannot be compelled to use an agency's prescribed form. If it is convenient for the applicant to complete the form, its use may be appropriate. However, it has been advised that a failure to use a prescribe form cannot serve to enable an agency to delay responding to a request or to deny access to records. In short, an written request that "reasonably describes" the records sought [see FOIL, section 89(3)] should suffice.

For a more detailed explanation of that point, it is suggested that you go to the index to FOIL opinions on our website, click on to "form", scroll down to "form prescribed by agency", and click on to #10004.

With respect to faxed requests, in most instances, accepting requests by fax does not pose a problem. The instances in which there may be difficulty involves situations in which a fax machine is dedicated to a particular use, and when you do not want to enable a member of the public to tie up the machine so that it cannot be used as intended.

Next, since you asked Mr. VanAllen whether he wants to inspect records or obtain copies and he has not answered, it is suggested that you inform him that you will not begin to deal with his request until he informs you of his preference.

If you would like to discuss the matter, please feel free to call. 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-13324

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 18, 2002

Mr. Walter C. Ervin 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. Ervin:

I have received your letter and the materials attached to it. You have sought guidance concerning your requests for records transmitted to the City of Elmira involving a variety of payments. Based on a review of the materials, I offer the following comments.

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

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

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.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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, it is possible if not likely that a key issue involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the recordkeeping systems of the City, to extent that the records sought can be located with reasonable effort, I believe that your 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, assuming that the records of your interest exist and can be found with reasonable effort, they must be disclosed. In short, I do not believe 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: City Council
Tina Wilber

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13325

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 18, 2002

Mr. William Appel
[redacted]

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

Dear Mr. Appel:

I have received your letter and 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.

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

In my opinion, if as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records within the same particular period (i.e., thirty-six days) following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a substantial period, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for a lengthy delay in disclosure.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AV-13326

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 18, 2002

Mr. Christopher Pawelski
[redacted]

The staff of the Committee 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. Pawelski:

I have received a variety of materials from you pertaining to your requests made under the Freedom of Information Law to the Cornell Cooperative Extension of Orange County. Based on a review of the correspondence and a conversation with Mark Brigham, Executive Director of that entity, I offer the following comments.

First and perhaps most importantly, 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 or prepare a new record in response to a request. Therefore, insofar as the information sought does not exist in the form of a record or records, the Freedom of Information Law would not apply.

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.

Third, if copies of records have been made available to you in the past, an agency ordinarily is not required to honor a second request for the same records. Based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your representative, there must be a demonstration that neither you nor your representative possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

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

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

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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Brigham
D. Merrill Ewert
Terry Gifford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13327

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 19, 2002

E-MAIL

TO: Kimberly Wilder [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. Wilder:

I have received your letter of March 21 in which you sought guidance concerning access to a certain kind of record.

Specifically, if an a town seeks bids for auditing services and an auditing firm sends the town a "letter of engagement", you asked whether that document is available under the Freedom of Information Law. You indicated that a town official informed you that an engagement letter was received and later revised and that only the "new, revised copy" must be disclosed.

From my perspective, if the initial version of the letter of engagement continues to exist, it is likely accessible under the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law is expansive in its coverage, for it includes within its scope all records of an agency, such as a town. Section 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, whether a document is an initial, preliminary or final version, I believe that it clearly constitutes a "record" 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.

In my view, the only ground for denial of possible significance in the situation that you described would be §87(2)(c), which authorizes an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations..." In the context of bidding, if the deadline for submission of bids has not yet occurred, disclosure of bids submitted prior to the deadline would in most instances "impair" the fairness of the process and possibly prevent an agency from receiving a bid optimal to taxpayers. Disclosure in that circumstance could enable a firm to submit a bid lower than those of other bidders or perhaps enable the firm to know the highest price that might be paid by the agency. However, if the deadline for submission of bids has been reached, any impairment as described above would essentially have disappeared.

If indeed the deadline for submission of bids has been reached, and particularly if a contract has been awarded, I believe that the records in question, irrespective of which version of the letter of engagement might be of interest, would be accessible. Again, in that circumstance, I do not believe that any of the grounds for denial of access could appropriately be asserted.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13328

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 19, 2002

E-MAIL

TO: William S. Hecht [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Hecht:

I have received your letter of March 23 in which you sought an advisory opinion relating to a request made under the Freedom of Information Law.

You indicated that you transmitted a request to the Town of Skaneateles for the "newly proposed town zoning laws", and that you sought them "in digital format." In response to the request, the Town Clerk informed you that the records "were not in the town office" and that you could not obtain them. You wrote, however that the records are maintained "on the computer of the Town of Skaneateles lawyer..."

In this regard, I offer the following comments.

First, based on the information that you provided, I believe that the records sought are subject to whatever rights of access exist under the Freedom of Information Law, irrespective of where they may be kept. That statute applies to all records of an agency, such as a town, 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 upon the language quoted above, the documentation at issue need not be in the physical possession of an agency to constitute Town records; so long as they are produced, kept or filed for an agency, such as a town, 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, 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 a person or firm retained by a municipality prepares or maintains records for the municipality, I believe that they constitute agency records that fall within the coverage of the Freedom of Information Law. Further, under the regulations promulgated by the Committee on Open Government, which govern the procedural implementation of the law (21 NYCRR Part 1401), an agency's records access officer has the duty of coordinating the agency's response to requests for records. When town records are not kept in town offices, I believe that the records access officer is obliged to obtain the records for the purpose disclosing them to the extent required by law or to direct the person in possession of the records to disclose the records in a manner consistent with law.

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

I am unaware of the status of the proposals. If they have been disclosed to the public, either in written form or during meetings open to the public, I believe that they would be accessible to the public. However, if they have not been shared with the public, it appears that they may be withheld. Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." Assuming that the proposed laws are being drafted for the Town by the Town Attorney, I believe that they would constitute the work product of the attorney and would fall within the scope of the attorney-client privilege. Attorney work product is exempt from disclosure under §3101(c) of the Civil Practice Law and Rules (CPLR); materials subject to the attorney-client privilege are exempt from disclosure under §4503 of the CPLR. Again, however, insofar as the

contents of the records have been disclosed to persons other than Town officials, i.e., to the extent that the privilege has been waived, I believe that the records would be available.

Lastly, as indicated earlier, the definition of "record" includes information maintained electronically, and I note that 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 with reasonably effort, 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.

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).

I hope that I have been of assistance.

RJF:jm

cc: Hon. Janet Aron

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13329

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

April 22, 2002

Mr. Derrick Caldwell
93-A-4157
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. Caldwell:

I have received your letter in which you sought an advisory opinion regarding the availability of "information concerning whether or not the 75th precinct in Brooklyn, East New York section, had a police officer, by the name of Sgt. Rice, in November of 1991." You wrote that you were "denied this information" on the ground that "it is privileged information and part of the officers' personnel record."

In this regard, 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, 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 employment or attendance 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 Department to deny access to you or anyone else.

I note, too, that in Capital Newspapers v. Burns [109 AD2d 92, aff'd 67 NY2d 562 (1986)], the issue involved access to records indicating the days and dates of sick leave claimed by a particular police officer, and the Court of Appeals held that §50-a did not apply. On the contrary, it was determined that those records were accessible. In consideration of that decision, I believe that the record of your interest must be disclosed.

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-13330

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

April 23, 2002

Mr. Roy Clendinen
241-01-04431
G.R.V.C
09-09 Hazen Street
East Elmhurst, NY 11370

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

Dear Mr. Clendinen:

I have received your letter in which you asked about the availability of "'Police Department Guidelines' with regards to precinct Supervisory staff giving uniformed police officers authority/direction to 'strip search' individuals who had been arrested for non-felony offenses." You also questioned the propriety of a response from the New York City Police Department indicating that the Department would respond to your request within 120 days.

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

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

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

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

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

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

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records "within 120 days" or some other particular period, following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law.

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

It is noted that §87(2)(g) permits an agency provide in pertinent part that:

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

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

Concerning "instructions to staff that affect the public" and "final agency policy or determinations", which are generally available, respectively, under subparagraphs (ii) and (iii) of §87(2)(g) of the Freedom of Information Law, there is little decisional law that deals directly with those provisions. However, in a letter of July 21, 1977 prepared by the sponsor of the revised Freedom of Information Law, former Assemblyman Mark Siegel indicated that §87(2)(g) is intended to insure that "any so-called 'secret law' of an agency be made available", such as the policy "upon which an agency relies" in carrying out its duties. Typically, agency guidelines, procedures, staff manuals and the like provide direction to an agency's employees regarding the means by which they perform their duties. Some may be "internal", in that they deal solely with the relationship between an agency and its staff. Others may provide direction in terms of the manner in which staff performs its duties in relation to or that affects the public, which would ordinarily be public. To be distinguished would be advice, opinions or recommendations that may be accepted or rejected. An instruction to staff, a policy or a determination each would represent a matter that is mandatory or which represents a final step in the decision making process.

While instructions to staff that affect the public and final agency policies or determinations are generally accessible, there may be instances in which those records or portions thereof may be withheld.

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

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

> On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

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

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a 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 or policy would jeopardize the lives or safety of public employees or others, the cited provision might be applicable.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1333

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

April 23, 2002

Mr. Charles G. Theiss
Rombout Exempt Firemen'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.

Dear Mr. Theiss:

I have received your note, which reached this office on March 26, concerning your efforts in obtaining information from the State Insurance Department.

In this regard, having reviewed the opinion addressed to you last year, it is reemphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that law specifies that an agency is not required to create a record in response to a request. If the information that you have requested, a "five-year summary of fire tax distributions for the Rombout Fire District and the for the Village of Fishkill Fire Department", does not exist in the form of a record or records, the Department would not be required to prepare a new record containing a summary of that nature on your behalf.

Notwithstanding the foregoing, since you referred to requests that had not been answered, 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael J. Bridgeford

From: Robert Freeman
To: [redacted]
Date: 4/23/02 10:36AM
Subject: Dear Ms. Elmore:

Dear Ms. Elmore:

I have received your letter concerning access to records relating to a grant acquired by a historical association. You indicated that the association operates out of town hall but that it is "not for profit."

In this regard, the nature or status of the association is not entirely clear. However, I note that the Freedom of Information Law is applicable to records of an agency (such as a town) and that it defines the term "record" to include any information in any physical form whatsoever kept, held, filed, produced or reproduced by, with or for an agency. Therefore, insofar as records are maintained by or for the town, I believe that they would be subject to rights of access conferred by the Freedom of Information Law.

If the historical association is wholly independent of town government, it is unlikely that the Freedom of Information Law would apply to its records. If, however, the town maintains substantial control over the association (i.e., if town officials appoint a majority of the association's board of directors), the courts have found that the Freedom of Information Law would be applicable in that kind of circumstance.

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-13333

From: Robert Freeman
To: [redacted]
Date: 4/23/02 4:36PM
Subject: Dear Mr. Van Pelt:

Dear Mr. Van Pelt:

I have received your inquiry in which you asked whether the "Freedom of Information Act appl[ies] to the New York Police Department from records that date to the 1950's and 1960's", and if it does, whether you "could...examine the records online..."

In this regard, first, the New York Freedom of Information Law is applicable to all records maintained by or for an agency of state or local government in New York, irrespective the time the records were created. In short, if the records of your interest continue to exist and are kept by or for the Police Department, they would be subject to rights of access conferred by that statute.

Second, assuming that the records of your interest exist, it is highly unlikely that they would be maintained electronically; rather, if they exist, they would more likely be maintained as paper records. If that is so, and if the records are available under the law, copies could be requested for a fee of twenty-five cents per photocopy. Further, even if records are maintained electronically, an agency would not be required to transmit them via email.

Lastly, when seeking records, a request should be made to the agency's "records access officer." That person has the duty of coordinating an agency's response to requests. Additionally, the law requires 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.

To seek the records of your interest, it is suggest that request be made to the New York City Police Department, Records Access Officer, Room 110C, One Police Plaza, New York, NY 10038.

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-13334

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

April 23, 2002

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 and apologize for the delay in response. You have expressed the view that requests made under the Freedom of Information Law should be confidential in a manner similar to records involving patrons' use of library materials, and you asked that a proposal be made to amend the law to guarantee confidentiality.

From my perspective, a change in the law is neither necessary nor warranted. In this regard, I offer the following comments.

As in all other cases in which requests for records are made under the Freedom of Information Law (FOIL), a request for requests and an agency's response to them should be analyzed in terms of that statute's presumption of access. In short, as you may be aware, FOIL is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, with the exception of portions of certain kinds of requests, the records at issue are accessible under the law.

In my view, the only instances in which requests or responses may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see FOIL, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy. Similarly, if an inmate seeks records concerning his medical care relating to a particular condition or disease, I believe that his or her name and other identifying details may be deleted to protect his or her privacy.

In the words of the Court of Appeals, the exception in the FOIL pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be

regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In many instances, a request or the correspondence between the agency and the applicant for records may not include personal or intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a community board, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. When a request of that nature is made by an individual in a personal capacity, I believe that his or her home address could be deleted prior to disclosure of the remainder of the record.

Requests are frequently made by firms, associations, or persons representing business entities, i.e., professional journalists. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, Nay 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991), and the requests would likely be available in their entirety.

Agencies have in some instances denied access because the records in question do not reflect a final agency determination. That kind of consideration might arise in the context of §87(2)(g), which pertains to "inter-agency or intra-agency materials." I do not believe that it is pertinent in this context, because the records are neither inter-agency nor intra-agency materials; they consist of communications between members of the public or persons representing business entities or interest groups, none of which constitute agencies [see definition of "agency", §86(3)]. As such, §87(2)(g) would not in my opinion serve as a basis for a denial 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-13335

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

April 23, 2002

Mr. James Cheeseman
West Gate Landscaping Inc.
166 Route 59
Suffern, NY 10901

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

Dear Mr. Cheeseman:

I have received your letter of March 25 and the materials attached to it. You have sought an opinion concerning your efforts in gaining access to records from Rockland County relating to the Nauraushaun Brook Improvement Project. Having reviewed the documentation, I offer the following comments.

First, in several items of correspondence, you referred to a requirement that County agencies provide or maintain an "index" identifying the records falling within the scope of your request. From my perspective, there is no such requirement. While each agency is obliged to develop a "subject matter list", that kind of compilation need not refer to records with specificity or particularity. Section 87(3) of the Freedom of Information Law states in relevant part that:

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

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. The regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. It is also emphasized 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. Further, there is nothing in the law that requires an agency to index or identify each record that falls within the scope of a request or those that may have been withheld.

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

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

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

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

While I am unfamiliar with the recordkeeping systems of the County, to extent that the records sought can be located with reasonable effort, I believe that a request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. Further, in the context of the request, a key question might involve, very simply, where County officials might begin to look for records. It is possible that records requested may be maintained in several locations by a variety of units within the County, and that those units may maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding the project in a single file, it may be a simple task to locate the records. If, however, records are not maintained in that manner, but rather by other means, portions of the request might not reasonably describe the records. For instance, correspondence from residents, records regarding easements, construction documents, and communications with other entities of

government might be kept in separate locations by different units within County government. Further, some of those records might be kept under the name of the project, while others might be kept by the name of a person, chronologically or by other means.

Third, it appears that various aspects of the request concern records determined to be available. However, the County chose to deny access to records characterized as "inter-agency or intra-agency materials". I am unaware of the nature of the records found to be deniable. However, I note 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."

The language quoted above indicates that an "agency" is an entity of state or local government in New York. Two entities to which you specifically referred, the Department of Environmental Conservation (DEC) and the State Emergency Management Office (SEMO), constitute "agencies", as do units of local government in New York. Since the definition of "agency" does not include a federal agency, §87(2)(g) could not be cited as a means of withholding communications with or from a federal entity. I note that there is case law involving the assertion of §87(2)(g) in relation to communications between agencies and entities other than New York state or municipal governments. In those instances, it was held that the assertion of §87(2)(g) was erroneous [see e.g., Community Board 7 of Borough of Manhattan v. Schaeffer, 570 NYS 2d 769; affirmed, 83 AD2d 422; reversed on other grounds, 84 NY2d 148 (1994); also Leeds v. Burns, Supreme Court, Queens Cty., NYLJ, July 27, 1992; aff'd 613 NYS 2d 46, 205 AD2d 540 (1994)]. Similarly, communications between the County and persons or entities other than those employed by or representing agencies would not, in my opinion, constitute inter-agency or intra-agency materials.

Insofar as the records sought may properly be considered as inter-agency or intra-agency materials, §87(2)(g) serves as the basis for determining the extent to which they may be withheld. That provision states that an agency may deny access to records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical

or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Terry D. Grosselfinger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13336

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 24, 2002

Mr. Mark R. Aesch
Chief of Staff
Rochester-Genesee Regional
Transportation Authority
1372 East Main Street
Rochester, NY 14609

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

Dear Mr. Aesch:

I have received your letter in which you sought assistance in relation to a denial of a request by the Rochester-Genesee Regional Transportation Authority ("the Authority") for certain records of the Fairport Central School District ("the District").

By way of background, you wrote that a subsidiary of the Authority instituted a program for young passengers called "Books on Buses." In brief, buses are stocked with books for children to read while commuting to school with their parents, and thousands of books have been donated. You added that teachers have used the program as a means of teaching a variety of skills to their students. In an effort to contact elementary teachers to inform them about the program, you sought lists of those teachers from several school districts, and, as I understand your remarks, all but one replied in a positive manner. Specifically, the Superintendent of the District that denied access suggested that the Authority is "a firm", that the list was sought for a commercial purpose, that disclosure would constitute "an unwarranted invasion of personal privacy", and that children are often used as "marketing pawns."

From my perspective, the Superintendent has mischaracterized the nature of the Authority and misinterpreted the Freedom of Information Law. In this regard, I offer the following comments.

First, §1299-dd of the Public Authorities Law provides that the Authority "shall be a body corporate and politic constituting a public benefit corporation", and §1299-ee, in describing the purposes of the Authority, states that:

> "It is hereby found and declared that such purposes are in all respects for the benefit of the people of the state of New York and the

> authority shall be regarded as performing an essential governmental function in carrying out its purposes and in exercising the powers granted by this title."

Based on the foregoing, I do not believe that the Authority can validly be characterized as "a firm" or that its purposes could be described as "commercial." On the contrary, the provision quoted above indicates that its function is governmental.

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.

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. That provision states in relevant part that:

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

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

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

Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

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

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

Third, in general, the reasons for which a request is made or an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City. 642 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. However, §89(2)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses is relevant, and case law indicates that an agency can ask why a list of names and addresses has been requested [see Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980).

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

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

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

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

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Superintendent and the District's Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William C. Cala
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13337

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 24, 2002

Robert F. DeWit
DeWit Insurance Agency, Inc.
P.O. Box A
Cornwall, NY 12518

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

Dear Mr. DeWit:

I have received your letter of March 28 and the materials attached to it. You described difficulty in relation to a request for a record of the Town of Cornwall. In an effort to assist you and enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be sent to Town officials.

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."

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. In my opinion, when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law, or forward the request to the records access officer.

Second, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following

the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that it unnecessarily serves to delay a response to or deny a request for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Elaine Schneer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13338

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 24, 2002

Mr. Michael Kuebler
[redacted]

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

Dear Mr. Kuebler:

I have received your letter and the materials attached to it. You have sought assistance concerning a denial of access to records used by Suffolk County in consideration of your candidacy for the position of police officer. You referred specifically to your interest in obtaining "internal correspondence by Applicant Investigating Officers, Suffolk County Psychologists and all persons present at the appeal review." The denial of access was based on the contention that the records at issue "are considered to be intra/inter agency communications that are not final and that are prepared to assist the decision makers in arriving at a determination."

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

The provision upon which the County relied to deny access, §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 an agency in 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" 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. While I believe that those portions of the records sought consisting of statistical or factual information (i.e., the results of agility tests, height, weight, etc.) must be made available, other aspects of the records, such as opinions or recommendations offered by psychologists, interviewers or other County employees or consultants, could in my view be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Liv Peterson
Derrick Robinson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3446
FOIL-AO-13339

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Helen Bunt
[redacted]

The staff of the Committee on 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. Bunt:

I have received your letter in which you sought assistance concerning your efforts in gaining access to records and meetings in the Town of Cornwall. In consideration of your remarks, I offer the following comments.

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

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

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.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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. From my perspective, the kinds of records that you are seeking should be accessible, for none of the grounds for denial would apply.

Further, it appears that the records in question may be the same in substance as those required to be maintained and made available pursuant to §29(4) of the Town Law. That provision states that the supervisor:

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

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

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

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

Lastly, you referred to gatherings held by "three or more board members without formally announcing meetings." By way of background, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, 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, stated that:

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

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

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

Based upon the direction given by the courts, if a majority of the Board gathers to discuss Town business, collectively as a body and in their capacities as Board members, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law.

I note, too, that the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a town board. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

I note that the judicial interpretation of the Open Meetings Law suggests that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at

> 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Based upon the foregoing, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

In an effort to enhance compliance with and understanding of the statutes discussed in the preceding paragraphs, 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:tt

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13340

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Eric Kent
87-B-1588
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Kent:

I have received your appeals addressed this office on April 21. Two involve access to court records; the other involves records maintained by GEICO, an insurance company.

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

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

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

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

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

With respect to the request for GEICO's records, private entities are not subject to the Freedom of Information Law. Again, based on the definition of "agency", that statute generally applies to entities of state and local government in New York.

Second, for future reference, when an agency denies access to records, the appeal is not made to the Committee on Open Government. The Committee is authorized to provide 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 concerning the right to appeal, §89(4)(a), provides in relevant part that:

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-13341

From: Robert Freeman
To: tclerk@twcny.rr.ny
Date: 4/26/02 11:07AM
Subject: Hi Lisa!

Hi Lisa!

Thanks for your congratulations. I am honored to become a honorary member of the Association, but the truth is that I've always enjoyed working with town clerks. You are ones who do the real work and put politics aside, and that's the way it should be.

Anyway....to your question. Ordinarily there is no prohibition against the disclosure of records. However, in this instance, assuming that the record is subject to the attorney-client privilege, I would contend that one member of the Board could not unilaterally decide to disclose. When a record is subject to the attorney-client privilege, it is confidential by statute (CPLR, section 4503) and, therefore, exempt from disclosure under FOIL.

The client is the Board as a whole, and decisions are made (or are supposed to be made) by means of action taken by a majority of its membership. If three of the five members choose to waive the privilege, the record could clearly be disclosed. However, absent a waiver by a majority, I do not believe that a member could, on his or her own, validly choose to disclose.

While I am not an expert on the subject, I note that section 805(1)(b) of the General Municipal Law prohibits the disclosure of "confidential" information acquired by a municipal official in the course of his or her duties. It is emphasized that records that "may" be withheld are not confidential; only those that are exempt from disclosure by statute may be characterized as confidential. To obtain a lengthy opinion on the subject, you can go the FOIL index to opinions and click on to "confidentiality, assertion of", and then to #12558.

I hope that this helps....and again, thanks for your kind words.

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
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13342

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Joseph W. Sallustio, Jr.
[redacted]

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

Dear Mr. Sallustio:

I have received your letter of April 2 and the materials attached to it. You have contended that you have the right to gain access to "daily attendance records" identifying those who participate in the City of Rome's Toddler Participation Program.

From my perspective, the City is not required to disclose records identifiable to individuals based on an age related characteristic.

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.

One of the grounds for denial, §87(2)(b), states that government agencies may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." It has consistently been advised that records maintained in relation or identifiable to individuals based on an age related characteristic or qualification may be withheld under that provision. While age may not be considered as an item of intimate personal information to some, it is so considered by others. Further, persons falling within certain age ranges, particularly senior citizens and children, are often most vulnerable and may be the targets of unscrupulous persons or entities. In this instance, since the participants are toddlers, I believe that their names and addresses or those of their parents may clearly be withheld to protect their privacy.

If your interest is determining the extent to which non-residents participate in the program, it may be possible to obtain the zip codes of the participants, without their names and addresses. Through disclosure of the zip codes, you could likely determine the extent of participation by non-residents without obtaining or needing their names and addresses.

As indicated in the letter addressed to you by City officials on March 21, when records include information that may be withheld under the Freedom of Information Law, an applicant does not have the right to inspect them. In that circumstance, an applicant seeking the public portions of the records could be charged a fee for photocopying records following appropriate deletions (see Van Ness v. Center for Animal Care and Control, 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

cc: Jeanette D. Reid
James S. Rizzo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13343

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. John F. Russo
Regional Organizer
Laborers' International Union of
North America
P.O. Box 571
Geneva, NY 14456

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

Dear Mr. Russo:

I have received your letter of April 3 and the materials attached to it. You wrote that your request for certified payrolls was denied by Cayuga County, and that you could "understand the reason for denying employees' names, addresses, social security numbers and race..." However, you questioned the denial of access to portions of the records indicating deductions for each employee.

So long as personally identifying details are deleted from the records in question, I believe that the remainder of the records 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. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

Second, assuming that the certified payroll records include a contractor's employees' names, addresses, social security numbers and their wages, I believe that those portions of the 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", and §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 decision 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, I believe that portions of the records reflective of the titles, duties, wages, hours worked and similar data must be disclosed, but that personally identifiable details pertaining to a contractor's employees may be deleted or redacted from the records prior to disclosure.

In the context of your question, if personally identifiable details are deleted, i.e., names, addresses and social security numbers, I believe that the remainder of the records, including data regarding deductions, must be disclosed. Absent those details, the identities of employees could not be ascertained. I note that §89(2)(c)(i) of the Freedom of Information Law specifies that disclosure would not constitute an unwarranted invasion of personal privacy "when identifying details are deleted."

Copies of this opinion will be forwarded as you requested.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Riccardo Galbato
Lee Brew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3449
FOIL-AO-1334

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Jolie Dunham
[redacted]

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

Dear Ms. Dunham:

I have received your note of April 12 and the materials attached to it. You indicated that you are "being 'threatened' for breaking 'confidentiality'" by disclosing information that you acquire during executive sessions in your role as a member of the City of Kingston School District Board of Education. Attached to your correspondence is a memorandum addressed to the Board and the acting superintendent by the District's attorney, Michael K. Lambert, in which he offered an opinion concerning a requirement that Board members "maintain the confidentiality of matters discussed in executive session" and the "consequences [that] may flow to an individual Board of Education member who wrongfully discloses confidential information."

In his opinion, Mr. Lambert cited §805-a(1)(b) of the General Municipal Law, which prohibits a municipal official from disclosing "confidential information acquired by him in the course of his official duties or use such information to further his personal interests." In consideration of that provision, he expressed the belief that "matters that are properly discussed in an executive session that are not otherwise public knowledge are 'confidential' within the meaning of" that statute. He also referred to an opinion that I prepared that offered a different opinion. The issue has arisen since the issuance of that opinion, and I believe that several judicial decisions, both state and federal, support my view. In this regard, I offer the following comments.

For purposes of considering the issue of "confidentiality", reference will be made to the Open Meetings Law, as well as the Freedom of Information Law. Both of those statutes are based on a presumption of openness. In brief, the former requires that meetings of public bodies, such as boards of education, be conducted open to the public, except when an executive session may properly be held under §105(1) or when a matter is exempt from its coverage; the latter requires that agency records be made available to the public, except to the extent that one or more grounds for denial access appearing in §87(2) may properly be asserted. 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." 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 state's highest court, 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 Freedom of Information 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 has 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 v. Burns, 67 NY2d 562, 567 (1986)].

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, when a governmental entity may choose to disclose or withhold records or to discuss in issue in public or in private, I do not believe that the records or the discussion may be considered "confidential"; only when the government has no discretion and must withhold records or discuss a matter in private could the records or information be so considered.

Viewing the matter from a different vantage point, there are federal decisions indicating that general prohibitions against disclosure by government employees are unconstitutional. Although you are not an employee, but rather an elected member of the governing body of a public corporation, I believe that the thrust of case law is pertinent.

In Harman v. City of New York [140 F.3d 111 (2nd Cir. 1998)], 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).

Again, you are not an employee, but rather an elected official. In my view, one of the responsibilities of elected officials involves speaking out on issues of concern to the public.

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).

In my opinion, in the context of school district business, matters would be "confidential" only on rare occasions. Those situations might involve information that is derived from student records or perhaps 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.

The general prohibition suggested by Mr. Lambert 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.

What if, after an executive session, a member of the Board 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 law? I note, too, that Mr. Lambert referred to matters "properly discussed in executive session." Frequently executive sessions are convened for "proper" reasons, but the public body drifts into a new subject. My hope is that there will always 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?

Lastly, while there may be no prohibition against disclosure of most of the information discussed in an executive session, to reiterate a pointed offered in other opinions rendered by this office, 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.

Copies of this opinion will be forwarded to the Board of Education and Mr. Lambert.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Michael K. Lambert

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FPPL-AL-35
FOIL-AO-13345

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Christine M. Tomczak
Public Access Officer
NYS Banking Department
Two Rector Street
New York, NY 10006

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

Dear Ms. Tomczak:

I have received your letter of April 10 and the correspondence relating to it. You have sought an advisory opinion concerning a request for "a copy of a reference letter provided to the Banking Department in connection with an individual's...application to obtain a license to operate as a mortgage broker..." The attorney for the applicant indicated that his employer "acknowledged his authorship of the letter" and contended, therefore, that there is "no privacy issue concerning the letter's origin."

From my perspective, notwithstanding the applicant's knowledge of the identity of the author of the letter, it may be withheld. In this regard, I offer the following remarks.

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)(b), states that an agency may withhold records when disclosure would "constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article..." In turn, §89(2)(b)(i) states that an unwarranted invasion of personal privacy includes, but shall not be limited to:

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

Based upon the direction provided in the language quoted above, I believe that a letter of reference pertaining to an applicant for employment could justifiably be withheld. While the person seeking the record is not an applicant for employment, but rather an applicant for a license, I believe that the rationale and justification for a denial of access would be the same.

In the case of a reference submitted in relation to an application for employment, the exception to rights of access is, in my view, based on an intent and a need to ensure that the author can offer candid remarks concerning the applicant without a requirement that his or her views will be made known to the applicant. As indicated in the introductory language of §89(2)(b), situations in which disclosure would constitute an unwarranted invasion of personal privacy are not limited to the examples that follow. In this instance, the Banking Department has a need to obtain a frank assessment of the applicant by his employer and perhaps others, and without the capacity to withhold letters of reference for the purpose of protecting the privacy of the employer or others, it would be impeded in its ability to reach appropriate determinations to grant or deny applications for licenses.

I recognize that §89(2) indicates that portions of records might be made available following the deletion of personally identifying details. Nevertheless, the applicant is aware of the identity of the author, and consequently, the deletion of identifying details would not serve to protect the privacy of the author. It is noted that advice consistent with this commentary has been offered in a variety of contexts. For example, it has been advised that when allegations or complaints are made regarding licensees or public employees, those portions of the complaints that would identify complainants may be withheld to protect their privacy. However, if it is clear in consideration of the facts and circumstances that the deletion of a name or other identifier would not serve to protect the privacy of the complainant, it has been advised that the complaint may be withheld in its entirety.

It may be contended, too, that disclosure would contravene the Personal Privacy Protection Law. As a "data subject", the applicant generally enjoy rights of access to records about himself. However, insofar as the records pertain to or identify others, there are 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 Privacy Protection Law, it is precluded from disclosing under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3450
FOIL-AO-13346

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 3, 2002

Mr. R.A. Vogan
[redacted]

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

Dear Mr. Vogan:

I have received your letter and the materials attached to it. You referred to an advisory opinion prepared on April 2 in which I addressed a series of issues, and you have sought my views concerning a variety of other matters as they relate to the Lake Shore Central School District and its Board of Education.

First, you wrote that policies considered by the Board are not available to the public until they have been approved. In this regard, I dealt indirectly with that issue in the response of April 2. The provision dealing with the matter, §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..."

As indicated earlier, those portions of intra-agency materials that consist of recommendations, advice, or opinions, for example, need not be disclosed. From my perspective, a proposed policy is essentially a recommendation that may be withheld. This is not to suggest that a record of that nature must be withheld, for the Board and the District have discretionary authority to disclose it. Further, there are many instances in which proposed policies and similar records are disclosed prior

to their adoption as a means of enhancing the public's understanding of an issue policies and to elicit the views of interested persons.

Second, you contended that the descriptions of the subjects to be discussed during executive sessions are inadequate and that the Board conducts "inappropriate business" during executive sessions. By means of example, you referred to executive sessions held to discuss "personnel issues" and "negotiations" and numerous topics that have been considered in executive session, including ain appropriation for emergency repairs, setting the date for high school graduation, approval of a resolution for the "support of safe homes" and contracts for administrators, support for "libraries legislation", creation of a school monitor position, etc. In addition, you referred to a discussion of a new position at a "retreat."

In this regard, by way of background, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

In my view, insofar as a retreat dealt with the creation of positions or other items of Board business, the gathering constituted a "meeting" that should have been conducted open to the public in accordance with the Open Meetings Law and preceded by notice given pursuant to §104 of that statute.

Third, 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.

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 particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

When a discussion concerns matters of policy, such as the manner in which public money 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 issues" 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)].

Next, with respect to "negotiations", the only provision of the Open Meetings Law in which that term appears, §105(1)(e), pertains to collective bargaining negotiations involving a public employee union. Not all negotiations involve collective bargaining, and the application of that provision as a basis for conducting an executive session is limited. Further, it has been held that motion under §105(1)(e) should identify *the* negotiations that are the subject of the discussion, i.e.,

"I move to enter into executive session to discuss the collective bargaining negotiations with the teachers' union."

Lastly, it appears that the Board has routinely taken action during executive sessions. Based on judicial decisions, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Carter Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13347

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 6, 2002

Mr. William A. Hurst
McNamee, Lochner, Titus & Williams, P.C.
P.O. Box 459
Albany, NY 12201-0459

Mr. Jeffrey D. Wait
City of Saratoga Springs
City Attorney's Office
City Hall, Room 9
Saratoga Springs, NY 12866

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

Dear Mr. Hurst and Mr. Wait:

I have received your letters, which are respectively dated April 5 and April 11, as well as a variety of related materials. The matter involves a delay in disclosing records requested from the City of Saratoga Springs on behalf of the Saratoga Lake Association. As I understand the matter, there appears be no dispute at this juncture concerning rights of access to the contents of the records sought; rather the issue appears to be the delay in disclosure by the City.

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

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

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

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 a request is voluminous and a significant amount of time is needed to locate records or review them to determine rights of access, a substantial period, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, insofar as records or reports are clearly public and can be found easily, there would appear to be no rational basis for a lengthy delay in disclosure.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13348

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. Robert S. Risman, 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. Risman:

I have received your letter in which you requested an advisory opinion pertaining to the availability of various police records concerning a "possible domestic dispute" involving your neighbor, who is "currently a lieutenant with the New York Police Department." You indicated that you "wrote a letter to each investigating officer in an attempt to FOIL the case number of the file, the file itself, the police report and findings, the names of the three officers on the scene, and a copy of [your] own statement for [your] records and to check for accuracy." You further indicated that you have not received responses 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.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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 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.

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

While I am unfamiliar with the contents of the records at issue, several of the grounds for denial might be pertinent.

For instance, pursuant to §87(2)(e), an agency may withhold records or portions thereof that:

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

i. interfere with law enforcement investigations or judicial proceedings...

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

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

The leading decision concerning subparagraph (iv) is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

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

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The

> information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

While I am unfamiliar with the records in question, it is my understanding that complaint follow-up reports are typically brief. Upon information and belief, they generally contain factual information relating to a particular event; ordinarily, they would not contain detailed descriptions of investigative techniques. From my perspective, as the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. However, in view of the general contents of those records, it would likely be rare that §87(2)(e)(iv) would serve as a basis for withholding.

As suggested earlier, the foregoing is not intended to indicate that the content of a police officer's activity log must be disclosed in its entirety; on the contrary, the suggestion is that the record would be available or deniable, in whole or in part, based upon its specific content.

Lastly, it has been advised that identifying details pertaining to those involved in a domestic dispute need not be disclosed unless there is an arrest, in which case the identity of the person charged would be public. A record of that nature would in my view remain public unless charges are dismissed, in which case the records relating to the event would be sealed pursuant to §160.50 of the Criminal Procedure 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-13319

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. Larry Greenstein
[redacted]

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

Dear Mr. Greenstein:

I have received your letter in which you sought guidance concerning rights of access to records transmitted to school districts by the Office of Facilities Planning at the State Education Department pertaining to compliance with the Americans with Disabilities Act and building code requirements. You also sought clarification concerning the provision dealing with an agency's obligation to disclose external audits.

In this regard, first, I believe that the term "audit" should be accorded its common meaning. An ordinary dictionary definition of the term suggests that it means "the final report of an examination of books of account by an auditor" or "a methodical examination and review" (Webster's Seventh New Collegiate Dictionary). In the context of the Freedom of Information Law, the term in my view typically relates to financial, program or management audit of a unit of government or component of a unit of government. I do not believe that the kinds of communications to which you referred could be characterized as an audit.

Second, in my view, the content of the records in question would serve as the determining factor in considering the extent to which they must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision to which you alluded would likely govern rights of access. Specifically, §87 (2)(g) enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

One of the contentions offered by the New York City Police Department in a decision rendered by the 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" 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 opinion, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, expressions of policy or final determinations, they must be disclosed.

I point out that the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13350

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. Peter Osinski
Town of Cornwall
Office of Town Clerk
183 Main Street
Cornwall, NY 12518

Dear Mr. Osinski:

As you requested, I have reviewed the form that may be used to seek records from the Town of Cornwall under the Freedom of Information Law, as well as the instruction sheet for applicants for records.

In general, the form, in my opinion, is consistent with the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401). However, I would like to offer two minor suggestions.

In the instructions (and "instructions" is misspelled), it states that an applicant should "identify the specific records" sought. I note that the original version of the Freedom of Information Law required that an applicant seek "identifiable" records. That standard resulted in difficulties and frustration on the part of many, because they could not name or specify exactly which records they wanted to inspect or copy. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records. Therefore, the applicant is not required to specify with particularity the records of his or her interest; rather, he or she should provide sufficient detail to enable the records access officer and other agency staff to locate the records. In a related vein, in many instances, it is appropriate for you or staff to describe the manner in which records are kept (i.e., by address, in chronological order, etc.). By so doing, a request can be made in a manner consistent with an agency's filing or recordkeeping system.

An area of possible concern involves the appeal to the Town Board. Under §89(4)(a) of the Freedom of Information Law, a person denied access to records has the right to appeal to the Town Board as the governing body, or to a person or body designated by the Board to determine appeals. While the appeal to the Board is fully consistent with law, in similar situations, problems have occurred, because the Board must, by statute, determine the appeal within ten business days of its receipt. If it is not scheduled to have a meeting within that time, a special meeting would have to be called in accordance with both §62 of the Town Law and the Open Meetings Law in order to consider the appeal and render a determination. Often it has been difficult to convene a quorum or

hold a meeting within ten business days, and consequently, it has been suggested that the governing body designate a person (i.e., the Supervisor, the Town Attorney, etc.) to determine appeals. By so doing, the necessity of holding a meeting is avoided.

Your interest in compliance with law is much appreciated, and I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13351

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 13, 2002

E-MAIL

TO: Patrick Hoey [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. Hoey:

I have received your letter in which you sought advice concerning a request made under the Freedom of Information Law to the Nassau County Board of Elections. Specifically, you sought a list of political party committeemen, including their addresses, but the County provided names without addresses.

In this regard, it is noted at the outset that I am not an expert with respect to the Election Law and that I am unaware of the requirements concerning recordkeeping in relation to names and addresses of committeemen. I point out, however, that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency, such as the Board of Elections, is not required to create a record in response to a request. If the Board maintains the names, but not the addresses, the Freedom of Information Law would not require the Board to acquire the addresses or prepare a new record that includes both names and addresses.

If the Election Law or some other provision of law requires the Board to maintain and disclose names and addresses of committeemen, I believe that such a provision would supersede the Freedom of Information Law.

I hope that I have been of assistance.

cc: Commissioner DeGrace

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13352

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 13, 2002

Mr. Richard Bernard Lyon
82-C-0626
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Lyon:

I have received your letter addressed to the Secretary of State of the New York. Under various provisions of New York law, you requested records relating to your arrest in Florida in 1981.

In this regard, the provisions of the Freedom of Information Law and the other statutes to which you referred are applicable to records maintained by governmental entities in New York; they do not apply to records maintained in Florida or any other state. Further, the Department of State does not carry out law enforcement functions in the context of the situation that you described and does not possess the kinds of records that you requested.

Insofar as you might seek records maintained in New York, I note that the Freedom of Information Law applies to agency records and that §86(3) defines the term "agency" to mean:

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

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

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

Based on the foregoing, the Freedom of Information Law of New York pertains to records maintained by entities of state and local government, but not the courts. However, frequently court records are available under other provisions of law (i.e., Judiciary Law, §255), and it is suggested that a request for court records be made to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

When seeking agency records, a request should be made to the "records access officer" at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. Again, the Department of State does not maintain the kinds of records that you described.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13353

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Mary C. Beyers
[redacted]

Dear Ms. Beyers:

I have received your letter concerning your efforts in obtaining records under the Freedom of Information Law from the Town of Evans Justice Court. You asked that I "explain the rules to them."

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

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

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

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., 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,

Robert J. Freeman
Executive Director

RJF:jm

cc: Justice Court, Town of Evans

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13354

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Richard J. Logis
The Patent Trader
185 Kisco Avenue
Mount Kisco, NY 10549

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

Dear Mr. Logis:

I have received your letter in which you sought an advisory opinion "affirming that a final rating [of a public employee's performance] is indeed a public document."

From my perspective, a final rating of a public employee's performance that appears on an evaluation, for example, must ordinarily be disclosed. However, in order to learn more of the matter of your interest, I contacted Ms. Katherine Robbins, Records Access Officer for the Byram Hills School District and the recipient of your request. In brief, I was informed that no final rating was prepared concerning the employee who is the subject of the request. It is my understanding that the Superintendent offered a recommendation to the Board of Education concerning the employee, but that the employee submitted a letter of resignation, effective at the end of the school year, before the Board determined to accept, reject or modify the Superintendent's recommended rating. In short, if no record indicating a final rating exists, no record of that nature would have been withheld, and the Freedom of Information Law would not apply.

When there is a final rating, again, I believe that it should be made accessible. By way of background, as you may be aware, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another and from one employee to another. Neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

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. Two of the grounds for denial are relevant to an analysis of rights of access to an employee evaluation.

Section 87(2)(g) enables an agency to withhold records that:

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

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

Also significant is §87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear based upon judicial decisions that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, with regard to records pertaining to public employees, the courts have found in a variety of contexts that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

While the contents of performance evaluations may differ, I believe that a typical evaluation contains three components.

One involves a description of the duties to be performed by a person holding a particular position, or perhaps a series of criteria reflective of the duties or goals to be achieved by a person holding that position. Insofar as evaluations contain information analogous to that described, I believe that those portions would be available. In terms of privacy, a duties description or statement of goals would clearly be relevant to the performance of the official duties of the incumbent of the position. Further, that kind of information generally relates to the position and would pertain to any person who holds that position. As such, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In terms of §87(2)(g), a duties description or statement of goals would be reflective of the policy of an agency regarding the performance standards inherent in a position and, therefore, in my view, would be available under §87(2)(g)(iii). It might also be considered factual information available under §87(2)(g)(i).

The second component involves the reviewer's subjective analysis or opinion of how well or poorly the standards or duties have been carried out or the goals have been achieved. In my opinion, that aspect of an evaluation could be withheld, both as an unwarranted invasion of personal privacy and under §87(2)(g), on the ground that it constitutes an opinion concerning performance.

A third possible component, as in this instance, is often a final rating, i.e., "good", "excellent", "average", etc. Any such final rating would in my opinion be available, assuming that any appeals have been exhausted, for it would constitute a final agency determination available under §87(2)(g)(iii), particularly if a monetary award is based upon a rating. Moreover, a final rating concerning a public employee's performance is relevant to that person's official duties and therefore would not in my view result in an unwarranted invasion of personal privacy if disclosed.

In the context of the facts as I understand them, the Superintendent prepared a recommendation for review by the Board. The recommendation could in my view be withheld under §87(2)(g). If the Board determined to accept, reject or modify the Superintendent's recommendation, a final determination would have been rendered, and based on the preceding commentary, I believe that it would have been accessible. However, since a letter of resignation was submitted prior to any action by the Board, no final rating was apparently prepared.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Katherine M. Robbins

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-297
OML-AO-3456
FOIL-AO-13355

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Katy Odell
Editor
North Creek News-Enterprise
P.O. Box 85
North Creek, NY 12853

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

Dear Ms. Odell

As you are aware, I have received your letter of April 11 in which you sought an advisory opinion concerning "how much information [you] can expect to obtain" pertaining to an employee of the Johnsburg Central School who was the subject of disciplinary charges and later resigned. Specifically, you raised the following questions:

> "1) Should the board have named the individual Wendy Raymond when it took its first action on April 8 to suspend here, but did not name her?
>
> 2) Should the board have stated publicly in the April 8 meeting motion the reason for its disciplinary action of suspension without any pay against 'an employee' who we now know is Wendy Raymond?
>
> 3) Now that we know the name of the person in question because she has resigned, how much more detail must be publicly available according to FOIL? Does the Personal Privacy Protection Law apply here? For example, must the school release to us if requested:
>
> • Raymond' position/title at the school (we believe she is a staff member, not a teacher, but have not yet confirmed this)
> • Her length of employment
> • Her address and age
> • Any prior disciplinary actions against her."

In this regard, I offer the following comments.

First, the Personal Privacy Protection Law would not have been pertinent, for that statute applies only to records maintained by state agencies; it excludes units of local government, such as schools or school districts, from its coverage.

Second, it is unclear on the basis of your letter whether the subject of the action taken was a tenured employee. If she was tenured, §3020-a of the Education Law would have required that the Board initiate charges during an executive session. If she was not a tenured employee, the Board would nonetheless have had a basis for considering the matter in executive session. Section 105(1)(f) permits a public body to enter into executive session to discuss:

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

The issue clearly would involved either the employment history of a particular person or a matter leading to the discipline of a particular person, thereby enabling the Board to validly conduct an executive session.

Although the Open Meetings Law requires that a motion for entry into executive session indicate "the general area or areas of the subject or subjects to be considered", it has been advised that a motion to initiate charges, for example, need not identify the employee. Guidance to that effect has been offered based in part on the judicial interpretation of the Freedom of Information Law. In brief, it has been held that 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 be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b); Herald Company v. School District of the City of Syracuse, 430 NYS2d 460 (1980)].

In consideration of the foregoing and in response to the first two questions that you raised, I do not believe that the Board would have been required to name the subject of the discussion or that the charges, which were not proven, would have to have been disclosed.

Third, several of the remaining items of your interest must, in my view, be made available.

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

Perhaps of greatest significance is the provision cited earlier, §87(2)(b), concerning unwarranted invasions of personal privacy.

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

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

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

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

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which allegations or charges have resulted in the issuance of a written reprimand,

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

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

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

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

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access.:

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

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee

> suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

In consideration of the foregoing and your questions, it is clear that a public employee's title must be disclosed, for it clearly relates to the performance of one's duties. Records indicating length of one's employment would also be available based on the same rationale. I note, too, that attendance and leave records have been found to be accessible (see Capital Newspapers, supra). Similarly, in view of judicial decisions cited earlier, if there were determinations in which disciplinary action was taken, records reflective of those actions would also be accessible under the law. With respect the home address, §89(7) specifies that the home address of a present or former public employee need not be disclosed, and it has been consistently advised that one's age may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

I hope that the foregoing serves to clarify your understanding of open government laws and 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-13356

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Carman Williams-Murray
[redacted]

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

Dear Ms. Williams-Murray:

I have received your letter in which you sought an advisory opinion concerning a denial of access by the New York City Housing Authority to fax numbers and email addresses of its employees. The denial of your request is based on a contention that the items sought "do not constitute 'the documents and statistics leading to determinations.'"

From my perspective, whether the items in question consist of documents or statistics is irrelevant; the only question involves the extent to which they may be withheld in accordance with the grounds for denial of access appearing in the Freedom of Information Law.

As you may be aware, 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 some circumstances, fax lines may be dedicated to certain uses. If those lines were to become tied up by an outsider and could not be used as intended, an agency could be precluded from carrying out its duties in a manner in which the public would be adequately served or protected. For example, if a telephone or fax number is used by a municipality to engage in law enforcement functions or emergency communications, and if the municipality cannot transmit or receive information due to incoming faxed transmissions that tie up the line, I believe that §87(2)(f) would likely serve as a basis for a denial of a request. That provision authorizes an agency to withhold records when disclosure "would endanger the life or safety of any person."

I note that an agency has the burden of defending secrecy and demonstrating that records that have been withheld fall within the scope of one or more of the grounds for denial [see §89(4)(b)]. However, in cases involving the assertion of §87(2)(f), the standard developed by the courts is somewhat less stringent, for it has been found that:

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

It is noted that the principle enunciated in Stronza has appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Division of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994]. In sum, insofar as there is a possibility that disclosure of phone or fax numbers could endanger life or safety, based on judicial decisions, I believe that §87(2)(f) could properly be asserted.

A similar contention might be made with regard to the disclosure of e-mail addresses. While I am not an expert in computer technology, it has become widely known due to events that became international in their effects that e-mail and the use of an e-mail address can transmit viruses that can cripple an electronic information or communication system or obliterate information stored electronically. A virus attached to a single e-mail address can be transmitted to every other e-mail address that has been contacted. That being so, again, it might be contended that a wholesale disclosure of e-mail addresses, which in turn could result in an inability to carry out critical governmental functions, could jeopardize the lives and safety of members of the public, as well as government employees.

Moreover, a new provision amending §87(2) that is especially pertinent to the matter became effective in October. Specifically, paragraph (i) states that an agency may withhold records or portions thereof which "if disclosed would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." Via disclosure of email addresses, viruses could be transmitted or other incursions might occur that could result in the harm sought to be avoided by the new provision cited above.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: LeeAnne Tuller
Earl Andrews

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13357

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Wayne Jackson
The Capitol
Suite 7274
Albany, NY 12224-0274

The staff of the Committee on Open 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 in which you asked whether a not-for-profit corporation that receives public money is required to disclose records pursuant to the Freedom of Information Law.

From my perspective, the receipt of public moneys is not the key factor in determining the application of the Freedom of Information Law. Rather, the application of that statute is dependent on whether an entity is governmental in nature.

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."

Based on the foregoing, "governmental" entities, i.e., entities of state and municipal government, fall within the scope of the Freedom of Information Law. In my view, the receipt of government money does not transform a not-for-profit or profit-making entity into a governmental entity that would be subject to that law.

I know of no judicial decision that focuses squarely on the issue.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13358

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

May 15, 2002

Ms. Mary Ules
[redacted]

The staff of the Committee on 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. Ules:

I have received your letter of April 9 and the materials attached to it, which relate to requests made to the City of Utica and the City's responses indicating that the records did not exist. You have asked whether "filing an article 78 would have been appropriate course of action to take" in the circumstances described in the materials.

Several items sent to you by the City indicated that the records of your interest did not exist. On March 30, an assistant corporation counsel wrote that "[a]ll complaints are logged into a Codes Department computer system" and that "[t]here is no indication on the computer system that a written report was made responding to the complaint since there is no log-in of any such written report." On April 7, a "search certification" was prepared, and it was asserted that no record relating to a particular complaint could be found. In a letter of May 7, the same assistant corporation counsel referred to the certification, stating that the record of your interest "does not exist", that no record was created and that the certification was not a "Denial of Access."

From my perspective, for purposes of the Freedom of Information Law, a denial of access occurs when an agency maintains a record and determines to withhold it; there is no denial of access when the record sought does not exist or is not maintained by the agency in receipt of a request. When there is a denial of access, "the person denied access to a record may...appeal" in accordance with paragraph (a) of §89(4). If an appeal is denied because a record has been withheld, paragraph (b) of §89(4) indicates that the determination to withhold records may be reviewed by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. That provision states in relevant part that:

> "...a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules."

The responses by the City indicate that no records were withheld because no records falling within the scope of your request existed. That being so, it does not appear that there would have been a basis for initiating an Article 78 proceeding pursuant to §89(4)(b) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: John Orillio, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13359

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Peter Marotta
Hudson Valley Arts Center
P.O. Box 274
Hudson, NY 12534

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

Dear Mr. Marotta:

I have received your letter concerning a request made under the Freedom of Information Law to the Empire State Development Corporation for a certain report. You were informed that the report did not exist, even though it apparently should have been submitted to that agency prior to the date of your request.

In this regard, the Freedom of Information Law pertains to existing records. If the report of your interest had not been prepared or received by the Empire State Development Corporation at the time of your request, there would have been no record to disclose, and the Freedom of Information Law would not have applied. Whether the report should have existed at the time of your request involves a matter that would pertain to requirements separate from those imposed by the Freedom of Information Law.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert J. Beshaw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13360

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Ms. June Maxam
[redacted]

The staff of the Committee on 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 letter in which you questioned the propriety of a fee assessed by the Department of State for copies of records sought under the Freedom of Information Law.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law limits the fee that may be charged by an agency to "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*" (emphasis added). One such statute is §96 of the Executive Law, which provides that:

> "...the department of state shall collect the following fees...
>
> 3. For a copy of any paper or record not required to be certified or otherwise authenticated, fifty cents per page..."

Based on the foregoing, I believe that the Department of State was required, by statute, to charge fifty cents per photocopy for copies of the records of your interest.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Theresa Wescott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13361

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Ms. Ann Ruzow Holland
Executive Director
Friends of the North Country, Inc.
P.O. Box 446
Keeseville, NY 12944-0446

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

Dear Ms. Holland:

I have received your letter in which you sought assistance concerning the application of the Freedom of Information Law to the Friends of the North Country, Inc. ("Friends"), which is "a private, not-for-profit, tax exempt corporation..." Although Friends is not a governmental entity, you wrote that:

> "...we have contracts with New York State (NYS) Housing Trust Fund Corp., New York State (NYS) Affordable Housing Corp. and Franklin County to provide administrative services for Housing Rehabilitation Programs. With regard to NYS Affordable Housing Corp., we are considered a 'grantee'. With regard to the NYS Housing Trust Fund Corp., we are considered a 'contractor'. Lastly, with regard to the Franklin County Disaster Recovery Initiative, we are considered a 'sub-recipient'."

As you may recall from our earlier correspondence, 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 entities of state and local government in New York. I do not believe that Friends could be characterized as an agency or that it has a responsibility to comply with the Freedom of Information Law.

Nevertheless, in consideration of its relationships with governmental entities, it appears that some of Friends' records may fall within the scope of the Freedom of Information Law. For purposes of that statute, the term "record" is defined 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).

Perhaps most significant is a decision rendered by the Court of Appeals, the state's highest 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. 417 (1995)].

Insofar as records maintained by Friends are "kept, held, filed, produced or reproduced...*for* an agency", such as the New York State Housing Trust Fund Corporation, i.e., for the purpose of providing administrative services that would otherwise be provided by that entity, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform Friends into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it maintains are maintained for an agency, and that those records would fall within the coverage of that statute.

In other circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records

access officer of that agency. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation that you described, if Friends maintains records for the Housing Trust Fund Corporation, a request should be made to the Corporation's records access officer. To comply with the Freedom of Information Law and the implementing regulations, the records access officer would either direct Friends to disclose the Corporation's records in a manner consistent with law, or acquire the records from Friends in order that he or she could review the records for the purpose of determining rights of access.

To reiterate, the responsibility to give effect to or comply with the Freedom of Information Law would not involve Friends, but rather the government agency whose records are maintained by Friends on its behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13362

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Gerald Pauletti
[redacted]

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

Dear Mr. Pauletti:

I have received your letter of April 12 and the materials attached to it. You have sought assistance in relation to requests made under the Freedom of Information Law to Community School District 27 in Ozone Park.

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 provides in relevant part that an agency is not required to create a record in response to a request. For instance, if there is no record containing a "total" number of hours allotted to a program, there would be no obligation to prepare a total on your behalf. Similarly, if there is no record specifying the "number of years and months teaching experience" in a particular subject, there would be no requirement that staff review records for the purpose of creating a record containing the information sought.

In a related vein, records must be maintained in accordance with schedules indicating minimum retention periods before they may be discarded. In some instances, records must be kept permanently; in many others, they may be destroyed following particular time periods, and those periods are generally based on the significance of the records. Since you are seeking records that may involve matters occurring a dozen years ago or perhaps longer, I would conjecture that many have legally been destroyed. Insofar as records falling within the scope of your request are no longer maintained, the Freedom of Information Law would not apply.

Second, an issue of possible significance involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the 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 the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding a certain subject or program, since the beginning of its existence, in a single file, it may be a simple task to locate the records. If, however, records are not maintained by subject, but rather are kept chronologically, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

Third, insofar as the information sought exists in the form of a record or records and can be found with reasonable effort, 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, that a person is licensed or certified as qualified to teach certain subject or to coach, for example, would involve a matter relevant to the performance of that person's duties, and a record indicating the grant of a license or certification would be public. Similarly, records indicating titles, dates during which certain duties were performed would, in my view, be accessible. Other items, such as dates of birth, have little or no relevance to the performance of one's official duties and my in my opinion be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chancellor Levy
Patrick Boyd
Mohamed Ahmed

SPL-AC-3618
FOIL-AC-13363

From: Robert Freeman
To: [redacted]
Date: 5/17/02 12:31PM
Subject: Dear Mr./Ms. Basze:

Dear Mr./Ms. Basze:

I have received your letter concerning records relating to a relative who passed away in 1938 at religious facility.

In this regard, the Freedom of Information Law is applicable to records maintained by state and local government in New York, and the Personal Privacy Protection Law pertains to personal information maintained by state agencies. Therefore, neither of those laws would apply to a private or religious organization.

To the best of my knowledge, the religious facility would not be obliged to withhold the kinds of records of your interest, but there is no law that would forbid disclosure. It is suggested that you contact the office that oversees or has jurisdiction over the facility, that you indicate your relationship to the deceased, and that you emphasize, since the death occurred more than 60 years ago, that the records have primarily historical and personal value to your family.

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

CML-AO-3458
FOIL-AO-13364

From: Robert Freeman
To: [redacted]
Date: 5/17/02 12:23PM
Subject: Dear Mr. Farbstein:

Dear Mr. Farbstein:

I have received your inquiry concerning "access to library hearing records" and whether those records are subject to the Freedom of Information Law.

In this regard, first, as a general matter, the Freedom of Information Law applies to records maintained by entities of state and local government. Some libraries, such as school district or municipal libraries, are clearly governmental entities, and their records would be subject to rights of access conferred by the Freedom of Information Law. Others, even though they may be called "public" libraries and receive significant government funding, are not-for-profit entities (i.e., association and free association libraries). In those instances, because they are not governmental, I do not believe that the Freedom of Information Law would apply.

Second, you referred to a "library hearing". I am unfamiliar with that phrase. If you mean a "meeting" of a library board of trustees, those boards, including those that may be not-for-profit as described above, are required by section 260-a of the Education Law to comply with the Open Meetings Law. Under that law, meetings of those boards are presumptively open to the public, and minutes would have to be prepared.

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 - 13365

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 20, 2002

Mr. Stephen Van Woert
[redacted]

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

Dear Van Woert:

I have received your letter and the materials attached. You have complained with respect to delays in response to your request for records made to the Department of Transportation.

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

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

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.

In my opinion, 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 period, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, insofar as a record or report is clearly public and can be found easily, there would appear to be no rational basis for a lengthy delay in disclosure.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: John Dearstyne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13366

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 20, 2002

Mr. Bill O'Neil
[redacted]

The staff of the Committee on Open 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'Neil:

I have received your letter concerning your right to inspect records, rather than paying a fee for copies.

In this regard, when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there are often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the ground for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record.

For example, I do not believe that you would have the right to inspect W-2 forms, for they include information that you have no right to see. Based upon the direction provided by the Freedom of Information Law and the courts, insofar as W-2 forms pertaining to public employees indicate gross wages, they must be disclosed. However, pursuant to §87 (2)(b) of the Freedom of Information Law concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

In short, while portions of payroll records containing names and gross wages must be disclosed, an agency could seek payment of the requisite fee for photocopies, which would be made available after the deletion of certain details (see Van Ness v. Center for Animal Care and Control and the New York City Department of Health, Supreme Court, New York County, January 28, 1999). Again, however, if a record is available in its entirety, I believe that you would have the right to inspect it free of charge.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13367

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 20, 2002

E-Mail

TO: [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear "Tortmegood":

I have received your letter in which you wrote that the agency by which you are employed "does not publicize the information set forth in 21 NYCRR s. 1401.9." When you raised the issue, you were informed that "it may generate more FOIL requests", which, according to your statement, total approximately 3,000 per year. You have asked what may be done to encourage compliance.

In this regard, the provision in question states that:

> "Each agency shall publicize by posting in a conspicuous location and/or by publication in a local newspaper of general circulation:
>
> (a) The location where records shall be made available for inspection and copying.
>
> (b) The name, title, business address and business telephone number of the designated records access officers.
>
> (c) The right to appeal by any person denied access to a record and the name and business address of the person or body to whom an appeal is to be directed."

Based on the foregoing, an agency has a choice regarding its effort to comply with requirements imposed by §1401.9. It may publish the requisite information in a newspaper. Some agencies have done so, and typically, publication of that nature occurred once, soon after the regulations were promulgated in 1978. I note that there is no requirement that notice be published

annually or more than once. In addition or alternatively, an agency may post the requisite information in a conspicuous location. Many agencies have done so by posting the information continuously on bulletin boards or agency directories, for example.

In an effort to enhance compliance, it is suggested that you share this response with those responsible for ensuring compliance with the Freedom of Information Law at your agency. If an agency fails or refuses to carry out a requirement imposed by law, as you are aware, a person may seek to compel compliance by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-13368

From: Robert Freeman
To: taber@cityofjamestownnny.com
Date: 5/21/02 2:56PM
Subject: Dear Ms. Taber:

Dear Ms. Taber:

I attempted to reach you by phone to discuss your inquiry without success.

It has been advised that requests made under the FOIL are available, except to the extent that the requests themselves include intimate personal information. For instance, if a recipient of public assistance seeks records pertaining to himself or herself from a department of social services, disclosure of that person's identity would indicate that he or she is poor and would constitute an "unwarranted invasion of personal privacy." In that situation, the substance of the request should be disclosed, but the personally identifying details could be deleted.

In the situation that you described, the requests were not made by a person, but rather by an entity, the Jamestown Professional Firefighters. If that is so, there would no issue relating to privacy, and I believe that the requests would be available.

If you would like to discuss the matter, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13369

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Allan Marshall
95-R-6269
Clinton Correctional Facility
P.O. Box 2002 - Annex
Dannemora, NY 12929

Dear Mr. Marshall:

I have received your letter of May 16 in which you appealed to this office in relation to your request for all "records and documents filed against [the Clinton Correctional Facility] and its personnel regarding discrimination and retaliation."

Please be advised that the primary function of the Committee on Open Government involves providing opinions and guidance concerning the Freedom of Information Law. The Committee does not have possession or control of records generally, and it is not empowered to determine appeals. The provision pertaining to the right to appeal under statute, §89(4)(a), states in relevant part that:

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

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

I note, too, that your request is unlimited in terms of time, and that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Insofar as the records of your interest can be found with reasonable effort, I believe that the request would meet that standard. However, if, due to the nature of the Department's filing or recordkeeping systems, a review of hundreds or perhaps thousands of records would be needed to locate those falling within the scope of your request, I do not believe that the request would have reasonably described the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13370

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Nick Tripoli
[redacted]

Dear Mr. Tripoli:

I have received your letter in which you raised a series of questions concerning your difficulty in obtaining records from the Town of Princetown.

In this regard, first, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, such as a town board, 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."

In consideration of the foregoing, the records access officer must "coordinate" an agency's response to requests. Therefore, I believe that requests may be made to town officials generally. In my opinion when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law, or forward the request to the records access officer.

Second, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

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

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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)].

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).

Lastly, that litigation has been or may be commenced has no impact on a request made under the Freedom of Information Law. As stated by the state's highest court, the Court of Appeals, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision,

the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. 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. In short, the status, interest or need of a person seeking records under the Freedom of Information Law have no bearing on his or her rights of access or the duty of an agency to respond to a request.

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

cc: Town Board
Town Clerk
Town Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13371

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Christopher M. Powers
Law Offices of Ingerman Smith, L.L.P.
167 Main Street
Northport, NY 11768

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

Dear Mr. Powers:

I have received your letter and the materials relating to it, one of which is an agreement between a school district an individual who agreed to resign and which states that the agreement "shall remain confidential and shall not be revealed to any third party for a period of ten (10) years from the date hereof, unless production of this agreement or of the terms of this agreement is required by law." The other documentation consists of what are characterized as letters of recommendation and a general release.

You have sought an opinion concerning "which, if any, of these documents must be provided pursuant to the Freedom of Information Law. From my perspective, the agreement must be disclosed, but the district could choose to withheld the letters of recommendation. In this regard, I offer the following comments.

First, situations have arisen in which the parties to an agreement or stipulation of settlement have agreed to refrain from speaking about or disclosing the terms of the agreement or stipulation on their own initiative. In my view, it is likely that the parties may validly agree not to speak about a settlement or agreement. However, the Freedom of Information Law pertains to records, not to speech. In a decision that may be pertinent to the matter that you described, Paul Smith's College of Arts and Sciences v. Cuomo, it was stated that:

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

> and set forth certain parts of the settlement terms" [589 NYS2d 106,107, 186 AD2d 888 (1992)].

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

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

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

Second, I believe that the agreement must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Unless records may justifiably be withheld in accordance with one or more of the grounds for denial, a claim, a promise or an agreement to maintain confidentiality would, based on judicial decisions, be meaningless.

In Geneva Printing Co. v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.

> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law [see FOIL, §87(2)(g)(iii)]. The decision states that:

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

In another decision, the matter involved the subject of a settlement agreement with a town that included a confidentiality clause who brought suit against the town for disclosing the agreement under the Freedom of Information Law. In considering the matter, the court stated that:

> "Plaintiff argues that provisions of FOIL did not mandate disclosure in this instance. However, it is clear that any attempt to conceal the financial terms of this expenditure would violate the Legislative declaration of §84 of the Public Officer's Law, as it would conceal access to information regarding expenditure of public monies.
>
> "Although exceptions to disclosure are provided in §§87 and 89, plaintiff has not met his burden of demonstrating that the financial provisions of this agreement fit within one of these statutory exceptions (see Matter of Washington Post v New York State Ins. Dept. 61 NY2d 557, 566). While partially recognized in Matter of LaRocca v Bd. of Education, 220 AD2d 424, those narrowly defined exceptions are not relevant to defendants' disclosure of the terms of a financial settlement (see Matter of Western Suffolk BOCES v Bay Shore Union Free School Distrlct, ___AD2d___ 672 NYS2d 776). There is no question that defendants lacked the authority to subvert FOIL by exempting information from the enactment by simply promising confidentiality (Matter of Washington Post, supra p567).
>
> "Therefore, this Court finds that the disclosure made by the defendant Supervisor was 'required by law', whether or not the contract so provided" (Hansen v. Town of Wallkill, Supreme Court, Orange County, December 9, 1998).

In short, absent the assertion of a ground for denial appearing in §87(2) of the Freedom of Information Law, and none in my view would apply, I believe that the agreement must be disclosed in response to a request made under the Freedom of Information Law, notwithstanding the language regarding confidentiality in the agreement.

Third, while I recognize that disclosure of the agreement in full would identify the individual, based on the decisions cited earlier and others, I do not believe that the provisions in the Freedom of Information Law pertaining to the protection of personal privacy would authorize a denial of access. I note that there is nothing in that statute 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.

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 involve a final agency determination, I believe that such a determination must be disclosed, again, unless a different ground for denial could be asserted.

In consideration of the judicial decisions cited in the preceding commentary, I believe that disclosure of the agreement would constitute a permissible rather than unwarranted invasion of personal privacy and that it must be disclosed on request.

With respect to the letters of recommendation, §89(2)(b)(i) states that an unwarranted invasion of personal privacy includes "personal references of applicants for employment." Therefore, it appears that the letters of recommendation could be withheld from the public. I point out, however, that the Court of Appeals has held that the Freedom of Information Law is permissive, in that an agency *may* disclose records even if it is not obliged to do so [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. Consequently, in my view, the letters of recommendation could be withheld, but the District would not be required to withhold them.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-299
FOIL-AO-13372

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Joseph P. Clark
Attorney at Law
46 East Market Street
Corning, NY 14830-2615

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

Dear Mr. Clark:

I have received your letter and the materials attached to it. You have sought an opinion concerning the status of the Corning Council for Assistance and Information for the Disabled, Inc. ("AIM") under the New York Freedom of Information and Personal Privacy Protection Laws, as well as the federal Freedom of Information and Privacy Acts.

In this regard, first, the federal statutes to which you referred pertain only to records maintained by federal agencies. Similarly, the Personal Privacy Protection Law is applicable to records maintained by or for state agencies and specifically excludes units of local government from its coverage [see §92(1)]. The state 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 entities of state and local government in New York. I do not believe that AIM could be characterized as an agency or that it has a responsibility to comply with the Freedom of Information Law.

Second, however, in consideration of a relationship with a governmental entity, such as Chemung County, it appears that some of AIM's records may fall within the scope of the Freedom of Information Law. For purposes of that statute, the term "record" is defined 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).

Perhaps most significant is a decision rendered by the Court of Appeals 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. 417 (1995)].

Insofar as records maintained by AIM are "kept, held, filed, produced or reproduced...*for* an agency", such as Chemung County, i.e., for the purpose of providing services that would otherwise be provided by that entity, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform AIM into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it maintains are maintained for an agency, and that those records would fall within the coverage of that statute.

In other circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation that you described, if AIM maintains records for Chemung County, a request should be made to the County's records access officer. To comply with the Freedom of Information Law and the implementing regulations, the records access officer would either direct AIM to disclose the County's records in a manner

consistent with law, or acquire the records from AIM in order that he or she could review the records for the purpose of determining rights of access.

To reiterate, the responsibility to give effect to or comply with the Freedom of Information Law would not involve AIM, but rather the government agency whose records are maintained by AIM on its behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-13373

From: Robert Freeman
To: [redacted]
Date: 5/24/02 9:13AM
Subject: Dear Mr. Sutcliffe:

Dear Mr. Sutcliffe:

I have received your inquiry in which you asked how you might find birth and death certificates in New York.

In this regard, rights of access to those records are governed by provisions of the Public Health Law. According to section 4173, birth records are available only to the subjects of those records or their parents if they are under the age of 18. Section 4174 pertains to death records and indicates that they are not available, except in the circumstances prescribed by that statute.

In short, birth and death records are generally unavailable to the public in New York.

If you are interested in genealogical searches, the Health Department has issued guidelines dealing with access to genealogical records. To obtain information regarding those guidelines, it is suggested that you connect with the Department's website. The address is <www.health.state.ny.us>.

The text of the Public Health Law provisions cited above, and all New York statutes, are available through the state Assembly's website at <www.assembly.state.ny.us>.

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-13374

From: Robert Freeman
To: HSherwani@ci.mount-vernon.ny.us
Date: 5/24/02 3:23PM
Subject: Dear Ms. Herwani:

Dear Ms. Herwani:

I have received your inquiry in which you asked "how and where to file a decision from an appeal pursuant to the Public Officers Law."

While I am not entirely sure what your question means, the provisions dealing with the right to appeal are found in Public Officers Law, section 89(4)(a). In short, any person denied access has the right to appeal to the head or governing body of the agency that withheld the record, or to a person designated to determine appeals by that person or body. The appeals person or body has ten business days from the receipt of an appeal to grant access to the records or "fully explain" in writing the reasons for further denial.

To appeal an initial denial of access, the person denied must do so within thirty days of such denial and indicate the date and location of the request, the records that were withheld, and his or her name and address. The person denied access may but is not required to offer legal arguments or contentions when he or she appeals.

The provision cited above also requires that copies of appeals and the ensuing determinations be sent to the Committee on Open Government. The address of the Committee is indicated below.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OMC-AO-3463
FOIL-AO-13375

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 28, 2002

E-Mail

TO: Patrick Rausch <patr@us.ibm.com>

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Rausch:

I have received your letter in which you indicated that the you are member of a board of education, and that the Board has adopted a policy which states in part that: "Matters discussed in executive sessions must be treated as confidential; that is, never discussed out of executive session." You have questioned the propriety of the policy. In addition, you have sought a recommendation concerning your ability to divulge information that should not have been discussed during an executive session. By means of example you wrote that:

> "[Y]our superintendent uses the 'Specific history of a particular person' reason to move into executive session to discuss financial problems like double bookings of revenues, or other items that create a dollar shortfall in out budget. He says that the public will demand to know who did it or make a call that it was the business manager, and this is why the confidentiality. [You] believe this is wrong, and want to discuss the financial issues in public without any personnel discussion. When [you] raise this, the board majority accepts the superintendent's personnel excuse to not do so, and continues the executive session under the confidentiality cover."

From my perspective, the policy is inconsistent with law. In this regard, I offer the following comments.

First, it appears that the use of an executive session in the circumstance that you described would have been inappropriate.

By way of background, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment,

> employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department, the creation or elimination of positions or matters relating to the budget, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion of possible layoffs 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 short, 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" 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.

Second, both the Open Meetings Law, and its companion, the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals, the state's highest court, that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I am unaware of any statute that would prohibit a Board member from disclosing the kind of information to which you referred. Even though information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term

"confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute, an act of Congress or the State Legislature, that specifically confers or requires confidentiality.

For instance, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matters described in your correspondence.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or

even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13376

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 28, 2002

Mr. Mike McAndrew
The Post-Standard
P.O. Box 4915
Syracuse, NY 13221-4915

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

Dear Mr. McAndrew:

I have received your communication of May 1, as well as others, concerning a request for certain records made to the Office of Mental Retardation and Developmental Disabilities ("the Office"). You have sought an advisory opinion concerning the response to your request by the Office.

According to your letter:

> "An incident that occurred on or about Aug. 17, 2997 at Syracuse Developmental Center involving the center's chaplain, Charles A Aho, and a resident of the center, Charles Henson. [Your] understanding is that the Rev. Aho left the center with the resident for a long period of time without authorization and that police were called to find them. The Rev. Aho was charged with endangering the welfare of an incompetent person as a result of the incident."

You requested a variety of records pertaining to the incident, some of which were found to be accessible, others of which do not exist; and the remaining records were denied. The response to your request indicates that those withheld are "investigative reports" that are exempt from disclosure pursuant to §33.13 of the Mental Hygiene Law and, therefore, §87(2)(a) of the Freedom of Information Law.

From my perspective, insofar as the records at issue may be characterized as "clinical records", the Office is required to deny access; insofar as they cannot be so characterized, it appears that portions of the records may be 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.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which in subdivision (a) states in relevant part that:

> "A clinical record for each patient or client shall be maintained at each facility licensed or operated by the office of mental health or the office of mental retardation and developmental disabilities, hereinafter referred to as the offices. The record shall contain information on all matters relating to the admission, legal status, care and treatment of the patient or client and shall include all pertinent documents relating to the patient or client."

Further, subdivision (c) provides that information "about patients or clients reported" to the Office "and clinical records or clinical information tending to identify patients or clients, at office facilities shall not be a public record and shall not be released by the office or its facilities to any person or agency", except in specified circumstances.

To the extent that §33.13 is applicable, I believe that it exempts records from disclosure in their entirety. In contrast, when the Freedom of Information Law governs rights of access, an agency is required to review records to determine which portions, if any, fall within the grounds for denial. In that situation, often an agency is required to delete portions of records, i.e., personally identifying details, and disclose the remainder of the records.

Based on a decision rendered by the Court of Appeals, the state's highest court, I believe that when a class of records or data is specifically exempted for disclosure by statute, an agency is not required to delete portions of records, to protect privacy, for example; rather, the records are considered to be exempt from disclosure in their entirety [see Short v. Board of Managers of Nassau County Medical Center, 57 NY2d 399 (1982)]. If §33.13 had not been enacted, and if no analogous statute existed, I would agree that the Office, assuming it had the capacity to do so, would be obliged to delete identifying details pertaining to patients and perhaps others and disclose the remainder of the data. However, since §33.13 encompasses clinical records as a class, I do not believe that the Office would be obliged or permitted to withhold portions of those records and disclose others.

Notwithstanding the foregoing, it is questionable in my view whether the records that have been withheld would in every instance constitute "clinical records." In a case involving records relating to an assault in a psychiatric facility, it was held that the records were not exempt from disclosure by statute. In Feliciano by Perez v. State [669 NYS2d 457 (1997), the court considered a variety of statutes dealing with review functions precipitated by incidents occurring at both medical and psychiatric hospitals [see e.g., Public Health Law, §§2805-l and 2805-m, and Education Law, §6527(3)] and found that the provisions requiring confidentiality relating to those incidents pertain only to incidents involving "care and treatment." In Feliciano, "Claimant, then a fourteen year-old patient at Bronx Children's Psychiatric Center, [sought] damages for an alleged sexual assault by

an employee...of the Center...and for other possible similar incidents" (id.), and the court concluded that the pertinent confidentiality statutes "precluded disclosure of material that was in the nature of quality-of-care review and oversight" and that they would not apply to records "of an investigation that was essentially part of a security function" (id., 459). In my view, if the records in question are similar or analogous to those considered in Feliciano and other decisions in which the same conclusion was reached, the documentation sought would not constitute clinical records or records involving quality of care, and the statutes cited above requiring confidentiality would not apply. In that event, although I believe that the Freedom of Information Law would govern rights of access, several grounds for denial could be pertinent.

Section 87(2)(b) authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", and §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy. It would appear that names or other identifying details pertaining to the patient involved in the incident, other patients who might be named, and witnesses, for example, could be withheld based on the exception regarding the protection of privacy. Those provisions would also apply in my opinion insofar as they include or refer to unsubstantiated allegations pertaining to a named individual.

Also of likely relevance would be §87(2)(g), which permits an agency to withhold records that:

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

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

I note that the provisions referenced in the preceding paragraph pertain to communications between, among or within agencies, and that §86(3) defines the term "agency" to mean:

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

thereof, except the judiciary or the state legislature."

Based on the foregoing, a written communication between the Office, for example, and a religious organization would not constitute "inter-agency" material, for the religious organization is not an agency. This is not to suggest that communications between the Office or its facilities and a religious organization must necessarily be disclosed. While those communications might not fall within the scope of §87(2)(g), other exceptions to rights of access might apply.

Although the Office and its facilities are not criminal law enforcement agencies, it has been advised, in consideration of particular facts, that agencies may perform law enforcement functions. In those circumstances, §87(2)(e) may be pertinent, for it permits an agency to withhold records that:

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

The extent to which the provision quoted above may be asserted would be dependent on the extent to which the harmful effects described in subparagraphs (i) through (iv) would arise by means of disclosure.

In sum, insofar as the records sought consist of clinical records, I believe that the Office would be required to deny access pursuant to §33.13 of the Mental Hygiene Law. Insofar, however, as that statute does not apply, the Freedom of Information Law, in my opinion, would determine rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: John Shave

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13377

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershon
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 28, 2002

Ms. Pamela Piazza
[redacted]

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

Dear Ms. Piazza:

I have received your letter of May 1 and the materials attached to it. You have sought guidance concerning the fees that may be charged under the Freedom of Information Law for copies of records by the Village of Lakewood.

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

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

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a 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., tape recordings or 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); Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS2d 214, 226 AD2d 339 (1996)].

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

Based upon the foregoing, the fee for a photocopy up to nine by fourteen inches cannot exceed twenty-five cents, unless an act of the State Legislature authorizes a different fee. For reproducing other records, such as a tape record or electronic information, the fee would involve the cost of a blank cassette or in proper circumstances, 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, again, unless a different fee is prescribed by statute.

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

In short, the fees described in your correspondence appear to be excessive and inconsistent with the Freedom of Information Law and its judicial interpretation.

Lastly, since one of the requests involved court records, I point out that the Freedom of Information Law is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

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. In the context of your correspondence involving a justice court, I believe that the court may, based on §255 of the Judiciary Law, charge at the rate that may be imposed by a county clerk for a similar service.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Chief Bentley
Beth Basile

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3468
FOIL-AO-13378

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 3, 2002

Mr. Robert E. White
Attorney at Law
110 Main Street
Saranac Lake, NY 12983

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

Dear Mr. White:

I have received your letter of May 3. You indicated that, as its attorney, you are involved in a disciplinary proceeding initiated under §75 of the Civil Service Law in the Saranac Lake Central School District. You raised two questions concerning disclosure of information relating to the matter.

First, when the Board is about to enter into executive session to discuss possible disciplinary action against an employee, you asked whether the motion to do so should "identify by name the employee that is going to be discussed in executive session." This office has consistently advised that the identity of the person who is the subject of an executive session in the kind of situation to which you referred need not be made known. In this regard, I offer the following comments.

As you are aware, the Open Meetings Law 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.

The provision that would justify an executive session in the situation described, §105(1)(f), 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).

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, holding 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.). *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); emphasis added].

The second question involves a situation in which the members of a board of education to initiate charges and whether "they should identify the employee by name when they come out of executive session and pass the official resolution preferring charges against the employee." Again, I do not believe that the board would be required to identify the person charged by name. In this instance, the Freedom of Information Law offers guidance.

The resolution adopted by the board would be memorialized in the form of a record, and I believe that the name could be withheld under the Freedom of Information Law. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent is §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 name of the person who is the subject of such allegations may, according to case law, be withheld, for disclosure at that juncture would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-13379

From: Robert Freeman
To: mmcandrew@syracuse.com
Date: 6/3/02 10:27AM
Subject: Hi Mike - -

Hi Mike - -

When an applicant appeals, the appeals person is not bound by the response or the reasons for denial offered initially by the records access officer.

All the best.

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-13380

From: Robert Freeman
To: [redacted]
Date: 6/3/02 9:21AM
Subject: Re: ART 78 queries

Dear Mr. and Ms. Roberts:

I have received your inquiry, and I can offer basic guidance regarding Article 78, and you should feel free to call.

With respect to your questions, your elected representatives can confer with anyone - - constituents and others - - in an effort to reach a decision regarding their eventual decisions. There is no obligation on their part to memorialize those conversations or identify those with whom they may have spoken.

With regard to the recordings of the meeting, if the tape of the meeting was prepared by or for the Village, or if the Village maintains a copy, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law. In that event, the fee for a copy would be based on the actual cost of reproduction. Further, when an agency, such as a village, prepares a copy, the recipient can request a certification in writing in a village official asserts that the record is a true copy.

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

OML-AO-3469
FOIL-AO-1338

From: Robert Freeman
To: Bob and Jenny Petrucci
Date: 6/3/02 2:03PM
Subject: Re: 2 Issues

When an agency indicates that it does not maintain a record, an applicant may seek a written certification under section 89(3) of the FOIL in which an official asserts that a diligent search for the record was made but that the record cannot be found. It is suggested that you review that provision and request such a certification if you believe that it would be useful to do so.

With respect to the minutes, section 106 of the Open Meetings Law prescribes what might be characterized as minimum requirements concerning the contents of minutes. For open meetings, subdivision (1) pertaining to open meetings indicates that, at a minimum, minutes must consist of "a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Based on the foregoing, minutes need not include reference to comments made or each issue that might have been considered. In short, minutes may be expansive, but they need only include reference to the activities specifically referenced in section 106(1).

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

----- Original Message -----
From: Robert Freeman
To: [redacted]
Sent: Monday, June 03, 2002 7:48 AM
Subject: Re: 2 Issues

If an agency indicates that a document doesn't exist, a response of that nature in my view is not a denial of access. A denial of access occurs when a response refers to a record maintained by agency that the agency refuses to disclose. Further, if a record does not exist, FOIL generally does not apply.

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 - 13382

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 4, 2002

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:

I have received your correspondence concerning difficulties that you have encountered in obtaining records from the Village of Croton in a timely manner.

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

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

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

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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

A potentially significant issue involves whether a request "reasonably describes" the records sought as required by §89(3) of the 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)].

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 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, and I believe that a request would reasonably describe the records insofar as the records can be located with reasonable effort. On the other hand, if particular records cannot be located except by means of a review of what may be hundreds or thousands of records individually, the request would in my opinion not reasonably describe the records. In that event, the records access officer could explain that the records are not kept in a manner that would permit their retrieval in conjunction with the terms of the request and indicate how the records are kept.

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees
Richard Herbek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13383.

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 10, 2002

Mr. Dennis G. O'Hara
O'Hara & O'Connell
Suite One Hundred
200 Salina Meadows Parkway
Syracuse, NY 13212-4505

Mr. Timothy D. Bunn
Deputy Executive Editor
The Post-Standard
Clinton Square
P.O. Box 4915
Syracuse, NY 13221-4915

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

Dear Mr. O'Hara and Mr. Bunn:

I have received your letters, respectively dated May 3 and May 9, pertaining to a request made under the Freedom of Information Law by the *Post-Standard* for copies of statements of legal services submitted by the firm of O'Hara and O'Connell to the Liverpool Central School District over a five year period.

In brief, while various aspects of the records have been determined to be accessible, Mr. O'Hara has contended that "the District is not required to release *any* narrative description of the legal services that have been provided to it because such information is subject to the attorney client privilege as codified in CPLR §4503" (emphasis his); Mr. Bunn believes that the redactions were made erroneously, for in many instances, the information that has been withheld merely involves a "reasonable description of the matter that outside counsel worked on and got paid for."

From my perspective, when the attorney client privilege is applicable, it is clear that a communication falling within the scope of the privilege may be withheld. Nevertheless, as in numerous other situations involving the Freedom of Information Law, the nature and content of a record determine the extent to which the record may be withheld. 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 confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [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. 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 situation at issue, again, Mr. O'Hara has contended that "any narrative description" of legal services rendered would be subject to the attorney client privilege. In my view, that opinion is overbroad.

By way of background, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared or imparted pursuant to an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with such a nattorney-client relationship may be considered privileged under §4503 of the CPLR. 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 the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant 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.)...
>
> "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 being communicated and, consequently, 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.)"

In short, in Knapp, it was found that those portions of billing statements indicating "the general nature of legal services performed", as well as certain others, did not fall within the attorney client privilege and were available.

In the other decision dealing with the issue under the Freedom of Information Law, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], the matter 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.).

Although the County argued that the "description 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 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 determines 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...
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157,

> 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

In my view, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, I agree that references identifiable to students may properly be deleted. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered ordinarily" would beyond the coverage of the privilege.

Having received copies of redacted billing statements from both of you, I cannot know of the nature of the redactions. However, if, for instance, redactions indicate the name or caption of a matter that is in litigation, since the fact of litigation is generally public, I do not believe that redaction in every such instance would be consistent with law. Similarly, not every reference to a grievant could, in my view, justifiably be withheld. If a grievance relates to an employee's medical condition, it is likely that the disclosure of his or her name would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. On the other hand, if the grievance involves a matter pertaining to employees generally, there would be no issue regarding privacy, and therefore, likely no basis for redaction. Similarly, reference is made to various telephone conferences, some of which involve public employees (i.e., "telephone conference with _____ of Office of Facilities Planning at SED"); that person would not be client of the attorney, an employee or a student, and I cannot envision how disclosure of that person's identity could be characterized as privileged.

Historically, and on the basis of case law, I believe that the proper assertion of the privilege involves the need to ensure that an advantage is not given to an adversary. I would conjecture that disclosure of many of the items that were deleted would have no such adverse effect. In those circumstances, the attorney client privilege could not, in my view, be properly asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-13384

From: Robert Freeman
To: pompey@traknet.com
Date: 6/11/02 8:44AM
Subject: Dear Ms. Christmas:

Dear Ms. Christmas:

I have received your letter in which you asked whether the Town of Pompey must copy your cemetery records "and give them to a representative of the local historical society."

In this regard, since the definition of the term "record" in section 86(4) of the Freedom of Information Law includes "any information...in any physical form whatsoever" maintained by or for a government agency, I believe that the cemetery records fall within the coverage of that statute. Further, as a general matter, the Freedom of Information Law is based on a presumption of access and requires that records be made available, unless there is a basis for denial of access in section 87(2). If the records are old and have primarily historical value, it is likely that they would be available in their entirety.

With respect to "giving" copies to the historical society, while you may do so, the Freedom of Information Law authorizes agency to charge up to 25 cents per photocopy up to 9 by 14 inches, or the actual cost of reproducing other records, such as those maintained electronically or which are larger than 9 by 14.

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-13385

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 13, 2002

Mr. Robert S. Risman, 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. Risman:

I have received your recent correspondence addressed to Mr. Treacy and to me concerning your efforts in gaining access to records of the Town of Lake George. Based on a review of the materials, I offer the following comments.

First, after a civil service examination is administered, it is my understanding that an "eligible list" is prepared that identifies and ranks those who passed the exam. Eligible lists have long been available to the public pursuant to rules and regulations promulgated by the Department of Civil Service (see §71.3). While those records are accessible, it has been consistently advised that a list or similar record identifying those who took an exam may be withheld. By comparing names of those who took an exam with an eligible list identifying those who passed the exam, the names of those who failed the exam would become known. That being so, it has been advised that disclosure of the identities of those taking an exam would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)] and that access may be denied.

Second, 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 those persons are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital

Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

In a judicial decision that focused on rights of access to a resume or similar record pertaining to a person employed by a government agency, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that portions of resumes must be disclosed in accordance with the previous commentary. The Committee's opinion stated that:

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

I note that Kwasnik was affirmed by the Appellate Division [691 NYS2d 525, 262 AD2d 171 (1999)]. Based on that decision and others dealing involving analogous principles, those portions of a resume that are relevant to the performance of one's duties must be disclosed. In addition, it has been held that those portions of records indicating one's general educational background are accessible [Ruberti, Girvin and Ferlazzo v. NYS Division of State Police, 218 AD2d 494 (1996)], and the court in Kwasnik also determined that portions of a resume or employment application indicating one's prior public employment must be disclosed, but that references to private employment may be withheld as an unwarranted invasion of personal privacy.

Lastly, the Freedom of Information Law does not include provisions or otherwise deal with the retention and disposal of records. Provisions relating to that subject can be found in Article 57-A of the Arts and Cultural Affairs Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. James P. Mathis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 13386.

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 13, 2002

Mr. Robert F. Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your letter of May 4 and the materials attached to it. You have sought assistance in obtaining certain records from the Town of Greenburgh. Specifically, you sought the "chemical hazard and inventory data" and a "site specific emergency response plan" relating to the Knollwood Road pump station. The Town denied access due to "elevated concerns for infrastructure security."

In this regard, I offer the following comments.

First, §89(6) of the Freedom of Information Law provides that when records are available as of right pursuant to a different law, nothing in the Freedom of Information Law can be asserted as a means of denying access. Therefore, if, for example, a federal law specifies that certain records must be made available to the public, I do not believe that the Freedom of Information Law would diminish or alter any such right.

Second, when the Freedom of Information Law governs rights of access, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that §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 sentence indicates that a single record or report may include portions that must be disclosed, as well as portions that may be withheld. Further, it imposes an obligation on an agency to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Assuming that there is no statute that specifies that the records in question must be disclosed, it is likely that the provision of greatest significance in ascertaining rights of access and the Town's ability to deny access is §87(2)(f). That provision permits an agency to withhold records or portions

thereof which if disclosed "would endanger the life or safety of any person." Although an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more of the grounds for denial [see §89(4)(b)], in the case of the assertion of that provision, the standard developed by the courts is somewhat less stringent. In citing §87(2)(f), it has been found that:

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

The principle enunciated in Stronza has appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Divsion of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991), Fournier v. Fisk, 83 AD2d 979 (1981) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994], and it was determined in American Broadcasting Companies, Inc. v. Siebert that when disclosure would "expose applicants and their families to danger to life or safety", §87(2)(f) may properly be asserted [442 NYS2d 855, 859 (1981)]. Also notable is the holding by the Appellate Division in Flowers v. Sullivan [149 AD2d 287, 545 NYS2d 289 (1989)] in which it was held that "the information sought to be disclosed, namely, specifications and other data relating to the electrical and security transmission systems of Sing Sing Correctional Facility, falls within one of the exceptions" (id., 295). In citing §87(2)(f), the Court stated that:

> "It seems clear that disclosure of details regarding the electrical, security and transmission systems of Sing Sing Correctional Facility might impair the effectiveness of these systems and compromise the safe and successful operation of the prison. These risks are magnified when we consider the fact that disclosure is sought by inmates. Suppression of the documentation sought by the petitioners, to the extent that it exists, was, therefore, consonant with the statutory exemption which shelters from disclosure information which could endanger the life or safety of another" (id.).

In short, although §87(2)(f) refers to disclosure that *would* endanger life or safety, the courts have clearly indicated that *"would"* means *"could."*

This is not to suggest that the records sought may necessarily be withheld in their entirety. There may be elements of the records which if disclosed would enhance or improve public safety and diminish danger. For instance, they may indicate that tainted water should be boiled or that certain actions should be taken in the event that substances are inhaled or come in contact with people or objects. Information of that nature must in my opinion be disclosed. On the other hand,

insofar as disclosure would enable terrorists to evade detection or effective law enforcement or potentially enable them to jeopardize lives and safety, the records may in my view be withheld pursuant to §87(2)(f).

I hope 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

FOIL-AC-13387

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 13, 2002

Mr. Bernard J. Blum
President
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 of May 6 in which you asked that the Committee on Open Government conduct "an investigation as to who/why/where/ all the topsoil has disappeared from the Rockaway Peninsula..."

In this regard, the Committee is authorized to provide advice and opinions concerning the Freedom of Information Law; it is not empowered to conduct investigations or compel an agency to grant or deny access to records.

Further, it is my understanding, based on the materials that you enclosed, that you have been informed that records containing the information sought do not exist. Here I point out that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. Similarly, agency officials are not required by the Freedom of Information Law to answer questions; their obligation under that statute is to grant or deny access to existing records.

Lastly, it appears that your questions were answered nonetheless by the Deputy Director of the Department of Sanitation. Specifically, Mr. Henry Ehrhardt explained that a "new machine...no longer removes the debris and the soil, but sifts out the debris while the soil is left in place."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Henry Ehrhardt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13388

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 13, 2002

Mr. Art Siegel
Concerned Citizens of Walton
4057 County Highway 22
Walton, NY 13856

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

Dear Mr. Siegel:

I have received your letter of May 2 in which you referred to a motion approved by the Walton Town Board "to have any mail addressed to the Town Supervisor stamped on the envelope...left unopened." In consideration of the advisory opinion rendered on March 12, you asked that an additional opinion be prepared to address this issue.

In this regard, irrespective of whether the Town Supervisor or any other person opens the mail, the mail or any other document that comes into the possession of the Town or a town official in relation to the performance of his or her duties in my view clearly constitutes a Town record that falls within the coverage of the Freedom of Information Law. As indicated previously, the Freedom of Information Law includes all Town records within its scope, irrespective of their origin, content or function, for §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."

Further, irrespective of which Town official receives, opens or possesses mail sent to the Town, based on §30(1) of the Town Law, those materials are in the legal custody of the Town Clerk.

In short, I believe that any record kept by, in possession of, or maintained for any Town officer or employee constitutes a Town record for the purposes of the Freedom of Information Law and is in the legal custody of the Town Clerk pursuant to §30(1) of the Town Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk
Mr. and Mrs. Ronald Leone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13389.

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 14, 2002

EMAIL

TO: Preston E. Pierce< Preston.Pierce@co.ontario.ny.us>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Pierce:

I have received your letter concerning access to veterans' discharge records maintained by county clerks.

In this regard, by way of background, §250 of the Military Law, which was enacted in substance more than fifty years ago, 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-five 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.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13390.

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

June 18, 2002

Mr. Rubin Sterngass
[redacted]

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

Dear Mr. Sterngass:

I have received your note in which you questioned the propriety of a response to a request for a certain record made to the Rockland County Highway Department. Specifically, you requested a "copy of the demolition order - circa 1986 - in reference to steel swimming pool situated on Bobin Cottage Motel lands of Tax I.D. # 138 - H - 18 Rockland Lake - Town of Clarkstown." The Superintendent of Highways indicated that the Department was "unable to locate any file or information regarding your request."

In consideration of the foregoing, I offer the following comments and suggestions.

First, it is possible that the County might not maintain the record, and I recommend that a request be made to the records access officer for the Town of Clarkstown. I believe that to be the Town Clerk.

Second, records often do not have to be kept permanently. In brief, Article 57-A of the Arts and Cultural Affairs Law requires that the Commissioner of Education adopt schedules indicating minimum retention periods for records kept by local governments. The length of a retention period is based on the relative significance of the record. Some records may be disposed of within a short period of time because they have minimal value. Others may be have to be retained for years or perhaps permanently due to their fiscal, legal, historical or other value. I am unaware of the length of time for which a demolition order must be maintained. It is possible, however, since the demolition occurred at least fifteen years ago, that the record might legally have been destroyed. If that is so, the Freedom of Information Law would not apply.

Third, assuming that the kind of record of your interest is ordinarily kept by the County Highway Department and continues to exist, the issue may involve whether the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out

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

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

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

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

While I am unfamiliar with the recordkeeping systems of the County, if the record 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 kind of record in which you are interested is a record not maintained in a manner that permits its retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate it, the request would not in my opinion meet the standard of reasonably describing the records. For instance, if demolition orders are kept by location, it would appear that the record in question could be located easily. If they are kept chronologically or intermingled with other kinds of records, and if locating the record involves, in essence, a search for the needle in the haystack, the request may not meet the standard of reasonably describing the records.

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:tt

cc: Charles H. Vezzetti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 3472
FOIL-AO- 13391

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

June 18, 2002

Mr. Tim Gannon
Reporter
The News-Review Newspaper
P.O. Box 1500
Mattituck, NY 11952

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

Dear Mr. Gannon:

I have received your letter in which you questioned the sufficiency of a resolution approved by the Riverhead Board of Education "that includes no mention of who or what the resolution applies to." The resolution states that:

> "...the President of the Board of Education and the Superintendent of Schools are hereby authorized to execute an Agreement with a district employee. Such Agreement was reviewed by the Board in executive session. The President of the Board and the Superintendent of Schools are further authorized to execute such documents as are required by such Agreement."

Although you were informed that by an attorney for the District that he was "waiting for an opinion from [this] office", I have received no correspondence from him.

In consideration of the matter, I believe that the resolution should have included the name of the employee and that the agreement referenced in the resolution must be made available in great measure, if not in its entirety. In this regard, I offer the following comments.

First, §106 of the Open Meetings Law pertains to minutes, and subdivision (1) states that minutes of an open meeting must consist, at a minimum, "of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." The only decision of which I am aware that may be pertinent to the matter is Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993]. That case involved a series of complaints made by the petitioner that were reviewed by the school board president, and the minutes of the board meeting stated that "the Board hereby ratifies the action of

Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your inquiry, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the nature of the agreement and the identity of the employee.

Second, with respect to access to the agreement itself, I direct your attention 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 note 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.

Perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

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

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

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

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

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

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure.

> Without one, the agreement is invalid insofar as restricting the right of the public to access."

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

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

Also pertinent is a decision in which the subject of a settlement agreement with a town that included a confidentiality clause brought suit against the town for disclosing the agreement under the Freedom of Information Law. In considering the matter, the court stated that:

> "Plaintiff argues that provisions of FOIL did not mandate disclosure in this instance. However, it is clear that any attempt to conceal the financial terms of this expenditure would violate the Legislative declaration of §84 of the Public Officer's Law, as it would conceal access to information regarding expenditure of public monies.
>
> "Although exceptions to disclosure are provided in §§87 and 89, plaintiff has not met his burden of demonstrating that the financial provisions of this agreement fit within one of these statutory exceptions (see Matter of Washington Post v New York State Ins. Dept. 61 NY2d 557, 566). While partially recognized in Matter of LaRocca v Bd. of Education, 220 AD2d 424, those narrowly defined exceptions are not relevant to defendants' disclosure of the terms of a financial settlement (see Matter of Western Suffolk BOCES v Bay Shore Union Free School District, ___AD2d___ 672 NYS2d 776). There is no question that defendants lacked the authority to subvert FOIL by exempting information from the enactment by simply promising confidentiality (Matter of Washington Post, supra p567).
>
> "Therefore, this Court finds that the disclosure made by the defendant Supervisor was 'required by law', whether or not the contract so provided" (Hansen v. Town of Wallkill, Supreme Court, Orange County, December 9, 1998).

In short, I believe that the agreement, a contract between the District and an employee, must be disclosed. A possible exception to disclosure would involve the situation in which part of an agreement involves a requirement that the employee engage in drug or alcohol treatment, for example. In that instance, that portion of the document could, in my opinion, be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy, but the remainder would ordinarily be accessible.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Chris Powers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13392

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 20, 2002

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 and the materials attached to it, all of which pertain to your requests for records of the Town of Davenport under the Freedom of Information Law.

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

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

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

In addition to the foregoing, every law must, in my opinion, be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend

public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Hon. Todd Rider
Hon. Margaret Bonney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3473
FOIL-AO-13393

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 20, 2002

Mr. Craig B. Greenfield
[redacted]

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

Dear Mr. Greenfield:

I have received your letter in which you raised issues concerning the Half Hollow Hills School District process of school redistricting.

According to your letter:

> "In addition to having presented 'plans' from A through E to the public but modifying and finalizing the plans between meetings in secrecy (all the while impacting students' lives without their parents knowing or being able to object), the Board, as its final act, presented a plan denoted 'E-3' at the final public meeting, but which was, [you] recently learned, a different plan from that described to the public using the same name. Thus, the vote was taken on a plan, which the public knew as something different from what, in reality, it was. One example was the movement of the redistricting line in [your] neighborhood which, although described in the E-3 nomenclature over several weeks as one street, actually turned out to be a different street due to the Board's either changing the line after the vote (a real possibility) or the Board's 'hoodwinking' the public by using the same E-3 name, but with different, and unknown parameters."

You have requested my views concerning the foregoing in relation to the Open Meetings Law, and in this regard, I offer the following comments.

From my perspective, it is unclear when or whether meetings were held. However, it appears that the Board took action in private by altering the location of the "E-3" designation as it originally had been presented to the public. If meetings were held, either by means of an actual convening or by phone or via email, for example, I believe that the Open Meetings Law would have been implicated.

By way of background, it is emphasized that the definition of "meeting" [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, stated that:

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

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

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

Based upon the direction given by the courts, if a majority of the Board gathers to discuss District business, collectively as a body and in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Second, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone, via mail or e-mail. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting held by means of a telephone conference, or a vote taken by mail or e-mail would in my opinion be inconsistent with law.

Based on relatively recent legislation, I believe that voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference. It is noted that 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."

As amended, §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, including the use of videoconferencing for attendance and participation by the members of the public body." 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 such a body, i.e., the Board of Education, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

The amendments to the Open Meetings Law in my view clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law.

As indicated earlier, the definition of the phrase "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, 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, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon

> reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of telephone calls or e-mail.

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the official convening of a public body for the purpose of conducting public business' (Public Officers Law §102[1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions to invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner was formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 Affd 45 NY2d 947).
>
> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the

> intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

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

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

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote by phone, by mail, or by e-mail.

The remaining area of inquiry involves a request made under the Freedom of Information Law in February to which the Board has only responded in part. You indicated that you requested a variety of records, including minutes, notes "or any written indication of how [your] street was taken from one plan, put on another plan, removed from that plan and then put into the final plan....together with the reports of any consultants on whose opinion they relied." As of the date of your letter to this office, you had received only "copies of emails from community residents to the Board, and nothing else..."

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..."

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

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

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

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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

Next, 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. Insofar as existing records maintained by or for the District fall within the scope of your request, I believe that the District is obliged to respond in a manner consistent with law. If records do not exist, the District in my view should inform you of that finding in writing.

Lastly, when 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.

Here I point out that the Freedom of Information Law is applicable to all District records, for §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 definition, internal communications, notes and materials prepared for the District by a consultant, for example, would constitute "records" that fall within the scope of the Freedom of Information Law.

Records prepared by agency staff for internal agency use would constitute "intra-agency materials" that fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

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

iii. final agency policy or determinations; or

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

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

It has been held by the Court of Appeals, the state's highest court, that records prepared for an agency by a consultant are agency records that should be treated as if they were prepared by agency staff. In a discussion of the issue of records prepared by consultants for agencies, the 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 agency staff or a consultant for an agency may be withheld or must be disclosed based upon the same standards. 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).

In sum, insofar as the materials at issue involve records communicated between or among District officials or that were prepared for the District by a consultant, I believe that those portions consisting of statistical or factual information, instructions to staff that affect the public or final District policy or determinations must be disclosed.

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-13394

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 20, 2002

Mr. Willis L. White
97-A-3804
Lakeview Correctional Facility
P.O. Box T
Brocton, NY 14716-0679

Dear Mr. White:

I have received your letter of June 14 in which you appealed a denial of access by the Department of Correctional Services under the Freedom of Information Law.

In this regard, the primary function of the Committee on Open Government involves offering advice and opinions pertaining to the Freedom of Information Law. The Committee does not have the authority to determine appeals or compel an agency to grant or deny access to records. The provision concerning the right to appeal, §89(4)(a), provides in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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 at the Department of Correctional Services designated to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13395

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 21, 2002

Mr. William Marventano
Director of Public Safety
Cayuga Community College
197 Franklin Street
Auburn, NY 13021-3099

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

Dear Mr. Marventano:

I have received your letter and the materials attached to it. The correspondence focuses on a request for records of the City of Auburn relating to an arrest. In brief, the request was denied in great measure due to the pendency of an investigation.

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 that to which allusion was made 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, I am not suggesting that the records in question 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).

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 witnesses, complainants or victims, rights of access, or conversely, the ability to deny access, would in opinion be dependent on attendant facts. 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. Additionally, §87(2)(b) and (f) of the Freedom of Information Law provide respectively that an agency may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" or "endanger the life or safety of any person." There are often situations in which names or other identifying details pertaining to witnesses or victims may be withheld under those provisions. Again, I am not suggesting that the name of a victim may be withheld in all circumstances, but rather in those situations in which the exceptions cited above could justifiably be asserted.

Often most relevant is §87(2)(e), which 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 a blanket denial of a request for the kinds of records that you described would be inconsistent with law and that an agency must review the records to ascertain the extent to which they may properly be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas G. Leone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3177
FOIL-AO-13396

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

June 24, 2002

Mr. Matthew J. Reynolds
[redacted]

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

Dear Mr. Reynolds:

I have received your letter in which you raised questions concerning the implementation of the Open Meetings and Freedom of Information Laws by the Village of Hamburg. Rather than focusing on the particular situations that you described, in the following comments, I will focus on the two grounds for entry into executive session upon which you focused, those pertaining to "litigation and personnel."

By way of background, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

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

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

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

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

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

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

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

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co.

> v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

Next, the provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the description of the general intent of the grounds for entry into executive session suggested in my remarks in the preceding paragraph, i.e., that they are intended to enable public bodies to avoid some sort of identifiable harm. For instance, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public

> town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Again, §105(1)(d) would not permit a public body to conduct an executive session due to a possibility or fear of litigation. As the court in Weatherwax suggested, if the possibility or fear of litigation served as a valid basis for entry into executive session, there could be little that remains to be discussed in public, and the intent of the Open Meetings Law would be thwarted.

In the instant situation, in my view, only to the extent that the Board discusses its litigation strategy would an executive session be properly held.

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

With respect to the enforcement of the Open Meetings Law, that statute contains no provisions involving negligence or criminal penalties. However, I note that §107 provides that a court may invalidate action taken in private that should have been taken in public and may award attorney's fees to the successful party. In addition, there have been situations in which public bodies have been ordered by courts to comply with the Open Meetings Law, but have failed to do so, and the courts have found the members to have been in contempt. As you may be aware, a finding of contempt can result in incarceration and/or the payment of a fine.

Lastly, since you referred to the possibility of delayed responses to requests under the Freedom of Information Law, I point out that that statute, specifically, §89(3) of the Freedom of Information Law states in part that:

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

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the

> material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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 effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be sent 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-13397

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

June 24, 2002

Ms. Jody Adams
[redacted]

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

Dear Ms. Adams:

I have received your letter May 18. As I understand your comments, you are primarily interested in obtaining or knowing the reason for withholding addresses and telephone numbers of public employees as they appear in a variety of records.

In this regard, first, §89(7) of the Freedom of Information Law has long provided that nothing in that statute "shall require the disclosure of the home address of an officer or employee, former officer or employee or of a retiree of a public employees' retirement system..." Stated differently, the home address of a present or former public officer or employee need not be disclosed under the Freedom of Information Law.

Second, with respect to the home telephone number, one of the grounds for denial of access, as you may be aware, is §87(2)(b), which enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Conversely, however, items that are irrelevant to the performance of one's official duties ordinarily would result in an unwarranted invasion of personal privacy if disclosed [see Seelig v. Sielaff, 201 AD2d 298 (1994)]; Matter of Wool (Supreme Court, Nassau County, NYLJ, November 22, 1977) and Minerva v. Village of Valley Stream (Supreme Court, Nassau County, May 20, 1981)]. From my perspective, one's home telephone number is clearly irrelevant to the performance of his or her official duties and may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Third, you expressed an interest in "ethics committee material" and financial disclosure forms. Here I point out that ethics committees or boards may have functions that differ from one municipality to the next and that the nature and content of financial disclosure statements will differ from one to the next. Nevertheless, enclosed for your review are written opinions rendered under the Freedom of Information Law within the past ten years that deal with municipal boards of ethics and financial disclosure statements.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
Encs.

cc: Hon. Elizabeth Neville, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13398

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

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

June 24, 2002

Mr. Jeffrey Phiency
97-B-2543
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Phiency:

Your letter of June 17 sent to the Division of Fire Prevention and Control 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 relating to the Freedom of Information Law.

According to your letter, you requested a fire investigation report pertaining to a fire that occurred at your residence in 1997 from the Savannah Fire Co., Inc. Although it is your belief that such a report is routinely prepared concerning the kind of incident that occurred at your residence, you were informed by the Chief of the Department that he could not locate any such report. You asked that "appropriate action" be taken and that the Savannah Fire Co. be "directed" to release the information sought.

In this regard, first, although the Savannah Fire Company may be a not-for-profit corporation, it was held more than twenty years ago by the state's highest court that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law.

Second, neither the Committee on Open Government nor the Department of State is empowered to compel an agency to grant or deny access to records.

Third, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency is not required to create a record in response to a request or obtain a record that it does not maintain. 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: James A. Burns
Chief Michael J. Kolcznyski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13399

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 25, 2002

Mr. Norman P. McCorkle
95-A-4616
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

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

Dear Mr. McCorkle:

Your letter of May 20 was received by the Office of Counsel at the Department of State and has been forwarded to this office for response. You requested assistance in obtaining information related to records requested from the New York City Police Department.

In response to your request for records related to your arrest, Mr. Daniel Gonzalez of the New York City Police Department responded that "this unit was unable to locate such: Memo Books, 911 Tape(destroyed)." You appealed this response by requesting a "certified certificate" that the office does not maintain the "Memo Book Entries." You also asked Mr. Leo Callaghan, Records Access Appeals Officer, several questions related to the "destruction of the 911 tape(s)." He wrote:

> "...that any record not addressed could not be located pursuant to diligent search. As to the questions raised in your letter, FOIL provides for access to existing documents which are reasonably identifiable within the parameters of the agency's record keeping systems, and does not require answers to interrogatories."

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.

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

First and perhaps most important, the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute provides in part that an agency need not create a record in response to a request. If indeed the New York City Police Department does not maintain the records

sought, the Freedom of Information Law would not apply. For instance, if there is no record of the date of destruction of a 911 tape, there is nothing to be disclosed under the Freedom of Information Law, and the agency would not be obliged to prepare a record containing the information sought.

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." In my view, Mr. Gallagher's response indicating that the record "could not be located pursuant to a diligent search" serves as such a certification.

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-13400

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 25, 2002

Mr. John R. Vero
Whiteman Osterman & Hanna
One Commerce Plaza
Albany, NY 12260

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

Dear Mr. Vero:

As you are aware, I have received your letter of May 17, the materials attached to it, and the recent determination of your appeal made under the Freedom of Information Law concerning a denial of access to records by the New York City Board of Education. You have sought an advisory opinion pertaining rights of access to the records sought.

By way of background, in April, you requested the following records with respect to the "English Language Arts Testing Program ('ELA') (RFP#1B736)", specifically, copies of "the previous Request for Proposals for the ELA", the "successful proposal for the current ELA" and the "actual contract awarding the ELA and any amendments to it." The receipt of the request was acknowledged and the request was later denied on the ground that "no awards have taken place." Based on prior discussions with staff of the Board, you wrote in your appeal that you assumed that the denial was based on §87(2)(c) of the Freedom of Information Law. In a determination of your appeal by Susan W. Holtzman, the provision cited above served as the basis for the denial, and she wrote that disclosure "would impair the present negotiations for the current contract..."

From my perspective, the denial was inconsistent with law. In this regard, I offer the following comments.

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

The Court of Appeals expressed and confirmed 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 that cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

The provision upon which the Board relied to deny access, §87(2)(c), permits an agency to deny access to records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in that provision in my opinion is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers.

As I understand its application, §87(2)(c) generally encompasses situations in which 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 of those 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 a 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, in a decision rendered more than twenty years ago, it was held that after the deadline for submission of bids or proposals has been reached and a contract has been awarded, "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)]. Conversely, the Court of Appeals sustained the assertion of §87(2)(c) in Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], in which 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 the case of your request, although the Board is currently involved in an RFP process and may soon award a contract, you have not sought records relating to that process or the upcoming contract award; on the contrary, the request involves records pertaining to the contract that was awarded some time ago that is about to expire. As indicated in Contracting Plumbers, supra, and confirmed in a case involving a request for a copy of a successful proposal following an award in an RFP process: "Once the contract was awarded...the terms of [the] RFP response could no longer be competitively sensitive" [Cross-Sound Ferry v. Department of Transportation, 219 AD2d 346, 634 NYS2d 575, 577 (1995)].

When the existing contract was awarded, that document, as well as the others that you requested, would, in my view, have been available to the public; no longer would disclosure in any way have "impaired" the ability of the Board to reach a fair and optimal agreement on behalf of the public; by signing a contract and consummating the process, any impairment would essentially have disappeared. A denial of access to those same records now because the Board is involved in a new RFP process in my view is unjustifiable. If anything, disclosure of the existing contract and the successful proposal that served as the basis for the award of that contract would likely *enhance* the process recently begun by the Board. When the winning contract and successful bids or proposals are disclosed, the recipients of those records have the ability to offer more competitive bids or proposals reflective of better value to an agency prior to the award of the next contract, thereby improving the likelihood that taxpayers will get more for their money.

It is a given that implementation of the Freedom of Information Law involves cost, time and effort. Nevertheless, it has been suggested that disclosures of winning bids, successful proposals and the contracts that have been awarded have resulted in greater competition and a better capacity on the part of private sector companies to offer government agencies and, therefore, the public, better value. In consideration of the thousands of contracts awarded annually by state and local government agencies annually, I believe that those disclosures have saved taxpayers far more than the cost of implementing that statute.

Although a determination of your appeal has been rendered, in an effort to encourage the Board to reconsider the determination, a copy of this opinion will be forwarded to Ms. Holtzman.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan W. Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13401

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 26, 2002

Ms. Linda Mangano
[redacted]

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

Dear Ms. Mangano:

As you are aware, I have received your letter of May 19, as well as the materials attached to it. Since the receipt of your letter, the Village of Ossining, in accordance with §89(4)(a) of the Freedom of Information Law, sent to this office a copy of its determination of an appeal following a denial of access to the record that you requested.

In brief, the record sought is a "report prepared for the Board of Trustees by the consulting firm of Hamilton, Rabinowitz and Alschuler, Inc." In one of the attachment to your letter, that entity is described as "a real estate consulting firm" that prepared "detailed financial analyses." In the determination of the appeal, Thomas G. Barnes, Corporation Counsel, indicated that the report "qualifies as intra-agency material" that falls within the coverage of §87(2)(g) of the Freedom of Information Law. He added that the report "was never adopted by the Board of Trustees, nor was it ever specifically relied upon or cited by the Board in connection with any final determination made in connection with the Cappelli application."

While I agree that the report at issue consists of "intra-agency material", it is likely in my view that portions of the report must be disclosed. In this regard, I offer the following comments.

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

Second, although §87(2)(g) potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals, the State's highest court, stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the

staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I note that in a recent case that reached the Court of Appeals, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that the report "was never adopted" or may not have been "relied upon or cited" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access.

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the

> intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation" (id., 276-277)."

I would conjecture that at least some elements of the record, in accordance with the direction offered by the Court of Appeals, would consist of statistical or factual information that must be disclosed, irrespective of its status as draft or non-final.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Thomas G. Barnes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13402

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. William Maddock
[redacted]

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

Dear Mr. Maddock:

As you are aware, I have received your letter of May 18 and the materials attached to it. In brief, you and others have attempted to acquire records relating to a particular parcel of real property in the Town of North Hempstead. Certain records were made available to you, but it is your contention that numerous others should be maintained by the Town. Despite that contention, Town officials have indicated that all of the records falling within the scope of your request that the Town maintains have been made available to you.

In this regard, first, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency, such as a town, is not required to "prepare any record not possessed or maintained..." by the agency. Therefore, insofar as the Town does not maintain the records of your interest, the Freedom of Information Law, in my view, would not apply. Whether an agency *should* maintain particular records would involve provisions of law separate from the Freedom of Information Law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Bonnie P. Chaikin, Town Attorney

FOIL-AO-1340

From: Robert Freeman
To: [redacted]
Date: 6/27/02 10:17AM
Subject: Dear Ms. Mahoney:

Dear Ms. Mahoney:

I am gratified that you remembered my offer of assistance in your administrative law class and hope that I can help. You have asked whether your friend may obtain arrest records of the father of her two sons. You added that she believes that the records will be useful in a family court proceeding.

In this regard, first, that the records may be used or pertinent in judicial proceeding is irrelevant to rights of access conferred by the Freedom of Information Law.

Second, if an arrest was made and there was a conviction, or if a charge is pending, I believe that the record of the arrest and the charge would be accessible. Charges are read during an arraignment, which is a public judicial proceeding. On the other hand, if a person is arrested and charged, and the charge is later dismissed in favor of the accused, the records relating to the event are supposed to be sealed under section 160.50 of the Criminal Procedure Law.

Assuming that the individual in question was arrested and convicted, or if charges are pending, the difficulty may involve locating the records. The statewide database containing criminal history information has been found to be outside the coverage of the Freedom of Information Law. However, if you know where the person was arrested (i.e., City of Albany, Town of Colonie, etc.) or the court in which he was convicted, you should be able to obtain records of arrest and conviction under the Freedom of Information Law from the local police or a district attorney. While court records are not subject to the Freedom of Information Law, court records are often available under other provisions of law. Again, if there was a conviction or if there is a pending charge, records should be available from the court in which the proceedings have occurred or will occur.

Also, county jails must maintain a public log that identifies everyone who has been committed to a county jail under section 500-f of the Correction Law. If the individual has spent time in a county jail, the log may be useful.

I hope that this helps. If you can provide additional information concerning where arrests may have been made, I may be able to provide more specific guidance. Please feel free to call any time.

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-1314/04

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Salaudeen Roots
01-A-2137
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034

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

Dear Mr. Roots:

I have received your letter in which you requested "assistance in obtaining copies of [your] credit history."

In this regard, the Committee on Open Government provides advice concerning the Freedom of Information Law, which pertains to records that are available from "agencies." 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."

I am unaware of any agency that maintains the records of your interest. It is suggested that you contact a commercial credit reporting service that provides credit reports for a fee.

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-13405

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. John Mandala
89-A-1920
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. Mandala:

I have received your letter in which you explained that you have not received responses to request for your "entire parole file" and "a Vaughn index which identifies the files according to numerical or alphabetical order."

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

Second, in regards to your availability of your parole file, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, with respect to the index of documents requested, 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.

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-13406

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Ronald Cheung
95-A-8061
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. Cheung:

I have received your letter in which you questioned the availability of "statements made against [you] in a criminal proceeding and the propriety of a denial based on a determination that "documents were previously given to [you]."

In this regard, I offer the following comments.

First, I am unfamiliar with your previous requests or which records might have been disclosed or withheld. Of potential relevance to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintain records that had previously been disclosed, the agency would be required to respond to a request for the same records.

Second, assuming that the records sought involving interviews of witnesses have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

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

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

Additionally, §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
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13407

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. John Brand
99-A-2574
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. Brand:

I have received your letter in which you requested that this office intervene and assist you with your request for records directed to the New York Police Department. You indicated that the New York Police Department has not responded 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 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13408

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Gregory M. Jackson
01-A-4820
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. Jackson:

I have received your letter in which you requested this office to direct Mr. Robert McAuley, Central Latent Site Manager at the Division of Criminal Justice Services, to "release any and all copies of documents pertaining to [you]...", because he has not "responded in the required time frame."

First, 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 noted that the Freedom of Information Law and its implementing regulations require each agency to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and request should ordinarily be directed to that person. When requests for records are received by another employee, I believe that the person in receipt of the request must either respond directly in a manner consistent with law or forward the request to the records access officer. I would recommend that you submit any further requests for records from the Division of Criminal Justice Services directly to the records access officer, Mr. Richard Ross, Executive Park Tower, Stuyvesant Plaza, Albany, NY 12203

Finally, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13409

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. William Mason
00-R-4306
Butler Correctional Facility
P.O. Box 388
Red Creek, NY 13143

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

Dear Mr. Mason:

I have received your letter in which you explained that the Columbia County Sheriff's Department did not answer your "FOIA request."

In the regard, first, it is noted that your request referred to the Federal Freedom of Information Act. That act pertains only to the availability of records from federal agencies and is not applicable to state or local agencies. It is suggested that you reference the New York State Freedom of Information Law in future requests for records directed to any state or local agency.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13410

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Maris Kasparovics
[redacted]

The staff of the Committee 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. Kasparovics:

I have received your letter of May 12 and the materials attached to it. Additionally, because I did not fully understand their contents, and because the name of a Town of Oyster Bay Deputy Town Attorney appears in the correspondence, I contacted him to learn more of the matter.

In brief, it is my understanding that an incident occurred that led you to file a notice of claim against the Town. Although the claim was dismissed, the Deputy Town Attorney, Mr. Jeffrey Ehrlich, indicated, in your words, that "an investigation was conducted" and informed you of the procedure for requesting a copy. Following your request for the report, however, you were informed that no such record exists.

During my discussion of the matter with Mr. Ehrlich, he told me that, upon receipt of the notice of claim, he contacted the appropriate town employee in an effort to defend the Town. It is my understanding the communications between himself and that official are the only records that might fall within the coverage of your request. I would conjecture that you were informed that no investigative report exists because the communications likely were not titled or characterized in that manner.

Irrespective of the name of the communication or communications, it appears that the record or records could justifiably be withheld. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, two of the grounds for denial would be pertinent to the records as Mr. Ehrlich described the situation to me.

First, I believe that the communications between Mr. Ehrlich and the Town employee were prepared based on an attorney-client relationship and would be subject to the attorney-client privilege. Those kinds of communications are confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, §87(2)(a) of the Freedom of Information Law. The latter authorizes

a government agency to withhold records that are "specifically exempted from disclosure by state or federal statute." And second, because the communications were made between Town employees, they would consist of "intra-agency materials" that fall within the scope of §87(2)(g). Under that provision, opinions, advice recommendations and the like may be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeffrey Ehrlich

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13411

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Mildred C. Waters
[redacted]

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

Dear Ms. Waters:

I have received your letter of May 19 and the correspondence attached to it. In brief, you requested records from the Office of Children and Family Services concerning "the proposed siting of the Maximum Security Juvenile Facility (Prison) in Bainbridge..." In response to the request, you were informed that a thorough search for the records was made and that none were identified that fell within the scope of your request. It was also suggested that you might seek the records from a Chenango County agency.

In this regard, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency, such as a town, is not required to "prepare any record not possessed or maintained..." by the agency. Therefore, if an agency does not maintain the records of your interest, the Freedom of Information Law, in my view, would not apply. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law 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.

It is also recommended, as suggested by Mr. Conway, that you seek the records from the County agency that may have a role in the project.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Joseph Conway

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-1341 2

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Thomas Dollio
88-T-2364
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. Dollio:

I have received your letter in which you sought assistance in obtaining audio and videotapes from your facility. You were informed that the records of your interest do not exist.

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.

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.

Finally, as you requested, I am returning Auburn Correctional Facility's response to your Freedom of Information Law request.

I hope that I have been of assistance.

Sincerely,

Dave Treacy

David Treacy
Assistant Director

DT:jm

FOIL-AO-13413

From: Robert Freeman
To: cardenia@us.ibm.com
Date: 7/1/02 4:52PM
Subject: Dear Mr./Ms. Cardenia:

Dear Mr./Ms. Cardenia:

I have received your inquiry concerning the use of a form when seeking records under the NY Freedom of Information Law.

In this regard, although the law states that an agency may require that a request be made in writing, there is no particular form that must be used. In general, any written request that "reasonably describes" the records sought should suffice [see Freedom of Information Law, section 89(3)].

I note that our website includes material that may be useful to you. Under "Publications" is "Your Right to Know", which serves as a guide to the Freedom of Information Law and includes 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
(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-1314

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 2, 2002

Mr. James Cheeseman
President
West Gate Landscaping Inc.
166 Route 59
Suffern, NY 10901

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

Dear Mr. Cheeseman:

I have received your letter of May 23 and the materials attached to it. Based on a review of the documentation, I offer the following comments.

First and perhaps most importantly inconsideration of the matter, Rockland County's records access appeals officer indicated that your company's surety "had been previously supplied with a copy of the entire file." I recognize that you believe that certain records were not made available (i.e., a U.S. Army Corps of Engineers permit). However, insofar as the records sought have been made available to your representative, it is likely that the same records need not be made available a second time.

Based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your representative, there must be a demonstration that neither you nor 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 surety to determine whether he or she continues to possess the records of your interest. If that person no longer maintains the records, he or she should prepare an affidavit so stating that can be submitted to the County.

Second, it appears that you misunderstand the requirements associated with the subject matter list. As indicated in the opinion sent to you in April, while each agency is obliged to develop a "subject matter list", that kind of compilation need not refer to records with specificity or particularity. Section 87(3) of the Freedom of Information Law states in relevant part that:

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

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. In short, the subject matter list is not an index of records.

I am unaware whether the records of the Rockland County Drainage Agency are categorized in a subject matter list unique to that agency or whether the records are referenced in the County's subject matter list.

Third, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency is not required to "prepare any record not possessed or maintained..." by the agency. Therefore, insofar as the County does not maintain the records of your interest, the Freedom of Information Law, in my view, would not apply. Whether an agency *should* maintain particular records would involve provisions of law separate from 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 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.

Next, you expressed the belief that the Freedom of Information Law requires that when an agency denies access to records, it is required to provide "a list by category of documents withheld, the reason for denial and the number withheld by category." I do not believe that the law imposes those duties on agencies. 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

of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index.

Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

Lastly, based on a review of our files, it does not appear that Mr. Grosselfinger sent a copy of his determination of your appeal to this office as is required by §89(4)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Terry D. Grosselfinger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1315

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 2, 2002

Mr. Paul O. Hynard
[redacted]

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

Dear Mr. Hynard:

I have received your letter in which you referred to difficulty in obtaining medical records under the Freedom of Information Law from the Suffolk County Correctional Facility and requested this office to notify the records access officer on your behalf.

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, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained hy 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 County 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 Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, New York 12180

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1341/6

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 2, 2002

Mr. Elmer Rivera
96-A-1900
Box 51
Comstock, NY 12821-0051

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

Dear Mr. Rivera:

I have received your letter in which you asked several questions. I will respond to them in the order in which they were presented.

First, neither the Freedom of Information Law nor the federal Freedom of Information Act applies to foreign countries. The Freedom of Information Law is applicable to New York State and local agencies while the Freedom of Information Act is applicable only to United States federal agencies. I am unaware of "other channels in which to acquire confirmation of documents in foreign countries."

Second, with respect to the availability of "some sort of list...where [you] can find out what documentation [you are] entitled to", no such list is required to be maintained in New York State. The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, you questioned your ability to "obtain some sort of master index" of your files. I am unaware of the existence of a "master index." However, with respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. The subject of a criminal history record may obtain such record from the Division. You may direct a request for this record to Mr. Richard Ross, Records Access Officer, NYS Division of Criminal Justice Services, 4 Tower Place, Stuyvesant Plaza, Albany, NY 12203-3764.

Lastly, with respect to the availability of grand jury minutes, 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 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-1341

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 2, 2002

Mr. Leo A. Marino
441-01-09036
G.M.D.C./Rikers Islands C-73
15-15 Hazen Street
East Elmhurst, NY 11370

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

Dear Mr. Marino:

I have received your letter in which you requested an advisory opinion relating to the maintenance of a subject matter list. You also requested an opinion regarding §87(2)(e)(i).

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.

In response to your request for an opinion regarding §87(2)(e)(i), that provision 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;

The ability to deny access under the exception quoted above is limited to those instances in which the harmful effects described in subparagraph (i) would occur by means of disclosure.

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.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13418

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 2, 2002

Mr. Daniel T. Malark
01-A-4989
Altona Correctional Facility
555 Devils Den Road
Altona, NY 12910

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

Dear Mr.Malark:

I have received your letter in which you sought assistance in obtaining a certified disposition (with county seal) stating that [you] never violated Rensselaer County Probation on 12/22/93." You wrote that you were previously provided such record "back in 1999 for [your] parole board hearing."

In this regard, I offer the following comments.

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 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 County Clerk or the Division of parole does not maintain the records sought, the Freedom of Information Law would not apply. For instance, if there is no record of an agreement concerning immunity between the person you named and the Probation Department or the Office of the District Attorney, there is nothing to be disclosed under the Freedom of Information Law, and the agency would not be obliged to prepare a record containing the information sought on your behalf.

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

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1319

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 2, 2002

Mr. Richard Heisler
93-A-7185
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. Heisler:

I have received your letter in which you explained that you "requested to review [your] 'Guidance & Counseling Folder'...to assist [you] in the preparation of [your] parole board appearance." You wrote that your corrections counselor advised that "certain documents" are not available to you.

In this regard, I offer the following comments.

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

While some of the records should be available, several grounds for withholding records appearing in §87(2) of the Freedom of Information Law may be pertinent. 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.

Second, with respect to your request for "rap sheets", the general repository of criminal history records is the Division of Criminal Justice Services. The subject of a criminal history record may obtain such record from the Division.

Third, 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.

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

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

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

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

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1340

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 2, 2002

Mr. Jose Pineda
99-A-6057
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 facts presented in your correspondence.

Dear Mr. Pineda:

I have received your letter in which you asked whether prior disclosure of documents affects future requests for such documents, you have met your burden of showing you are not in possession of previously disclosed documents, statements of "non-testifying witnesses are available, and whether you might be reimbursed for "costs necessary to litigate...an action pro se."

In this regard, I offer the following comments.

First, I am unfamiliar with your previous requests or which records might have been disclosed or withheld. Of potential relevance to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintain records that had previously been disclosed, the agency would be required to respond to a request for the same records.

Second, this office cannot determine whether you have demonstrated that neither you nor your attorney maintains records that were previously disclosed. In my view, each agency has the authority to determine the sufficiency of such demonstration.

Third, assuming that the records sought involving interviews of witnesses have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. As a general matter, that statute is based upon a presumption of access. Stated differently,

all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

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

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

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

Fourth, §87(2)(g) authorizes an agency to withhold records that:

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

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

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

Lastly, 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 assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1342

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Juan Carlos Gomez
01-A-0483
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929-2001

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

Dear Mr. Gomez:

I have received your letter in which you requested information on obtaining records from various governmental entities.

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. Requests for records should be directed to the "records access officer" at the agency that maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

Second, 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., 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.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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 OML-AO-3483
FOIL-AO-13122

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Donald M. Stiglmeier
Clarence Senior Citizens, Inc.
4600 Thompson Road
Clarence, NY 14031

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

Dear Mr. Stiglmeier:

I have received your letter and the materials attached to it. You have asked whether the Clarence Senior Citizens, Inc. ("the Corporation") is subject to the Freedom of Information and Open Meetings Laws. According to the materials, the Corporation is a not-for-profit corporation.

In this regard, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based upon the language quoted above, a public body, in brief, is an entity consisting of two or more members that conducts public business and performs a governmental function for one or more governmental entities.

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."

In consideration of the foregoing, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York.

Although not-for-profit corporations typically are not governmental entities and, therefore, fall beyond the scope of the Freedom of Information and Open Meetings Laws, the courts have found that the incorporation status of those entities is, alone, not determinative of their status under the statutes in question. Rather, they have considered the extent to which there is governmental control over those corporations in determining whether they fall within the coverage of those statutes.

In the first such decision, Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the issue involved 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).

Most recently, in a case involving a not-for-profit corporation, the "CRDC", the court found that:'

> "...the CRDC was admittedly formed for the purpose of financing the cost of and arranging for the construction and management of the Roseland Waterpark project. The bonds for the project were issued on behalf of the City and the City has pledged $395,000 to finance capital improvements associated with the park. The CRDC denies the City has a controlling interest in the corporation. Presently the Board has eleven members, all of whom were appointed by the City (see Resolution #99-083). The Board is empowered to fill any vacancies of six members not reserved for City appointment. Of those reserved to the City, two are paid City employees and the other three include the City mayor and council members. Formerly the Canandaigua City Manager was president of the CRDC. Additionally, the number of members may be reduced to nine by a board vote (see Amended Certificate of Incorporation Article V(a)). Thus the CRDC's claim that the City lacks control is at best questionable.
>
> "Most importantly, the City has a potential interest in the property in that it maintains an option to purchase the property at any time while the bonds are outstanding and will ultimately take a fee title to the property financed by the bonds, including any additions thereto, upon payment of the bonds in full. Further, under the Certificate of Incorporation, title to any real or personal property of the corporation will pass to the City without consideration upon dissolution of the corporation. As in Matter of Buffalo News, supra, the CRDC's intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that

> it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law...
>
> "In Smith v. City University of New York, supra at page 713, the Court of Appeals held 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.' In the present case, the CRDC is clearly exercising more than an advisory function and qualifies as a public body within the meaning of the Public Officers Law. The CRDC is a formally constituted body with pervasive control over the entity it was created to administer. It has officially established duties and organizational attributes of a substantive nature which fulfill a governmental function for public benefit. As such its operations are subject to the Open Meetings Law" (Canandaigua Messenger, Inc. v. Wharmby, Supreme Court, Ontario County, May 11, 2001).

I note that the Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing in a decision rendered on March 15 of this year.

A review of the by-laws of the corporation indicates that the Clarence Town Board exercises substantial control over the Corporation and its Board of Directors. Article IV, subdivision (1) states that "Members of the Board of Directors shall be appointed by a majority of the Clarence Town Board." Subdivision (2) provides that "At each annual organization meeting of the Clarence Town Board, said Town Board shall appoint Board of Director members to serve for such terms as hereinafter provided or until his prior resignation or removal." Subdivision (3) states in part that: "The number of directors may be increased or decreased by votes of a majority of the Clarence Town Board." Subdivision (5) provides that: "Any or all of the member directors may be removed for cause by a majority vote of the members of the Board of Directors and a majority of the Clarence Town Board. Member directors may removed without cause only by vote of the Clarence Town Board."

In short, the Town Board essentially has complete control over the membership of the Board of Directors of the Corporation. That being so, and in consideration of the judicial decisions cited earlier, I believe that the Corporation is subject to both the Freedom of Information and Open Meetings Laws.

If my contention is accurate, there may portions of the by-laws which are, in my view, inconsistent with law. For instance, in subdivision (9) the members are authorized to vote by phone and in subdivision (14), they may authorize other members to vote on their behalf by proxy. Neither in my view would be consistent with the Open Meetings Law. I note, too, that §41 of the General Construction Law indicates that action may be taken only by means of an affirmative vote of a

majority of the total membership of a public body, but that subdivision (8) authorizes action to be taken by a majority of those present when a quorum convenes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO '1341'23

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Gerald W. Peter
[redacted]

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

Dear Mr. Peter:

I have received your letter of June 6 addressed to David Treacy of this office, as well as the materials attached to it. You indicated that you made two requests under the Freedom of Information Law that were not answered, and you have sought guidance concerning the matter.

First, having reviewed your requests, I emphasize that the Freedom of Information Law pertains to existing records and that §89(3) of that statute states in relevant part that an agency is not required to create a record in response to a request for information. While an agency may choose to supply information in response to questions, it not obliged to do so. In the context of your correspondence, if, for example, an agency does not have a record indicating the percentage of male or female employees or their race or ethnicity, its staff would not be required to prepare a record containing the information sought. Similarly, asking whether an agency conducted an audit or whether certain procedures comply with certain guidelines does not, in my view, constitute a request for records. In short, in the future, rather than attempting to elicit answers to questions, it is suggested that you seek existing records.

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 for records, and requests should ordinarily be made to that person. Again, in the future, it is advised that requests for records be sent to the records access officer.

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

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

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Betty B. Wu
Robert Taylor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13124

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

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

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

Dear Ms. Maxam:

I have received your letter of June 3 in which you sought an opinion concerning the propriety of a response to your request for certain records. In brief, you wrote that you are the defendant in a case that has been pending since 1998 and that a special prosecutor has been designated to prosecute. When you surmised that requests for records pertaining to your case had been made, you sought the records and the responses to them. You wrote, however, that rather than responding to you, the special prosecutor wrote to your attorney, indicating, in your words, that you "could not conduct 'discovery' on [your] own but citing no other reason for his obvious denial."

In this regard, I offer the following comments.

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

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

Based upon the foregoing, in general, the grounds for denial in the Freedom of Information Law would not be relevant to the standards regarding discovery in a legal proceeding; rather, in discovery, the issue would involve what is material and necessary to the proceeding.

It is also noted that in Farbman, it was suggested that statutory privileges, such as exemptions from discovery relating to attorney work product and material prepare for litigation embodied by §3101(c) and (d) of the CPLR respectively, would not be subject to disclosure under the Freedom of Information Law.

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

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence

pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a community board, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, persons representing business entities, or news media. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, Nay 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991). If a request was made in one's personal capacity, it is likely that his or her residence address and/or home telephone number could be deleted to protect personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary C. Hobbs

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3484
FOIL-AO-13425

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

E-MAIL

TO: Bob & Jenny Petrucci [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. and Ms. Petrucci:

As you are aware, I have received your inquiry of June 7. To the extent that this office is authorized to respond, I offer the following comments.

First, 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.

Second, if action is taken by a public body and no reference is made to that action in the minutes of its meeting, the public body, in my view, would have failed to perform a duty required by law to be performed. In that event, an Article 78 proceeding could be initiated to compel the public body to comply with law.

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."

Lastly, if a legal opinion is prepared in writing, it would be subject to the attorney-client privilege and, therefore, exempt from disclosure under the Freedom of Information Law, §87(2)(a), unless the client (i.e. a legislative body) waives the privilege.

I hope that I have been of assistance.

RJF:jm

cc: Charlene Indelicato

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1314

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. John S. Dobbs
[redacted]

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

Dear Mr. Dobbs:

I have received your letter in which you questioned your right to know the name of person who has complained to your town about you.

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, such as a town, are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

When a complaint is made to an agency, §87(2)(b) of the Freedom of Information Law is often relevant. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

With respect to such complaints, it has generally been advised that the substance of a complaint is available, but that those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be deleted.

Second, it is noted that the Freedom of Information Law is permissive. While an agency may withhold records in appropriate circumstances, it is not required to do so. As stated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling which the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, while I believe that identifying details pertaining to complainants may ordinarily be withheld, an agency is not prohibited from disclosing the records in question in their entirety.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13427

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. Joseph O'Connor
Orange County Correctional Facility
110 Wells Farm Road
Goshen, NY 10924

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

Dear Mr. O'Connor:

I have received your letter in which you asked for assistance in obtaining records indicating "the number of assaults reported by inmates, from correctional officers, in New York State Prisons. Also I would like to receive a breakdown of the number of assaults reported at each facility for the last five (5) years."

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 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 there is no record containing the information of your interest, the Freedom of Information Law would not apply.

However, if records of your interest exist, they would likely be available under the Freedom of Information Law. You may wish to consider directing a request for such records to the Department of Correctional Services, Bldg. 2, State Campus, Albany, NY 12226-2050.

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-13128

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. Anthony Peterson
85-A-4338
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. Peterson:

I have received your letter in which you requested advice regarding your attempts to obtain unspecified records from the New York City Police Department, and that agency's subsequent requests for "additional information."

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

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

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

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

While I am unfamiliar with your request or the recordkeeping systems of the New York City Police Department, to the extent that records sought can be located with reasonable effort, I believe that a request would meet the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds 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 or that additional information could be requested.

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

FOIL-AO-13429

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. G. Jean
00-A-3295
Green Haven Correctional Facility
Route 216/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. Jean:

I have received your letter in which you requested assistance in obtaining various records related to your arrest from the New York City Police Department. You wrote that you have not received the requested records or a response to your 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 the correspondence, I offer the following comments.

First, 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)].

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

Based on the foregoing, the Police Department could not properly claim that the records at issue can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

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

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

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

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

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

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

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 Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13430

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. Victor Bolling
93-A-4570
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. Bolling:

I have received your letter in which you asked for an opinion regarding the availability of a variety of records related to your arrest from the Queens County District Attorney's Office.

First, 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)].

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, 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 may claim that the kinds of records at issue can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

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

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

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

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

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

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).

Fifth, regarding your request for a "master index", reference to a master index appears in the Department of Correctional Services' regulations. Those regulations are based upon §87(3)(c) of the Freedom of Information Law, which requires that each agency maintain:

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

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, although a subject matter list is not prepared with respect to records pertaining to a single individual, such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested. Rather than seeking a "master index" from the office of a district attorney, it is suggested that you request the subject matter list maintained pursuant to §87(3)(c) of the Freedom of Information Law.

Lastly, with respect to your request for grand jury minutes, 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 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-13431

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. Nathan McBride
95-A-6015
354 Hunter Street
Ossining, NY 10562-5442

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

Dear Mr. McBride:

I have received your letter in which you questioned the propriety of a response from the New York City Police Department. You wrote that you received a "Miranda card", but had requested a "Miranda Warning Form." You also questioned the "claim[ed] destruction of the 911 Sprint report."

In this regard, I offer the following comments.

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

Second, the 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.

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,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13432

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. Edwin Castro
95-A-6664
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. Castro:

I have received your letter in which you requested assistance in obtaining records from the New York City's Comptroller's office. You wrote that the comptroller's office has not responded to your request for information related to an "incident that took place when [you were] at Rikers Island when [you] left Clinton Correctional Facility to go to 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 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 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.

Lastly, considering that the "incident" occurred when you were at Rikers Island, it is suggested that you submit requests for records to Thomas Antenen, Records Access Officer, New York City Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

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-13433

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

[redacted]
91-B-1923
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 [redacted]

I have received your letter in which you requested guidance in obtaining your "medical records from the Auburn infirmery [sic]."

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
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13134

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. John Brand
99-A-2574
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. Brand:

I have received your letter in which you requested intervention and assistance in obtaining information that "is vital to calculate [your] proper jail time."

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 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 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 the "total computation of jail days", and if an agency does not maintain a record that contains a "total", it would not be obliged to review its records and compile a series of figures to prepare a total on behalf of an applicant. In my view, that kind of inquiry would not constitute a request for records under 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-13435

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. Gregory R. Pollack
99-A-5210
Green Correctional Facility
P.O. Box 975
Coxsackie, NY 12051-0975

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

Dear Mr. Pollack:

I have received your letter in which you requested an opinion as to the availability of "any and all grievances, misbehavior reports, or complaints, with or without dispositions, filed against Mr. Gerry Ersken, Recreation Civilian employed here at Greene Correctional Facility."

You wrote that the "inmate records coordinator denied your request" and you had not received a response to your appeal of the denial.

From my perspective, rights of access would be dependent on the outcome of grievances or complaints. 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, 672 NYS2d 776, 250 AD2d 772 (1998); 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 §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,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13436

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. Andrew Styles
87-A-4358
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. Styles:

I have received your letter in which you wrote that you had requested your medical records from this office and that this office had denied your request.

In this regard, I offer the following comments.

A search of our files indicates that this office has not received recent correspondence from you. It is also noted this office does not maintain records of your interest. Requests for records should be directed to the agency that maintains such records. It appears that Wende Correctional Facility, in response to your request for medical records, has indicated that records of your interest do not exist or are not maintained by that facility.

As a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create or acquire 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.

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 personnel of the Department of Correctional Services 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, I note that §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:

Bureau of Hospital & Primary Care Services
New York State Department of Health
Hedley Building, 6th Floor
433 River Street
Troy, NY 12180-2299

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13437

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. Anthony Bertolini
00-A-0543
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. Betrolini:

I have received your letter in which you requested assistance from this office in obtaining records from the Nassau County Police Department. You wrote that you "submitted the attached request and received the attached reply", but no attachments were included in your correspondence. Nevertheless, I offer the following comments.

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

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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-13438

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. E. Lebron
95-A-0121
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. Lebron:

I have received your letter in which you requested "intervention and assistance in obtaining" records from the New York County District Attorney's Office. You wrote that "the A.D.A.'s have disregarded [your] lawyer's comment" that he "never had a copy of the document or the document simply does not exist" because the statement "had to be sworn."

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

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

Based on the foregoing, it is suggested that you contact your attorney. If the attorney no longer maintains the records, he should prepare an affidavit so stating that can be submitted to the office of the district attorney.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

FOIL-AO-13439

From: Robert Freeman
To: [redacted]
Date: 7/8/02 11:14AM
Subject: Dear Mr. Fain:

Dear Mr. Fain:

I have received your letter in which you asked what can be done "when a school board refuseds to respond to a FOIL request."

In this regard, first, pursuant to the regulations promulgated by the Committee on Open Government, each agency, such as a school district, 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.

Second, section 89(3) of the Freedom of Information Law requires that an agency respond to a request for records within five business days of its receipt of the request by either granting access, denying access in writing or acknowledging the receipt of the receipt and providing an approximate date indicating when the agency believes it will grant or deny access. If five business days have passed and no response has been given, the request may be deemed to have been denied. In any instance in which an agency denies access (i.e., in writing or by means of a failure to respond), the applicant has the right to appeal to the governing body (i.e., the board of education) or to a person designated by the governing body to determine appeals.

It is suggested that you contact the records access officer or district clerk to determine the status of your request. If no response is imminent, you should ask for the name of the person to whom an appeal may be made. When an agency receives an appeal, it has ten business days to grant access to the records or "fully explain in writing" the reasons for further denial.

To enhance compliance, certainly you may share materials communicated by this office or information available on our website with school district officials. Also, since you referred to the possibility of contacting the local news media, often shedding light on a problem helps to correct or resolve it.

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-1314/0

From: Robert Freeman
To: [redacted]
Date: 7/9/02 10:08AM
Subject: I have received your note concerning a claim by the Chappaqua Board of Education that a record could

I have received your note concerning a claim by the Chappaqua Board of Education that a record could be withheld due to "internal confidentiality" and in which you asked where you might file a complaint pertaining to the matter.

In this regard, this office, the Committee on Open Government, was created by the Freedom of Information Law, and its primary function involves providing advice and guidance concernng public access to government information in New York. As such, any complaint involving access to government records may be directed to this office.

With respect to the substance of the matter, without additional detail, I cannot offer specific guidance. However, as a general matter, the Freedom of Information Law is based on a presumption of access. In short, records maintained by or for a government agency, such as a school district, must be disclosed except to the extent that an exception to rights of access listed in the law may properly be asserted. I would conjecture that an exception dealing with internal governmental communications, so-called "inter-agency or intra-agency materials", would be pertinent. Under that provision, those portions of those kinds of communications consisting of advice, opinion, recommendation, ideas and the like may be withheld; other aspects of those records consisting of statistical or factual information, policy or final determinations must ordinarily be disclosed.

To obtain additional information regarding the Freedom of Information Law, a great deal of material is accessible on our website, which is identified below.

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-1341

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Nicholas Evanchik
[redacted]

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

Dear Mr. Evanchik:

I have received your letter of June 6 addressed to David Treacy of this office, as well as the materials attached to it. You have sought an opinion concerning the propriety of a denial of access to a "preliminary FEIS" by the Village of Briarcliff Manor.

In his response to your request, the attorney for the Village, Mr. Daniel Pozin, wrote that:

> "As the lead agency's document, we believe that all draft versions of the FEIS are intra-agency documents which are not subject to FOIL, as they do not yet represent final agency policy or determinations. Notwithstanding the fact that the FEIS is in large measure, being produced on behalf of the lead agency by the Applicant's consultants, it remains subject to final review, comment and modification at the request of the lead agency and the lead agency's consultants. As such, the documentation you have request is an incomplete, non-final working draft of a document upon which a decision will ultimately be made."

He added that:

> "...the SEQRA regulations, which are promulgated pursuant to the Environmental Conservation Law of the State of New York provide a specific sequencing for preparation, distribution, and comment on an FEIS. While the SEQRA regulations do require that the document be 'readily available for public inspection' (NYCRR 617.10(h)), we note that such public inspection is accorded once the FEIS has been accepted as complete by the lead agency and a notice of completion has been issued."

In this regard, I offer the following comments.

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

Second, although one of the grounds for denial may frequently be cited to withhold records characterized as "draft" or "preliminary", for example, that provision would not be applicable in a situation in which records are not prepared by an agency or a consultant retained by the agency. Specifically, §87(2)(g) deals with "inter-agency and intra-agency materials." Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). Further, it has been held by the state's highest court, the Court of Appeals, that records prepared by a consultant retained by an agency should be treated as though they were prepared by agency staff and that the records, therefore, constitute "intra-agency" materials [Xerox Corp. v. Town of Webster, 65 NY2d 131 (1985)].

It is unclear whether the preliminary FEIS has been prepared by a consultant retained by the Village or by or for the applicant. If it was prepared by or for the applicant and submitted to the Village, even in draft form, I do not believe that any of the grounds for denial would be applicable. In short, neither the applicant nor the applicant's consultant would constitute an agency, and if the record in question was prepared by either, the exception regarding intra-agency materials would not apply.

Third, even if the preliminary FEIS was prepared by the Village or its consultant and may properly be characterized as "intra-agency" material, it is unlikely that the document could be withheld in its entirety. Due to the structure of the provision dealing with inter-agency and intra-agency materials, it is clear that the contents of those materials determine the extent to which they may be withheld, or conversely, must be disclosed. 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..."

I emphasize 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.

In this vein, 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, 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.).

If the record sought indeed consists of intra-agency material, that it is preliminary does not remove it from rights of access. One of the contentions offered by the agency in Gould 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][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)..." (id., 276).

In short, that a record is in draft or preliminary would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of 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).

In sum, if the preliminary FEIS was prepared by the applicant or the applicant's consultant, the exception regarding inter-agency or intra-agency materials, in my view, would not serve as a basis for a denial of access. If the document was prepared by the Village or its consultant, I believe that it would constitute intra-agency material, but that those portions consisting of statistical or factual information must be disclosed, despite the status of the document as "preliminary."

Lastly, with respect to the remaining contention offered by Mr. Pozin, that certain records subject to the SEQRA process are accessible only at certain times or in a particular sequence, I do not believe that there is any legal basis for such a conclusion. The regulations promulgated by the Department of Environmental Conservation to implement SEQRA specify that certain records must be available to the public at certain times, but I have located no provision stating that the records cannot be disclosed at other times. Based on judicial interpretations involving exceptions to rights of access in the state Freedom of Information Law, the record at issue would not be "specifically exempted from disclosure by...statute" pursuant to §87(2)(a). The Court of Appeals has determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language or legislative intent that clearly confers or requires confidentiality, stating that:

> "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)].

I am unaware of any statute that specifies that a preliminary FEIS is exempt from disclosure. Moreover, a statute, based upon judicial interpretations of the Freedom of Information Law, is an act of the State Legislature or Congress [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)], and it has been found that agencies' regulations are not the equivalent of statutes for purposes of §87 (2)(a) [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d

965, reversed 55 NY 2d 1026 (1982)]. Therefore, insofar as an agency's regulations render records or portions of records deniable in a manner inconsistent with the Freedom of Information Law or some other statute, those regulations would, in my opinion, be invalid. In short, a state agency's regulations do not constitute a statute or statutes and would not serve to exempt records from disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Michael Blau
Daniel Pozin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13442

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Curly Hernandez
96-A-2503
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034

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

Dear Mr. Hernandez:

I have received your letter in which you requested assistance from this office in obtaining various records from the New York City Police Department "pertaining to the complaints filed, and/or investigations done by the Mollen Commission" regarding Police Officers Michael Kennedy and Matthew Barrett.

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

Considering that the individuals in question are police officers, it appears that the records of your interest could likely be withheld pursuant to §50-a of the Civil Rights Law.

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

FOIL-AO-13443

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Norman H. Gross
Ferrara, Fiorenza, Larrison, etal
5010 Campuswood Drive
East Syracuse, NY 13057

Mr. Daniel C. Monohan
President, Board of Education
Mohawk Central School
28 Grove Street
Mohawk, NY 13407

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

Dear Mr. Gross and Mr. Monohan:

I have received your letters, which are respectively dated June 6 and June 18. In the former, Mr. Gross indicated that the Mohawk Central School District sought an opinion concerning rights of access to information contained on absentee ballot applications. Mr. Monohan, as President of the Board of Education, expressed concern that if the portion of the application identifying an absentee voter is disclosed with the remainder deleted in response to a request for the names, and a second request involves the remainder of the application with the names deleted, there may be nothing to "prevent one person from 'foiling' one part one day and the other part the next day."

In my view, there is a means of dealing with the problem without infringing on personal privacy in the manner described by Mr. Monohan. In this regard, I offer the following comments.

First, §2018-b of the Education Law pertains to the use of absentee ballots in school district elections and describes the contents of an absentee ballot application. Subdivision (2) of that statute requires that an applicant include his or her name and address, that he or she is or will be a qualified voter on the day of a school district election, and that he or she will be unable to vote on the day of the election. That provision also requires an indication of the reason for one's inability to be present on the day of the election. The permissible reasons are limited to situations involving illness or physical disability, a business commitment, vacation or being detained in jail.

Subdivision (7) of §2018-b states in relevant part that the school district clerk or designee of the board of education "shall make a list of all persons to whom absentee voter's ballots shall have

been issued and maintain such list where it shall be made available for public inspection..." Consequently, there is requirement that a list be prepared identifying those to whom absentee ballots have been issued that is separate from the applications themselves.

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

As suggested by both of you, relevant are §§87(2)(b) and 89(2)(b), both of which provide, in brief, that an agency, such as a school district, may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." The latter includes a series of examples of unwarranted invasions of personal privacy. As indicated and required by the Education Law, that a person has been issued an absentee ballot is public. However, in my view, the reason for a person's absence on the day of an election is nobody's business and would, if disclosed, result in an unwarranted invasion of personal privacy. That a person is scheduled to be in a hospital, for instance, indicates that he or she has a medical problem. While that kind of information is not a medical record *per se*, the Court of Appeals has found that since it involves personal medical information and is an intimate detail of one's life, disclosure would result in an unwarranted invasion of personal privacy. Although the Court did not define or specify the parameters of what may constitute an unwarranted invasion of personal privacy, it offered guidance, stating that the purpose of the exception is to enable government agencies to withhold those portions of records that a reasonable person of ordinary sensibilities would regard as intimate, private information [Hanig v. State Department of Motor Vehicles, 79 NY2d 106 (1992)].

In short, I believe that a person's name, coupled with the reason for his or her absence on the day of an election, would constitute an unwarranted invasion of privacy.

The other exception of significance, §87(2)(f), authorizes an agency to withhold records insofar as disclosure would "endanger the life or safety of any person." In a situation in which it known that a person is away on business or vacation, it is possible that an unscrupulous recipient of that information could use the information to commit crimes, such as burglary, thereby jeopardizing the lives and/or safety of other residents or neighbors, for example.

If a person seeking the applications is interested in knowing whether the reasons for seeking absentee ballots are consistent with law, the names and other identifying details may in my opinion be deleted from applications to protect the privacy of the applicants. To prevent a person from obtaining separate portions of an application, thereby enabling the recipient to compare handwriting, it is suggested that a request for the names of those to whom absentee ballots were issued be granted by disclosing the list required to be maintained pursuant to §2018-b of the Education Law and that the portions of the applications that include names and addresses be deleted in every instance. By disclosing the list, the public can know the identities of those to whom absentee ballots were issued. By deleting names and addresses from the applications prior to the disclosure of the remainder of those records, the public can know whether the District validly issued absentee ballots.

Making disclosures of those separate records as described would preclude a recipient of the records from comparing one portion of the application with another through an applicant's handwriting, but at the same time enhance the accountability of the District and protect individuals' privacy and safety.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13414

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Carol Thompson
The Valley News
117 Oneida Street
Fulton, NY 13069

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

Dear Ms. Thompson:

As you are aware, I have received your letter in which you raised a variety of questions and issues relating to a request made under the Freedom of Information Law to Oswego County.

By way of background, a request was made on May 17 for the e-mail of two County employees. You were informed on May 21 that one of the employees "deletes and purges" his e-mail daily. A day later, you received a written denial indicating that the records were being withheld under §87(2)(g) pertaining to inter-agency and intra-agency materials. You appealed on the following day, contending that the records sought were "for private organization that operates under the county address, county phone number, and county e-mail address", even though the organization "is not a county agency, has no affiliation with the county, and advertises in the public domain with the county contact information of the particular employee..." As of the date of your letter to this office, you had received no response to the appeal.

In this regard, I offer the following comments.

First, I believe that the e-mail communications that you requested, insofar as they are maintained by the County, constitute agency records that fall within the coverage of the Freedom of Information Law. Section 86(4) defines the term "record" expansively to include:

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

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)].

Moreover, more than twenty years ago, the state's highest court, the Court of Appeals, found that the nature, the function or the origin of records are irrelevant in considering whether the records fall within the framework of the Freedom of Information Law. So long as information in some physical form is kept by or for an agency, it is a "record" subject to rights of access. In Westchester-Rockland Newspapers v. Kimball, the materials sought involved a lottery conducted by a volunteer fire company, which was found to be an "agency", and although that 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. 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" [50 NY2d 575, 581 (1980)].

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there may have been "considerable crossover" in the activities of persons as County employees and as citizens. That is of no moment in my opinion in considering whether the material in question is subject to the Freedom of Information Law.

Perhaps the most significant decision in relation to the matter, Capital Newspapers v. Whalen, framed the question as follows:

> "At issue in this appeal by petitioner's newspapers is whether two categories of documents in custody of respondent City of Albany should be held to be 'records' under FOIL: correspondence of a former Mayor of Albany, the late Erastus Corning, II, concerning matters of a personal nature and correspondence concerning the activities of the Albany County Democratic Committee. The narrow question of statutory construction presented arises from respondents' contention that although these papers are literally within the FOIL definitions as 'record[s]' being 'kept' or 'held' by an 'agency' (the City of Albany), they are, nonetheless, outside of the scope of FOIL because of the private nature of their contents. For reasons to be discussed, we disagree with respondents' contention and conclude that there should be a reversal" [69 NY2d 246, 249 (1987)].

In its discussion the Court of Appeals determined that it could:

> "...find nothing to suggest that the Legislature intended that the definitions of 'record' and 'agency' should be given anything other than their natural and obvious meanings. On the contrary, respondents' narrow construction would be inimical to the public policy underlying FOIL and would conflict with the legislative intent which is apparent in the language of the statute as a whole and in the detailed procedures established in FOIL for designating documents which should properly be exempt. Moreover, the construction, if given effect, could, as a practical matter, frustrate the very purpose of the legislation" (id., 252).

The Court also reiterated the principle expressed in Westchester-Rockland, supra, stating that:

> "...respondents seek to read into the definitions of 'record' and 'agency' a requirement that, for documents to be within FOIL's scope, their subject matter must evince some governmental purpose. There is, however, no language in the statute itself and nothing in the legislative history suggesting that the Legislature intended such content-based limitation in defining the term 'record'. On the contrary, we held in *Matter of Westchester Rockland Newspapers v Kimball* (50 NY2d 575, 581) that FOIL's scope is not to be limited based on 'the purpose for which the document was produced or the function to which it relates'. Such a limitation would be difficult to define, we explained, because of 'the expanding boundaries of governmental activity' and because '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., 252-253).

In short, email maintained on the County's computers, based on judicial decisions rendered by the state's highest court, clearly in my view constitute County records subject to rights of access conferred by the Freedom of Information Law.

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

The provision cited as the basis for denial in my opinion relates to communications between and among government officials in their capacities as government officials. 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"). When County officers or employees communicate in writing with persons or entities outside of government, those communications are not made to or from an "agency" and, consequently, the communications would not be "inter-agency or intra-agency materials." That being so, §87(2)(g) would not serve as a basis for a denial of access.

In considering the intent of the exception to rights of access pertaining to inter-agency and intra-agency communications, the Court of Appeals found that the purpose "...is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549])..." and to "safeguard internal government consultations and deliberations" [Gould v. New York City Police Department, 87 NY2d 267, 276 (1996)]. If indeed the records in question reflect communications involving County employees that do not relate to their governmental functions, I do not believe that they could be characterized as inter-agency or intra-agency materials or that §87(2)(g) would apply.

Third, §89(4)(a) of the Freedom of Information Law deals with appeals following denials of access and states in relevant part that:

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

When an appeal is made but no determination is rendered within ten business days of its receipt, it has been held that the appeal is deemed to have been denied, and that the person denied access has exhausted his or her administrative remedies and may seek judicial review by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)]. It is also noted that in such a proceeding a court may, if certain conditions are present, award costs and attorney's fees to a person denied access who substantially prevails [see Freedom of Information Law, §89(4)(c)].

Lastly, 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."

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..."

As such, records subject to the Local Government Records Law 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Theodore Jerrett
Bruce Clark

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13445

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Alexander Reed
94-B-1344
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. Reed:

I have received your letter and attached material. You requested guidance regarding your attempts to obtain records from the "Buffalo Central Police Services Forensics Lab."

The Erie County Department of Central Police Services response of October 3, 2001 acknowledged that your request, which had been forwarded to the County Attorney, was outstanding and that the County Attorney would be so notified. The February 15, 2002 letter from Erie County, apparently in response to a new request for the same information, asked you to "submit the date, submitting agency, case number and names of persons (if known) that are involved in your request."

In this regard, I offer the following comments.

From my perspective, the primary issue relates to the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY2d 245, 249 (1986)]. 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 Erie County, to extent that the records sought can be located with reasonable effort, based on the terms of your request, 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 in the manner in which you requested them, you should renew your request.

Based on the latest item of correspondence, the County does not use indictment numbers as identifiers in locating the records of your interest. It is suggested that you submit a new request in accordance with the direction offered by the County. That request should include "the date, submitting agency, case number and names of persons involved."

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: June E. Jonmaaire

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13446

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Anthony Bennett
96-B-1530
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

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

Dear Mr. Bennett:

I have received your letter in which you explained that you have not received a response to your requests for records from the Lockport 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Lockport Police Department
Niagara County Chairman of Legislation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13447

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Cisero Murphy
93-A-8565
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. Murphy:

I have received your letters in which you requested assistance from this office in obtaining "a copy of the warrant that was lodged against [you]." You also wrote that you have been unsuccessful in your attempt to obtain "Notice to the Defense Counsel" and a "Notice of Appearance."

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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

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

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

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

Based on the foregoing, the courts are not subject to the Freedom of Information Law. Other statutes, however, may grant rights of access to court records (see e.g., Judiciary Law, §255) and it is suggested that a request might be directed to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

Lastly, assuming that you are referring to a warrant related to your arrest, I point out that §120.80(2) of the Criminal Procedure Law states in part that:

> "[U]pon request of the defendant, the police officer must show him the warrant if he has it in his possession. The officer need not have the warrant in his possession, and, if he has not, he must show it to the defendant upon request as soon after the arrest as possible."

As such, it would appear that copies of warrants would be available to you from either a police department or the court in which the warrant was issued. Copies of "Notice to the Defense Counsel" and "Notice of Appearance" may be available from the office of the district attorney or the court.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1341/18

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Joseph Wolske
01-A-0026
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. Wolske:

I have received your letter in which you sought an advisory opinion regarding attempts to obtain your mental health records from the Department of Correctional Services.

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 Upstate 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.

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-13419

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. James Anthony Carter, Jr.
91-A-6633
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. Carter:

I have received your letter in which you questioned the availability of a variety of information concerning Dr. Stewart Fagin, who apparently provided you with medical care at your facility.

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 information related to being "relieved of his duty as a physician here at the prison", two of the grounds for denial may 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, 250 AD2d 772 (1998); 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 other provision 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.

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.

Third, with regard to determining whether "Dr. Stewart Fagin was licensed to practice medicine", 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. Since physicians are licensed by the State Education Department, a request for the license record could be made to that agency or the facility, if the facility maintains such a record.

Fourth, with respect to criminal history records pertaining to Dr. Fagin, 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].

Fifth, in relation to obtaining various court records under the Freedom of Information Law. It is emphasized that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

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

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

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

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

designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

Lastly, with respect to determining whether Dr. Fagin has an outside practice, if the facility maintains a record so indicating, that portion indicating he maintains such a practice would, in my view, be public. However, I believe that the location or nature of the practice could be withheld as an unwarranted invasion of personal privacy.

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-1345O

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

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.

Dear Mr. Hyde:

I have received your letters of June 10 and June 15, both of which relate to requests made under the Freedom of Information Law to the Office of the State Comptroller. In consideration of your comments and questions, I offer the following remarks.

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

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

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

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's

status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records is in my opinion irrelevant.

Third, notwithstanding the foregoing, in my view, it is reasonable for an agency to assume that a request by a person is not ordinarily intended to include records that he or she wrote and transmitted to the agency. If that person lost or misplaced the records that he or she authored and clearly indicates that the request includes those records, I believe that the agency should honor the request. In other instances, however, in my experience, agencies fairly assume that an applicant for records does not want records that he or she prepared and sent or delivered to the agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Albert Wm. Brooks
Shelly Brown
Helen Fanshawe
Maureen Madden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3486
FOIL-AO-13451

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Robert Mishkin
Town and Country Senior Residence
53 Mountain Avenue
Mount Kisco, NY 10549

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

Dear Mr. Mishkin:

I have received your letter of June 12 and the materials attached to it. Please accept my apologies for the delay in response and understand that, in fairness, responses to inquiries are prepared in the order in which they are received.

As I understand the materials, on June 4, you requested certain records from the Village of Mount Kisco relating to the "Woodcrest at Leonard Park" proposal, specifically, the DEIS, minutes of meetings of the Planning Board during which "appearances" were made concerning the proposal, and tape recordings of those meetings. In an acknowledgment of the receipt the request, you were informed that a review of the records sought and a determination would be made within sixty days of that acknowledgment. Following a conversation that we had, you wrote to the Village Manager, indicating that I advised that "according to State Law all records are public and should be available to the public within two weeks of the original meeting."

Since your statement to the Village Manager is not entirely accurate, for purposes of clarification, I offer the following comments.

First, while I do not recall the specifics of our conversation, I would conjecture that the reference to two weeks to disclose related to a provision in the Open Meetings Law. 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."

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."

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, 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.

Second, with respect to the DEIS, the regulations promulgated by the Department of Environmental Conservation indicate that the DEIS must be made "readily available." The regulations, which appear in 6 NYCRR 617.10, refer to "Draft EIS's" 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). Since the DEIS must be filed with the chief executive officer of the municipality and must be made available promptly, it would seem that a delay in disclosure of as much as sixty days may be inconsistent with law.

Third, tape recordings of open meetings maintained by or for the Village clearly constitute Village records subject to the Freedom of Information Law, and it was held more than twenty years

ago that they are accessible to the public (Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978).

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

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

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account

> the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: Patricia Dwyer

FOIL-AO-13452

From: Robert Freeman
To: [redacted]
Date: 7/11/02 3:28PM
Subject: Dear Mr. Futia:

Dear Mr. Futia:

I have received your letter concerning your unsuccessful attempts to "acquire a listing of the number of students attending the school district from each town" in which the district functions. Since the superintendent has indicated that there is no breakdown by town, you have asked for an opinion "on (1) such being public information and (2) that such information is simply a matter of record keeping for any school district."

In this regard, the Freedom of Information Law pertains to existing records, and section 89(3) of that law provides that an agency, such as a school district, is not required to create a record in response to a request. In short, if the district maintains no record indicating the number of students in attendance by town, there would be no obligation imposed by the Freedom of Information Law to prepare such a record, breakdown or statistic on your behalf. Insofar as the district does maintain records containing statistics or figures indicating the residence of students by town, I believe that those items would be accessible under the law.

Whether a school district should maintain the kind of breakdown or statistic in which you are interested is unrelated to the Freedom of Information Law, and I cannot offer advice with respect to that question.

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-13453

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

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

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

Dear Mr. Sheehan:

I have received your letter of June 14 concerning a request for records of the Town of Lancaster. In response to the request, you indicated that:

> "Chief Fowler wrote back and told us he would be willing to sell us a report for twenty five cents but we would have to come to the Town of Lancaster to get it.
>
> "I contacted Attorney Robert Sherwood, Town of Lancaster Attorney, and he called today and said that the Chief was charging $3.00 to send a policeman to mail the report, it we wanted it to be mailed and we were going to be charged for this service."

You have asked whether the foregoing, in my view, "is a legitimate charge." I do not believe that the fee is consistent with law, and in this regard, I offer the following comments.

First, by way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy 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, a fee in excess of twenty-five cents per photocopy, a fee for personnel time, or a fee higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search or personnel time. 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 §1401.8).

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute. Again, the Law itself indicates that the only

fee that may be charged involves the reproduction of records. I do not believe that personnel costs may be charged.

Second, while nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government deals 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 specific 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.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Thomas Fowler
Robert Sherwood

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1314

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Wyeth Akeley
[redacted]

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

Dear Mr. Akeley:

I have received your letter of June 17 and the materials attached to it. You have asked that I "evaluate" your request for records made to the City of Newburgh and the propriety of its response.

By way of background, several categories of records were requested, but they involve two general areas. One relates to communications from David Rider, the City's Corporation Counsel, to City officials; the other involves minutes of meetings of the City Council during which certain actions were taken. The receipt of the request was acknowledged, and you were informed that it was "forwarded to the proper department to be answered."

In this regard, I offer the following comments.

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

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

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

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

acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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 rights of access, the Freedom of Information Law is upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, two of the grounds for denial are relevant.

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.

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

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his

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

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that records consist of legal advice or opinion provided by counsel to the client, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

Insofar as the request does not involve communications between Mr. Rider or his firm when neither he nor his firm served as counsel for the City, I do not believe that the attorney-client privilege would be applicable or serve as a basis for a denial of access. If, for instance, Mr. Rider or his firm communicated with City officials prior to being retained or hired by the City, as I under the situation, there would have been no attorney-client relationship.

The other ground for denial of potential significance, §87(2)(g), permits an agency to withhold records that:

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

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

Aside from the applicability of the attorney-client privilege, as an employee or official of or a consultant retained by the City, I believe that the communications between Mr. Rider in any of those capacities and City officials would have constituted intra-agency materials. Insofar as those materials consist of advice or opinions, for example, I believe that they may be withheld under

§87(2)(g). Again, however, if any communications preceded his acting in those capacities, I do not believe that that exception would be applicable.

Lastly, it is emphasized that the foregoing is unrelated to any matters to which you referred involving conflicts of interest or ethical conduct. Those matters are separate from the issues that you raised concerning the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: City Council
Nancy D'Addio
Lorene Vitek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1345

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Chaka Zulu
74-B-395
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. Zulu:

I have received your letter regarding a request for records "made to the Geneva Free Library in Geneva, New York."

In this regard, while many "public libraries" are subject to the Freedom of Information Law, others so characterized may fall beyond the coverage of that statute.

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

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

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

Based on §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school

> library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, in French v. Board of Education, in which the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

If a library is not subject to the Freedom of Information Law, there would be no obligation to disclose. On the other hand, if a library is "public" and a governmental entity, it would be obligated to respond to a request for records.

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

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13456

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Jerald Miller
00-A-0607
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. Miller:

I have received your letter in which you requested "an advisory opinion on practices instituted by New York State Department of Correctional Services which [you] believe violate the spirit and intent of F.O.I.L." You question the propriety of responses and reasons provided in denying your requests for records.

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

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

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

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

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

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

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

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

The other issue pertains to the absence of any expressed reason for withholding records. In this regard, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the Freedom of Information Law. Section 1401.2 (b)(3) states that an agency's records access officer is responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor." Based on the foregoing, the reasons for a denial of access must be stated in writing. This is not to suggest that the reasons must be explained in an exhaustive manner. As indicated above, later in the process of seeking records, if an appeal is denied, §89(4)(a) provides that the reason must be "fully explain[ed] in writing."

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13457

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Edward Padilla
00-A-5852
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. Padilla:

I have received your letter in which you sought to "file a formal complaint against the New York City Dept. of Corrections Records Access Officer," for not responding to your request for records concerning an "assault charge against an 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from

> the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)].

Since the individual in question is a correction officer, it appears that the records of your interest can likely be withheld pursuant to §50-a of the Civil Rights 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-13458

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Maxwell D. Weinstein
[redacted]

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

Dear Mr. Weinstein:

As you are aware, I have received your correspondence of June 19. I hope that you will accept my apologies for the delay in response and understand that, in fairness, we respond to requests for opinions in the order in which they are received.

You have sought an opinion concerning the propriety of denials of access by the Village Justice Court in Ocean Beach and the Police Department to an incident report following the alleged "tampering with [your] client's golf cart." It is not clear on the basis of your letter whether the subjects of a criminal complaint were arrested. Nevertheless, 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."

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 (i.e., 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.

Second, in consideration of the definition of "agency", a village police department clearly maintains agency records. From my perspective, when a record is available from a justice court, for example, the same or equivalent records would be accessible from a police department.

Third, when the Freedom of Information Law is the governing provision, 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, unless an arrest or booking record has been sealed pursuant to §160.50 of the Criminal Procedure Law or is otherwise exempt from disclosure by statute, 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)].

On the other hand, if there has been no charge or arrest, if a person is the subject of an unsubstantiated allegation, and if no judicial proceeding relating to the allegation has been conducted, it has been advised that disclosure of a portion of record indicating that person's identity would, in most instances, constitute "an unwarranted invasion of personal privacy" and may be withheld pursuant to §87(2)(b) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Clerk, Village of Ocean Beach

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13459

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Mark A. Turley
98-B-1294
P.O. Box 8450
Rome, NY 13440

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

Dear Mr. Turley:

I have received your letter in which you requested this office "to make sure that an agency will comply with the law." You wrote that your request for a record was approved by Mr. Terrence Tracy, but that your facility has not made the record available to you.

It appears that you appealed a denial of access to records and that Mr. Tracy, the appeals officer fro the Division of Parole, determined to grant your request in whole or in part. Here I direct your attention to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of 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 agency must within ten business days of receipt of an appeal deny access or "provide access to the record." That being so, if you have not yet received the record, it is suggested that you contact Mr. Tracy to ask him to direct staff to disclose in accordance with his determination.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm
cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13460

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. John H. Kemp
President
Kemps Bus Service, Inc.
2926 Lakeville Road
Avon, NY 14414

The staff of the Committee 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. Kemp:

As you are aware, I have received your letter of June 19 concerning your efforts in gaining access to records of the Rochester-Genesee Regional Transportation Authority ("the Authority"). In brief, you complained that only you, and not members of your staff, were permitted to view records that you requested, and that the Authority has engaged in unreasonable delays in dealing with your request. Although you appealed a denial of access, the Authority's records access officer wrote that you were not denied access to records and that the records were and continue to be available for your inspection. He added that "the Freedom of Information law does not...permit you to bring whomever you choose to review information that you, specifically, have requested." Nevertheless, you informed me by phone that you were escorted out of the Authority's premises prior to viewing the records when you sought to inspect the records with staff.

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law that deals with whether a person who requests records may bring others with him or her to inspect the records. However, in a case involving the City of Rochester, it was held more than twenty-five years ago, that records accessible under the Freedom of Information Law are generally available to any person, regardless of one's status or interest [Burke v. Yudelson, 51 AD2d 673 (1976)]. In consideration of the nature of the records that you requested, charters and contracts, I believe that those records would clearly be available to any member of the public. I note, too, that there are many instances in which a representative of a person or entity seeking records reviews them on behalf of that person or entity. It is not uncommon for a request to be made by a corporate entity and for the entity's attorney, for example, to review or obtain copies on behalf of the entity.

The only issue in terms of enabling staff to inspect records with you, in my opinion, involves the physical aspects of the Authority's premises. If they are small and more than one person inspecting records would be disruptive, it may be reasonable to enable one person at a time to inspect records. On the other hand, if the location where records are typically inspected would accommodate you and those with you without disruption, it would be unreasonable in my view to preclude your colleagues from joining you.

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

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

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: Mark Aesch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13461

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Carlos Quinones
02-A-2181
Elmira Correctional Facility
Box 500
Elmira, NY 14902-0500

Dear Mr. Quinones:

I have received a copy of your appeal made under the Freedom of Information Law to the president of Volunteers of America in New York City.

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

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

Based on the foregoing, the Freedom of Information Law applies to records maintained by entities of state and local government in New York.

If Volunteers of America is a private organization and not a unit of state or local government, its records would not 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard Salyer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13462

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Myron Dukes
93-A-5935
Box 500
Elmira, NY 14902-0500

Dear Mr. Dukes:

I have received your letter in which you asked for the names of persons to whom you may appeal at two New York City agencies pursuant to the Freedom of Information Law, as well as forms to be used to appeal.

In this regard, there are no particular forms used to appeal denials of access to records. Further, this office does not maintain lists or other records that identify the persons to whom appeals should be directed at every agency. I note that the law refers to appeals made to the head of an agency, and §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 address appeals to the heads of the agencies in receipt of your requests and that you ask that an appeal be forwarded to the appropriate person if the recipient of the appeal does not determine the appeal.

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-13463

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Frederick Alexander Jones
[redacted]

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

Dear Mr. Jones:

I have received your letter in which you raised questions concerning access to court records and the name of a person residing in a certain rent controlled apartment in New York City.

In this regard, first, with respect to your inquiries concerning court records, it is emphasized that the Freedom of Information Law, the statute within the advisory jurisdiction of this office, pertains to agency records, and that §86(3) of that statute defines the term "agency" to include:

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

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

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

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

> "1. The clerk of the court shall keep a record of and be responsible for the proper indexing, filing or recording, as the case may be, collating, arranging, restoring and preserving of all records,

> documents, books, maps, instruments and other matter specified in this article or by other requirement of law heretofore or hereafter deposited, filed or recorded, of all matters specified by this article or by other requirement of law...
>
> 8. All books and records other than those sealed are open to inspection of any person at reasonable times."

Therefore, insofar as records in which you are interested are maintained by a Surrogate's Court, I believe that they would be available, except to the extent that the records may be sealed.

With regard to records maintained by other courts, the provision most generally applicable is §255 of the Judiciary Law. To seek records from a court, it is suggested that you contact of the clerk of the court in which the records are filed and that you provide sufficient detail in a written request to enable court personnel to locate the records of your interest.

Second, I do not believe that a government agency would be required to disclose the name of a person currently residing in a certain apartment. If an agency maintains a record containing that information, the Freedom of Information Law would be pertinent. 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, two of the grounds for denial would likely enable an agency to deny access to the name of a tenant.

While I am not an expert on the subject, I believe that rent control functions are now under the aegis of the State Division of Housing and Community Renewal. If that is so, the initial ground for denial, §87(2)(a) would appear to apply. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §8632-a(b) of the Unconsolidated Laws, a section within the Emergency Tenant Protection Act, states 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 part or his authorized representative." In short, records concerning a tenant in a rent controlled building are, based on the foregoing, available only to the tenant or his or her representative.

Aside from the provision referenced above, §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." In my view, that exception would ordinarily serve to enable an agency to withhold the identity of a tenant in an apartment building.

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-13464

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. James Rizzo
95-A-3842
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

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

Dear Mr. Rizzo:

I have received your letter in which you questioned the availability of a variety of "operations manuals" from your facility and requested this office to "look into this serious 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.

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

Perhaps most relevant would be §87(2)(e)(iv), which authorizes an agency to withhold records compiled for law enforcement purposes the disclosure of which would reveal non-routine criminal investigative 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 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 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). 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 certain portions of manuals would jeopardize the lives or safety of public employees or others, the cited provision would be applicable.

Lastly, regarding your contention that an agency should inform you that certain portions of records would not be provided, 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)].

I hope that I have been of assistance.

Sincerely,

David Treacy

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3491
FOIL-AO-13165

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Dorothy M. Borgus
[redacted]

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

Dear Ms. Borgus:

I have received your letters of June 20 and the material attached to them. You have sought advisory opinions concerning a request for records of the Town of Chili and the adequacy of a reference in an agenda to an executive session to be held by the Town Board.

According to your correspondence, on June 5, you delivered a request to inspect "the Abstract of Audited Vouchers to be presented for a vote on payment at that evening's Town Board meeting." In response to the request, the Town Clerk wrote that:

> "The abstract is presented to the Town Clerk after it is voted on. It is not an official document until then. Abstract will be available to public after I have signed it and it is official which is the day after the meeting."

Attached to your letter is a copy of the abstract, which is stamped "CONFIDENTIAL (For Internal Use Only)".

In this regard, I offer the following comments.

First, although I believe that the record sought is accessible under the Freedom of Information Law for reasons to be discussed in the ensuing remarks, I do not believe that the Town Clerk would have been required to make it available for your inspection instantly. Under §89(3) of that statute, an agency has up to five business days to respond to a request. While I am not suggesting that the cited provision should be used as a means of unnecessarily delaying disclosure, it is clear in my view that the Clerk would not have been required to honor your request immediately.

Second, with respect to rights of access, despite the Town Clerk's view that the abstract was a draft and may not have been "official" when the request was made, I believe that it constituted a record subject to the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

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

Based on the foregoing, whether a document is a draft or is "unofficial", it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. That is not to suggest that a record must always be disclosed, but rather that it falls within the coverage of the Law.

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

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In short, I do not believe that an assertion of confidentiality would serve to remove from public rights of access records that would otherwise be available.

Third, 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, there would have been no basis for denying access to record, even though it had not yet been signed by the Clerk.

Pertinent to an analysis of rights of access is §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires 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 rendered by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

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

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

Based on a review of the records that you attached, it appears that they consist of factual information and, therefore, that none of the grounds for denial could have been asserted.

As indicated earlier, your other letter deals with the description of an executive session in an agenda.

It is emphasized at the outset that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires the Town Board to prepare an agenda. When an agenda is prepared, it typically serves as an outline, a guide or a framework for activities that may be conducted at a meeting; there is nothing that would bind the Board to or require that the Board follow the agenda.

The portion of the agenda that you highlighted states that as follows: "Resolution to authorize the Town Board to enter into executive session for the purpose of discussing pending legal action/litigation." In my view, there is nothing inadequate or insufficient in relation to the foregoing. Again, it is merely a reference to a topic appearing in an agenda. If the Board later entered into executive session, I believe that motion to do so must be somewhat more expansive.

In that regard, 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 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."

If the Board seeks to discuss its litigation strategy regarding a matter not yet in court, and if the identification of the potential adversary would impair the Board's capacity to carry out its strategy, I do not believe that the identity of the adversary would have be included in the motion. In that event, it is suggested that a motion for entry into executive session indicate that the Board will discuss litigation strategy in relation to a matter in which premature disclosure of the identity of the adversary would be detrimental to the interests of the Town and its residents.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Richard Brongo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMLAO - 3490
FOIL-AO - 13166

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Lois A. Douville
[redacted]

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

Dear Ms. Douville:

I have received your letter of June 22, as well as the materials attached to it. You have sought an advisory opinion concerning the status of the Mohawk & Hudson River Humane Society ("the Society") under the Freedom of Information and Open Meetings Laws.

In this regard, the latter is applicable to meetings of public bodies, and §102 of that statute defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, the Open Meetings Law pertains to entities that conduct public business and perform a governmental function for the state or for a municipality. Having reviewed the Society's by-laws, I do not believe that its Board of Directors would constitute a public body.

It has been advised and determined in some instances that the boards of certain not-for-profit corporations are subject to the Open Meetings Law. Those instances have involved situations in which the government has substantial control over a corporation. For example, in a situation in which government officials designate the members of the board of directors of a not-for-profit corporation, I believe that the board such a corporation would constitute a "public body" despite its corporate status. In consideration of the by-laws of the Society, it appears that there is little if any government control, and if that is so, the meetings of its Board would, in my view, fall beyond the requirements of the Open Meetings Law.

Somewhat similarly, 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."

In view of the language quoted above, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York. I do not believe that the Society could be characterized as an agency or that it has a responsibility to comply with the Freedom of Information Law.

Nevertheless, in consideration of its relationships with governmental entities, it is possible that some of the Society's records may fall within the scope of the Freedom of Information Law. For purposes of that statute, the term "record" is defined 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).

Perhaps most significant is a decision rendered by the Court of Appeals, the state's highest 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. 417 (1995)].

Insofar as records maintained by the Society are "kept, held, filed, produced or reproduced...*for* an agency", such as a municipality, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform the Society into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it possesses may be maintained for an agency, and that those records would fall within the coverage of that statute.

In circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation that you described, if the Society maintains records for a municipality, a request should be made to the municipality's records access officer. To comply with the Freedom of Information Law and the implementing regulations, the records access officer would either direct the Society to disclose the municipality's records in a manner consistent with law, or acquire the records the from the Society in order that he or she could review the records for the purpose of determining rights of access.

To reiterate, the responsibility to give effect to or comply with the Freedom of Information Law would not involve the Society, but rather the government agency whose records are maintained by the Society on its behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Robert Freeman
To: skramar@rochester.rr
Date: 7/17/02 9:28AM
Subject: Dear Ms. Kramarsky:

Dear Ms. Kramarsky:

I have received your lettter in which you wrote that you have "pulled 134 pages [requested under the Freedom of Information Law] which need to be copied and then redacted due to the personal nature of the information." Although you have responded and held the materials for 30 days, the applicant has not contacted you concerning your response. You asked when you may "refile" the materials and what your responsibility would be if, for example, the applicant requests the same records six months from now.

In this regard, first, I would contact the applicant for the records and indicate that unless he informs you within a specific time (i.e., a week) that he continues to want them, his request will be considered to have been withdrawn.

Second, since the records apparently include items of a personal nature that the applicant has no right to see, he cannot inspect the records. In that situation it has been advised and confirmed judicially that an agency may charge for copies from which the proper deletions would be made. In a related vein, it has consistently been advised that an agency may require payment of the fee in advance of making copies.

In consideration with the foregoing, it is suggested that your letter to the applicant indicate that his request involves 134 pages, that they include information that is not accessible to the public, that copies can be made with the information deleted, and that you will begin making copies upon payment of a fee of 25 cents per photocopy, for a total of $33.50, if you hear from him within a week. Again, I suggest that you inform the applicant that you will consider the request to have been withdrawn if you do not hear from him within a week.

I doubt that there is anything that can be done with regard to the possibility that the same request may be made in future. Nevertheless, it is reiterated that a request need not be honored, in my opinion, until the applicant pays the proper fee. It has also been suggested that if an applicant has requested copies but has not paid for the copies, an agency can indicate that no future request will be considered until the applicant pays what is owed.

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-13468

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

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 information presented in your correspondence.

Dear Mr. Grace:

I have received your letter of June 26 in which you asked that I "instruct" the attorney for the Village of New Berlin to inform the Village Clerk to respond to your request made under the Freedom of Information Law. The attorney indicated that he forwarded your request to the clerk for her "review and reply." As of the date of your letter to this office, you had received no response.

In this regard, I note 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 "instruct" a person to take certain action or otherwise compel compliance with law. Nevertheless, in an effort to assist you, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee (21 NYCRR Part 1401), which deal with the procedural implementation of the Freedom of Information Law, each agency, such as a village, is required to designate one or more persons as "records access officer." That person has the duty of coordinating the agency's response to requests for records, and requests should ordinarily be made to that person.

I point out that the Village Law, §4-402, states that the clerk is custodian of village records. That being so, in my experience, the clerk is in most instances the records access officer of a village.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Merzig
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13469

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Thomas H. Miller
Miller & Miller
P.O. Box 875
New Berlin, NY 13411

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

Dear Mr. Miller:

I have received your letter of June 18, as well as the materials attached to it. You have sought an advisory opinion concerning the propriety of a denial of access to records by the City of Oneonta.

By way of background, in 1985 your client was awarded custody of her son, who in 1987, according to your letter, was abducted by the father of the child. Your client knew nothing of the whereabouts of her son, "or even whether he was dead or alive", for fourteen years, until January, 2001, when "after an investigation and search by multiple law enforcement agencies, including the FBI and the City of Oneonta Police Department, the child and his father were located living in Massachusetts under fictitious names." The father and his wife were arrested and brought to Oswego County to face felony charges.

In April of that year, your client made a request to the City of Oneonta under the Freedom of Information Law for records relating to the abduction of her son, including reference to a certain report. On May 3, she was informed that a report consisting of 236 pages would made available "upon the final disposition of the criminal charges pending against Daniel and Rosemary Greene." Later that year, charges against Rosemary were dropped, and in January of this year, an Otsego County grand jury "chose not to indict Daniel Greene." On March 5, as a "follow-up" to her original request, on behalf of your client, you requested "all information including the entire file or all files" pertaining to the police investigation of the abduction and any other information relating to the report referenced above, maintained by the Oneonta City Police Department, its employees or any other person acting on behalf of the Department. On March 14, your request was denied on the ground that the records had been sealed by order of the court pursuant to §160.50 of the Criminal Procedure Law (CPL). You appealed, and it was determined that all records maintained by the City falling within the request must be considered sealed unless and until the judge who issued the order to seal the records clarifies the scope of his order.

In this regard, I am mindful that the primary function of the Committee on Open Government involves offering advice with respect to the Freedom of Information Law. However, in many instances, it is necessary to review other statutes in conjunction with the Freedom of Information Law in order offer an appropriate legal opinion. For example, in the instant situation, insofar as §160.50 of the CPL applies, the Freedom of Information Law does not; contrarily, insofar as that statute does not apply, the Freedom of Information Law would, in my view, govern rights of access. I recognize, too, that the presence or absence of a comma in statutory language, as you pointed out, can result in different conclusions. For purposes of this analysis, it will be assumed that the language of the statute itself, including the placement of punctuation, is most pertinent. That being said, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records, such as those maintained by or for the City of Oneonta Police Department. For purposes of that statute, §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, documentation, in whatever form and irrespective of its authorship or source, maintained by or for the Department, would constitute a "record" that falls within the coverage of the Freedom of Information Law. I note that it has been held that police officers' memo books (often the black leather notebooks that police officers carry on their person) have been found by the Court of Appeals to constitute agency records subject to rights conferred by that statute [see Gould v. New York City Police Department, 89 NY2d 267 (1996)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for

> exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Third, of critical significance is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, as you are aware, is §160.50 of the CPL, which provides in subdivision (1) that "[u]pon the termination of a criminal action or proceeding against a person in favor of such person", "the record of such action or proceeding shall be sealed", and notification so indicating must be given by the clerk of the court in which the action or proceeding occurred. Paragraph (c) of subdivision (1) involving the notification states that:

> "all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency."

The key issue concerns the meaning of the term "official." As suggested earlier, insofar as the order to seal involves "official records and papers", those materials would be exempted from disclosure by statute, and the Freedom of Information Law would not apply. However, insofar as the records maintained by or for the Department cannot be characterized as "official", §160.50 of the CPL would not apply, and the provisions of the Freedom of Information Law would serve as the basis for determining the extent to which any such records must be disclosed.

As noted by more than one court, the language of paragraph (c) is not entirely clear. In Robinson Brog Leinwand Greene Genovese & Gluck, P.C. v. Catterson (Supreme Court, Suffolk County, NYLJ, August 13, 1997), the court stated that:

> "The statute does not provide a definition of what constitutes 'an official record or paper...relating to an arrest or prosecution' and so courts have struggled to interpret this language in light of its legislative purpose to protect exonerated accused from discrimination in employment, education, and professional licensing flowing from a criminal prosecution. Some guidance is provided by two Court of Appeals cases, each involving a tape conversation of an attorney which were part of a criminal proceeding and later sought by the Grievance Committee of the Bar. In each case the tape conversation was key to the criminal proceeding and was later sought by the grievance committee which could and did result at least in the Matter

> of Dondi, 63 NY2d 331, 482 NYS2d 431, in the attorney being deprived of his profession, even though he had been acquitted. In each case the Court of Appeals found that the tape recording had been properly sealed and could not be unsealed (Matter of Hynes v. Karassik, supra; Matter of Dondi, supra).
>
> "However, it is clear that the Court of Appeals agrees with the distinction of the First Department Appellate Division in the Matter of Hynes v. Karassik, 63 AD2d 597, 405 NYS2d 242 at p.243, that 'a tape recording made in the course of an investigation does not become an official record required to be sealed under the section simply because it is marked in evidence as an exhibit in the course of a criminal trial.' The Second Department Appellate Division applied this reasoning in the Matter of Anonymous, supra, finding that a tape recording of a statement suppressed during a criminal trial did not constitute the official record for purposes of CPL §160.50. The Second Department granted the motion to unseal by finding that the record was not in fact sealed and so found it unnecessary to exercise the court's inherent power to unseal.
>
> "Generally investigative and audit reports are not records required to be sealed by the CPL §160.50 (People v. Neuman, 104 Misc2d 577)."

In the last case cited by the court, it was stated that:

> "...the court would find that the various records in question here, which the court understands largely consist of investigative and audit reports prepared by the office of the Special Prosecutor during the investigation and previous prosecution of defendants Lorette Neuman and Dr. Carl Neuman, do not constitute 'official records and papers' within the meaning of CPL 160.50 (subd 1, par [c]). Here, the court would be guided by the distinction drawn in *Matter of Hynes v Karassik* (63 AD2d 597, aff'd 47 NY2d 659) wherein, in reversing the ruling of the trial court which had granted respondent's motion to unseal, the First Department nevertheless made available to the Bar Association Grievance Committee certain tape recordings which had been made in the course of an investigation, and which had later been received into evidence in trial. In so doing, the majority (KUPFERMAN, J., concurring and dissenting in part) made the following comment (at p 598): 'it seems appropriate to express our understanding that a tape recording *made in the course of an investigation does not become an official record* required to be sealed under the section *simply because it is marked in evidence as an exhibit in the course of a criminal trial.* On the other hand, it would seem clear that the indictment itself is such an official record.' (Emphasis added.)" (People v. Neuman, 104 Misc.2d 324, 326).

Most recently, in a case in which a defendant against whom charges had been dismissed contended that he had a right to all files maintained by the district attorney pertaining to his case, claiming that they consisted of "official records" that must be unsealed pursuant to his request pursuant to paragraph (d) of §160.50(1) of the CPL, the Court of Appeals rejected that contention. Rather, the Court determined that not all records pertaining to a criminal action or proceeding are "official" records, stating that:

> "Such a conclusion is contradicted by the plain language of the statute which limits the accused's access to all *official* records and papers, rather than permitting free access to any and all records and papers, without limitation.
>
> "Moreover, although CPL 160.50 specifies judgments and orders of a court as items 'included' in the category of official [89 N.Y.2d 766] records and papers, the statute is otherwise silent on the nature of such 'official' materials (*see,* CPL 160.50[1][c]) further supporting the conclusion that bright line rules are not wholly appropriate in this area. Indeed, such records and papers are not always subject to easy identification and may vary according to the circumstances of a particular case (*Matter of Dondi,* 63 N.Y.2d 331, 337, 482 N.Y.S.2d 431, 472 N.E.2d 281).
>
> "Thus, in *Matter of Dondi*, we held that 'on the facts of this case' certain 'testimonial evidence' consisting of an incriminatory tape recording constituted an official record subject to CPL 160.50(1)(c) (*id.*, at 337-338, 482 N.Y.S.2d 431, 472 N.E.2d 281). However, in *Matter of Hynes v. Karassik,* 47 N.Y.2d 659, 661-662, 419 N.Y.S.2d 942, 393 N.E.2d 1015, we affirmed the Appellate Division's determination that 'two tape recordings introduced into evidence at the criminal trial were not within the definition of 'official records and papers' protected by the sealing statute [680 N.E.2d 605] ***232** (CPL 160.50, subd 1, par [c]).' Consequently, while some recordings may qualify as an official record under certain circumstances, not all tape recordings will qualify as an official record in every case" [Harper v. Angiolillo, 89 NY2d 761, 765-766 (1997)]

In consideration of the decisions referenced above, it appears that "official records" and the capacity to seal involve those records "relating to the arrest or prosecution", and do not necessarily include investigative materials. If that is so, it would appear that some if not many of the records sought would not be subject to sealing requirements and would be subject to the Freedom of Information Law. The factual circumstances that you presented would suggest that investigative and other records may have been prepared years before the arrest and perhaps on a somewhat continual basis, and that those records might never have been used in determining whether to prosecute, nor might they have been pertinent to or used in relation to grand jury proceedings. Many of those records would appear to fall beyond several courts' construction of "official" records and, therefore, within the scope of the Freedom of Information Law.

To the extent that the Freedom of Information Law is applicable, several grounds for denial might be relevant in determining the extent to which they must be disclosed or, conversely, may be withheld.

Records prepared by Department personnel would likely fall within §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.

In Gould, supra, the Court of Appeals focused on that provision, and the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision

makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 276-277).

Based on the foregoing, neither the New York City Police Department nor an office of a district attorney could claim that certain reports could be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

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). At this juncture, since the criminal case is closed, it does not appear that disclosure would interfere in any way with an investigation or judicial proceeding.

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

In sum, while some of the records sought may fall within the coverage of §160.50 of the CPL and be exempt from disclosure, it appears, based on the judicial interpretation of that statute, that the remainder of the records would be subject to rights of access conferred by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James Koury
David S. Merzig

FOIL-AO-13470

From: Robert Freeman
To: rer@compuserve.com
Date: 7/17/02 12:47PM
Subject: Dear Mr. Roistacher:

Dear Mr. Roistacher:

I have received your inquiry concerning your right to obtain a portion of permit indicating the monthly payment of a permittee to the Hudson River Park Trust.

In this regard, as a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, agency records, such as those of a public benefit corporation, must be made available, except to the extent one or more grounds for denial of access listed in section 87(2) of the Law may properly be asserted.

If I understand the nature of the document correctly, there would be no basis for withholding the amount of a monthly payment by a permittee. I note, too, that when any portion of a request is denied, the agency is required to indicate the reason and inform the person denied access of the right to appeal to the head of the agency or his or her designee.

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-1347/

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Daniel McCarthy
Municipal Research Institute of NY
233 Broadway, Suite 970
New York, NY 10279

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. McCarthy:

I have received your inquiry concerning rights of access to "FOIL requests."

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, with the exception of portions of certain kinds of requests, the records sought are accessible under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a public body, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business

or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

In short, except in the situation in which a request includes intimate personal information, in which case identifying details may be withheld, I believe that requests made under the Freedom of Information Law should generally be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13472

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 18, 2002

Hon. Howard C. Welch
Councilman
City of Utica
1 Kennedy Plaza
Utica, NY 13502

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Councilman Welch:

I have received your letter in which you asked whether it is "allowable under the Freedom of Information Act to screen potential tenants for convictions on drug charges from police files."

In this regard, as a general matter, when records are available under the Freedom of Information Law, they must be made available to any person, irrespective of one's status or interest [see Burke v. Yudelson, 51 AD2d 673 (1976)]. Therefore, when records of convictions are accessible to the public, the recipient of those records may do with them as he or she sees fit.

I note that the state's database containing criminal history records maintained by the Division of Criminal Justice Services has been found to be exempt from the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989). However, if a police department or the office of a district attorney, for example, independently maintains records indicating convictions, those records would, in my view, be accessible to the public. A conviction would have occurred during a public judicial proceeding, and I do not believe that there would be a basis in the Freedom of Information Law for denying access to a record reflective of a conviction.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13473

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 18, 2002

Mr. Alan R. Lichtenstein
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lichtenstein:

I have received your letter of July 3 and the materials attached to it. You complained with respect to your efforts to gain access to actuarial records from the New York City Teachers' Retirement System. Having reviewed your remarks, I offer the following comments.

First, since you referred to the federal Freedom of Information Act, I note that that statute pertains only to records maintained by federal government agencies. The applicable statute is the New York Freedom of Information Law, which pertains to records maintained by agencies of state and local government.

Second, it is emphasized that the Freedom of Information Law concerns existing records and that §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the Retirement System does not maintain the data of your interest, I do not believe that it would be required to prepare a new record or records to accommodate you.

It is noted that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of tbe 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.

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 an agency's response to requests for records, and requests should ordinarily be made to that person. While I believe that the person in receipt of your request should have responded in a manner consistent with law or forwarded the request to the records access officer, it is suggested that you might renew the request. According to the Official New York City Directory (2000 edition), the records access officer for the Teachers' Retirement Board is Stanley J. Kessock; his phone number is (212) 386-5200.

Since you were unable to locate it, the Office of the Actuary is located at 220 Church Street, Room 1205, New York, NY 10013. The records access officer, according to the directory, is Susan M. Flaschenberg; her number is (212)442-5795.

Next, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

Lastly, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The kinds of records of your interest, purely statistical data, would in my opinion clearly be accessible under §87(2)(g)(i).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stanley J. Kessock

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13474

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 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 18, 2002

Mr. Shaun Jupiter
92-A-8712
Five Points Correctional Facility
P.O. Box 119
Romulus, NY 14541

Dear Mr. Jupiter:

I have received your letter of July 14 in which you appealed in relation to your request made under the Freedom of Information Law at your facility.

In this regard, the Committee on Open Government is authorized to provide guidance concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records.

The provision concerning the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department, Anthony J. Annucci.

Also, since the facility indicated that it does not possess the record of your interest, 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 hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13175

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 18, 2002

Mr. Joseph Jehle
89-A-1698
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 facts presented in your correspondence.

Dear Mr. Jehle:

I have received your letter in which you asked whether you have a right "to obtain copies of any and all official statements and or letters that were submitted by the District Attorney's offices for the Board of Parole to review when considering [you] for release."

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant to your inquiry is §87 (2)(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.

I would conjecture that a district attorney would offer a recommendation to the Board of Parole. If that is so, I believe that such a record could be withheld.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13476

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 18, 2002

Mr. Guy Mattia
00-A-6380
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. Mattia:

I have received your letter in which you sought assistance in obtaining various "log book entries" and a subject matter list from the New York City Department of Correctional Services. You wrote that you received no reply to your request for these 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Regarding your request for log book entries, if records are maintained that pertain only to your visitors or your visits to court, I believe that they would be accessible. If, however, no separate lists are maintained with respect to each inmate, rights of access may be different. For instance, if a visitor's log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the facility have the ability to locate portions of the log of your interest, I believe that those portions of the log would be available. If such records are not kept in plain sight and cannot ordinarily be viewed, it is my opinion that those portions of the log pertaining to visitors of 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 visitors log or court visit log, if they exist, are kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate or his 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 inmate court appearances, and each page would have to be reviewed in an effort to identify visitors of a particular inmate or court visits by inmates, I do not believe that agency staff would be required to engage in such an extensive search.

Lastly, §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 a 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 hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13177

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Angelo J. Rossi
[redacted]

The staff of the Committee 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. Rossi:

I have received your note of July 8 in which you sought assistance concerning requests made under the Freedom of Information Law to the New York State Department of Health and the Town of Northumberland.

With respect to the request to the Department of Health, having discussed the matter with Ms. Anita M. Gabalski, Director of the Department's Glens Falls office, the records sought have been or soon will be made available to you.

The other request involves a letter sent to the Northumberland Town Supervisor by the Town Engineer, as well as other correspondence between them. Although I am unfamiliar with the specific contents of the documents at issue, I offer the following remarks.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant to an analysis of rights of access is §87(2)(g), which pertains to communications between or among officers or employees of state or local government agencies. Specifically, that provision states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Having reviewed the first page of a letter of November 25, 1991 sent by the Engineer to the Supervisor, much of its content, in my view, consists of opinions, recommendations and conjecture. Insofar as the documentation at issue consists of that kind of commentary, I believe that it may be withheld. On the other hand, insofar as it consists of factual information or an instruction given by the Supervisor to the Engineer, or a determination rendered by Town officials, I believe that it must be disclosed.

Lastly, the preceding relates to existing records. Since the letter that you attached was prepared in 1991, it is possible that some of the correspondence falling within the scope of your request might legally have been disposed of or destroyed. To that extent, since it applies to existing records, the Freedom of Information Law would not apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anita M. Gabalski
Hon. Denise Murphy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13178

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Sidney G. Sloves
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sloves:

I have received your letter and the correspondence attached to it. In brief, you sought certain information from the Commissioner of Finance of the City of Yonkers on June 25, but as of the date of your letter to this office, you received no response to the request.

In this regard, I offer the following comments.

First, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer". The records access officer has the duty of coordinating an agency's response to requests for records, and requests should ordinarily be made to that person. While I believe that the person in receipt of your request should have responded in a manner consistent with law or forwarded the request to the records access officer, it is suggested that you might contact the Commissioner of Finance to ascertain the status of your request or resubmit the request to the records access officer.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

Lastly, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The kinds of records of your interest, purely statistical or factual data, would in my opinion clearly be accessible under §87(2)(g)(i). Insofar as they do not exist, the Freedom of Information Law would not apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James LaPerche
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 13479

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Roy Schneggenburger
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Schneggenburger:

I have received your letter of July 9 and the document attached to it. That item is a letter marked "PERSONAL & CONFIDENTIAL" that was sent to the Town of Lancaster Chief of Police by a member of the Town Board. You have contended that "under Article 87(2)subg - ii and iii and therefore are exceptions; not confidential; do affect the public. And therefore subject to F.O.I.L." You have asked that I review the document and advise with respect to rights of access.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, it has been found that a promise or assertion of confidentiality cannot be upheld unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when

> determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In short, unless it is based upon a statute, the characterization of records as "confidential" may be meaningless. That is not to suggest that such records must be disclosed, but rather that rights of access would be determined in accordance with an analysis of the grounds for denial appearing in the Freedom of Information Law.

Pertinent is the provision to which you referred, §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.

I disagree with your view of the letter. Subparagraph (ii) does not require the disclosure of materials that "affect the public" without more; rather, it involves "instructions to staff" that affect the public. From my perspective, the letter is not an instruction to staff, for I do not believe that a member of a town board may, acting alone, instruct staff; a town board, acting collectively as a body, or perhaps the town supervisor acting in accordance with the authority conferred by law, may issue an instruction to staff. With respect to subparagraph (iii), as I read the letter, it could not be characterized as the Town's policy or a final determination. On the contrary, the letter repeatedly includes expressions of opinion. Examples include the following: "I cannot consciously agree", "I do not believe", "I truly feel", "It is shameful", "grievously crossed the line", "arbitrary and excessive". Those phrases indicate expressions of opinion; they could not be viewed as facts, instructions, policy or determinations.

At the bottom of page 3 of the letter, the Board member wrote that "the following shall be instituted until further notice" and then listed a series of statements, i.e., that a freeze in hiring would go into effect, that no officers will be hired until certain steps are taken, that a contract must be settled, etc. It is clear, however, that the list did not represent an instruction to staff issued by the

Board, or policy or a determinations of the Board, for at the bottom of page 4, the member wrote that:

> "This statement and this letter are my own, although, I do sense from discussions with other Board members and school administrators, as well as the general public that these ideals and concepts are shared by many. I am proposing that the other Board members to [sic] immediately act upon the recommended measures."

Based on the quoted remarks, it is clear that the Board member offered recommendations rather than instructions. I note, too, that §63 of the Town Law states in relevant part that "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board." Therefore, unless and until the Town Board, by means of a majority vote of its total membership, approves the measures recommended by a member, the provisions that you cited would not, in my opinion, be applicable or require disclosure.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13480

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Steven C. Forshey
00-B-1330
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. Forshey:

I have received your letter and the attached materials in which you requested assistance in obtaining "inmate grievances" and a "proper claim" that you filed with Five Points 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, 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since your request appears to involve records that you prepared, it is unlikely that any of the grounds for denial would be applicable.

Lastly, however, of potential relevance is whether your request reasonably describes 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 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 your previous facility, 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 and they would be available from the facility that maintains them. 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.

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-13481

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Wayne Lofton
93-B-0761
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. Lofton:

I have received your letter in which you requested this office to "look into" a matter involving the alleged failure of the Wyoming Correctional Facility to respond to 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, 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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-13482

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. George Holland
91-A-0640
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. Holland:

I have received your letter in which you requested this office to provide you with a variety of Department of Correctional Services' employee manuals, directives and rule books. You wrote that you requested these records from the Department of Correctional Services and have not received a response.

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. In addition, the Committee does not maintain records generally and, therefore, does not have possession of the records of your interest. 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

While I am unaware of the content of the records of your interest, the leading decision involving similar records indicated that portions of the records might justifiably be withheld, but that the remainder must be disclosed. The focal point of the decision, §87(2)(e)(iv), enables an agency to withhold records compiled for law enforcement purposes which if disclosed would reveal non-routine criminal investigative techniques or procedures. 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.

Another 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.

Lastly, while the federal Freedom of Information Act authorizes an agency to waive fees under 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 Department of Correctional Services, 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

FOIL-AO - 13483

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Raymond Brown
01-R-2959
Marcy Correctional Facility
Box 3600
Marcy, NY 13403

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brown:

I have received your letter in which you asked this office to inspect and investigate a matter involving "an incident that happened at Arthur Kill Correctional Facility." You wrote that the facility and the Inspector General's Office have not responded to your requests for information related to the incident.

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, or investigate incidents that occur at correctional facilities. Insofar as your letter relates to the Freedom of Information Law, I offer the following general comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 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.

Several grounds for denial may be pertinent with respect to records related to an "incident" at a correctional facility . Of potential relevance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Also of potential relevance is §87(2)(e), which states in part that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings...
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

It is also possible that some aspects of the records could be withheld pursuant to §87(2)(f). That provision permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person."

The remaining ground for denial of apparent relevance would be §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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-13484

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 22, 2002

Mr. Luke V. Steele
95-A-3693
Elmira Correctional Facility
P.O. Box 500, 1879 Davis St.
Elmira, NY 14902-0500
C-Block, 8-14 Cell

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Steele:

I have received your letter and the attached material in which you requested an advisory opinion concerning a Freedom of Information Law denial received from the New York County District Attorney's Office. Your request for a copy of the "UF61 and DD5" was denied because no such records were found pertaining to the indictment numbers you referenced in your request.

In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

With respect to your request for "any and all records" in possession of the District Attorney's Office concerning particular indictment numbers, I note that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While I am unfamiliar with the records maintained by the District Attorney's Office, the response of March 11, 2002 denying access to particular records based on specific grounds for withholding under the Freedom of Information Law appears to be consistent with that statute.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Maureen T. O'Connor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13185

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 22, 2002

Mr. Gregory Love
97-A-3709
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. Love:

I have received your letter in which you requested assistance in obtaining records regarding your "Attorney Visits/Legal Mail" from the Suffolk County Sheriff's Department.

You wrote that you "received these documents but because they were missing some information and 'poorly' photocopied. [You] immediately returned these documents...explaining [your] reasons for sending them back and asked to be given what [you] paid for. They never responded, nor have they responded to..." subsequent requests for 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. 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, if indeed the records supplied were poorly reproduced and illegible, I believe that it would be reasonable for the agency to send you a second, but legible copy.

Second, with respect to a delay, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

> acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

Third, while you did not describe the "missing information", if records are maintained that pertain only to your attorney's visits or mail, I believe that they would be accessible. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If, however, no separate records are maintained with respect to each inmate, rights of access may be different. For instance, if a visitor's log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the facility have the ability to locate portions of the log of your interest, I believe that those portions of the log would be available. If such records are not kept in plain sight and cannot ordinarily be viewed, it is my opinion that those portions of the log pertaining to persons other than yourself could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In short, the identities of those with whom a person associates is, in my view, nobody's business.

Lastly, 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 Sheriff's Department does not maintain the records sought, the Freedom of Information Law would not apply.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1316

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 22, 2002

Mr. Edward Nelson
95-R-2256
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Nelson:

I have received your letter in which you requested an advisory opinion concerning the propriety of a response from the Westchester County District Attorney's office which indicates that "[y]our appeal is denied as untimely." The response further states that:

> "[Y]our May 2, 2001 Freedom of Information Law request, as you acknowledge, was constructively denied (because the Records Access Officer failed to respond to your request within five business days (Laws of Westchester County §437.81(3). This occurred more than ten months ago. According to the provisions of Public Officers Law §89(4)(a), requiring you to file your administrative appeal within thirty days of this denial, you were thus obligated to file your appeal by June, 2001.
>
> "Your current appeal, therefore, is woefully untimely, and is denied as such."

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

In a case that may be similar in some respects to your experience, it was found that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89 (3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming.
>
> It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the Department of Transportation" (Bernstein v. City of

New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the applicant could have appealed and respondent was "estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law, §89(4)(a)."

If your original request resulted in a written denial of access to records issued in a timely manner pursuant to §89(4)(a) of the Freedom of Information Law, you would have had thirty days from the denial to appeal. However, since the request was neither granted nor denied, I know of nothing in the Freedom of Information Law or judicial interpretation that would preclude you from either appealing the constructive denial of your request or seeking the records a second time.

You also asked whether "the Doctrine of Equitable Estoppel bar[s] the District Attorney's Office from raising a defense in light of their inaction?" In my view, an agency's failure to respond to a Freedom of Information Law request in a timely manner does not preclude the agency from denying access to the records.

Lastly, you asked whether "Penal Law §240.65 play[s] any role in preventing public access to records." That provision states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record. Unlawful prevention of public access to records is a violation."

From my perspective, the foregoing applies only when a person lies about the existence of a record or destroys a record to prevent a person seeking the record under the Freedom of Information Law from obtaining it.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13487

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 22, 2002

Ms. Stacey E. Wolf
Counsel
CNN Center
Box 105573
Atlanta, GA 30348-5573

The staff of the Committee 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. Wolf:

I have received your letter concerning a request made under the Freedom of Information Law to the New York City Police Department, as well as the correspondence attached to it.

By way of background, in a letter dated June 12 that was sent via overnight mail, you requested "a copy of the video shot by the New York Police Department Video Production Unit of the flag raising ceremony at Ground Zero on September 11, 2001 (the 'Video')." It was specified in the request "that CNN is aware that the NYPD has already provided a copy of the Video to another media organization and thus, the NYPD has waived any possible exemptions under FOIL." Although you wrote that you "expect[ed] an acknowledgment of this request within five working days", the receipt of your request was not acknowledged until a letter dated June 27 was sent to you. In that communication, you were informed that the record in question "must be located in the files of this office and reviewed to assess the applicability, if any, of the particular exemptions from disclosure set forth in FOIL", and it was "estimate[d] that this review will [be] completed within 90 days of this letter." Because you had received no response, you appealed on June 28, also in a letter sent by overnight mail and prior to the receipt of the acknowledgment, on the ground that "CNN has not received a written response to this request within the required statutory response time, and as such, must consider the request denied." You emphasized that, following the transmission of your request, "repeated follow-up efforts" were made to gain a written response. After you received the acknowledgment dated June 27, you wrote on July 2 to "confirm CNN's intent to pursue [y]our previously-submitted appeal..."

You have sought an opinion concerning the facts described above, and in this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of that statute states in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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, it has been advised that the agency would be acting in compliance with law.

In conjunction with the foregoing, every law in my opinion must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible.*" Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

I direct you to a recent judicial decision that also focused on a request made to the New York City Police Department that cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account

> the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

In the context of your request, a single record was sought, and that record, being well known not only to Americans, but to people throughout the world, should not, in my view, be difficult to locate or identify. That being so, I do not believe that a delay for as much as 90 days to "locate" and "review" the record in order to determine rights of access is reasonable or indicative of compliance with law.

If neither a response granting or denying a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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 any of those circumstances, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law.

With respect to your request, again, it was sent by overnight mail on June 12, and its receipt was not acknowledged until June 27. Clearly, more than five business days had passed before the Department responded in any way. That being so, I believe that you had the right to appeal on the ground that the request had been constructively denied.

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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 Court of Appeals expressed its general view of the intent of the Freedom of Information Law in a decision involving the Department 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).

From my perspective, in consideration of the facts associated with your request, none of the grounds for denial could justifiably be asserted to withhold the Video. As you stressed in your appeal, "[t]his Video has been previously provided by the NYPD to HBO and aired within the HBO program 'In Memoriam.'" Because the Video was previously disclosed to another entity, and because it was seen by millions of people, I believe that you, or any member of the public, would have the right to obtain a copy. As you are likely aware, the Freedom of Information Law generally does not distinguish among applicants for records, and it was held soon after its enactment that a record accessible under that statute should be made "equally available to any person, without regard to status or interest" [see Burke v. Yudelson, 51 AD2d 673 (1976); also Farbman v. New York City, 62 NY2d 75 (1984)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Department officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Leo Callaghan
Michael O'Looney
Daniel Gonzalez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13488

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 22, 2002

Mr. McKinley Miller
99-A-6160
Greene Correctional Facility
P.O. Box 8
Coxsackie, NY 12051-0008

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. Miller:

I have received your letter in which you requested an opinion concerning the availability of information regarding employees of the Nassau County District Attorney's Office.

You wrote that the District Attorney's office refused to "release the identity of the public official who conducted the grand jury that indicted [you]", and responded to your request for "a copy of the official titles, names and salary [sic] of their employees for...1999", by indicating that the record is no longer maintained by the office.

First, with certain exceptions, the Freedom of Information Law does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

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, you could seek such a certification.

Second, with respect to your request for the identity of an employee, 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 asking an agency to identify

an individual, the agency would not be obliged to create a record to answer the question. In my view, that kind of inquiry would not constitute a request for records under the Freedom of Information Law.

Lastly, in relation to your request for grand jury minutes, 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 I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13489

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. David Troeger
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Troeger:

I have received your letter, as well as the correspondence attached to it. You have sought guidance concerning a request made under the Freedom of Information Law to the Office of the State Comptroller ("the Office") and the notion of "creating" a record.

By way of background, in a request made on March 29, you sought four items of information pertaining to "all individuals granted approval for Tier 1 or Tier 2 status in the NYS and Local Employees' Retirement System after July 26, 1976." Those items are:

> "• Date approval was granted for individual for Tier 1 or Tier 2 status
>
> • Title of position individual worked in for which Tier 1 or Tier 2 status was approved.
>
> • Dates of employment individual worked in the title for which Tier 1 or Tier 2 status was approved
>
> • Jurisdiction individual worked in when they were in the title for which Tier 1 or Tier 2 status was approved."

In response to the request, you were informed that no record containing the information sought exists and that the Office is not required to prepare a record containing that information on your behalf.

In this regard, as suggested in the correspondence, the Freedom of Information Law pertains to existing records, and §89(3) provides in relevant part that an agency is not required "to prepare any record not possessed or maintained by such..." agency. I would conjecture that the Office maintains records that identify those persons granted approval for Tier 1 or Tier 2 status after July 26, 1976, that it has records indicating their titles at the time of approval, that other records likely indicate the dates of employment in the titles of employment for which Tier 1 or Tier 2 status was

approved, and that still other records indicate the jurisdiction in which those persons were employed when Tier 1 or Tier 11 status was conferred. In short, there are likely a variety of records that contain the items of information that you requested.

Nevertheless, based on the responses by the Office, it appears that there is no single record that contains each of those items with respect to each individual subject to the criteria that you described, nor is there an electronic means of generating a record that includes those items. If that is so, I do not believe that the Office would be required to acquire information from a variety of disparate records and create a new record that includes each of the items that you requested.

If, however, separate records exist that include the items of your interest, and if they can be reproduced or generated, albeit separately, and without information that you have no right to obtain (i.e., social security numbers and home addresses), I believe that those records or portions of them would be available upon payment of the requisite fee. Once in receipt of those records, you could do with them as you see fit and perhaps develop a record on your own initiative that includes those items in combination.

In short, the Office, in my view, is not required to compile information from various sources, thereby creating a new record, in order to accommodate you. However, assuming that the items of your interest are separately accessible in the manner suggested in the preceding paragraph, it appears that they should be made available. Once in receipt of those records, you could perform your own analyses or prepare your own compilations.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Albert Wm. Brooks

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13490

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. George Rand
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rand:

I have received your letter in which you expressed frustration in your efforts in gaining access to payroll information from school districts under the Freedom of Information Law.

In this regard, there is no entity of government, other than a court, that has the authority to compel an agency, such as a school district, to comply with the Freedom of Information Law. If a lawsuit is initiated, a court has discretionary authority to award attorney's fees to a person who has substantially prevailed, when the agency had no reasonable basis for a denial of access, and when the record sought is of clearly significant interest to the general public [see Freedom of Information Law, §89(4)(c)]. As you are likely aware, this office offers advice and guidance, and staff prepares written legal opinions. While the opinions are not binding, it is our hope that they are educational and persuasive, and that they encourage agencies to comply with law. In an effort to do just that, I offer the following comments.

First, with certain exceptions, the Freedom of Information Law does not require an agency to create or keep 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..."

Second, 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 compensation for unused 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.

Third, based upon the direction provided by the Freedom of Information Law and the courts, I believe that other records reflective of payments made to public employees are available. For instance, insofar as W-2 forms of public employees indicate gross wages, they must be disclosed. In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

It is my understanding that employers file records with the IRS that list their employees with wage related information. If that is so, I believe that a school district would be obliged to disclose those portions of such records that identify their employees and their gross wages, but that other

items, such as social security numbers, the number of exemptions claimed and similar items may be deleted.

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 records access officer of the school district to which you specifically referred.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alice Laino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13491

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Tym Alves
97-A-2916
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. Alves:

I have received your letter and the attached materials in which you sought assistance in obtaining your mental health records from your facility.

In this regard, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §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 facility which provided treatment 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 Treacy
Assistant Director

DT:jm

FOIL-AO-13492

From: Robert Freeman
To: taber@cityofjamestownny.com
Date: 7/23/02 4:22PM
Subject: Dear Ms. Taber:

Dear Ms. Taber:

I have received your inquiry concerning access to a police or court record relating to an individual who was charged with a violation, pleaded guilty and "was 'ACD'd'"

In this regard, I believe that the governing statutes are sections160.55 and 160.50 of the Criminal Procedure Law. Under the former, the record relating to a person convicted of traffic infraction or a violation (except a conviction for loitering or operating a vehicle while ability impaired) is supposed to be sealed everywhere (i.e., by police departments and DA's), except the court in which the conviction occurred.

In the case of the ACD, the record remains available from the the court until the conviction has in fact been dismissed (typically after six months if the individual has had no further encounters with the criminal justice system). When there is a dismissal, the record becomes sealed pursuant section 160.50 and would no longer be available from the court.

I hope that the foregoing is clear 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-13493

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Thang Nguyen
98-B-1975
Attica Correctional Facility
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. Nguyen:

I have received your letter in which you requested that this office contact the Monroe County Sheriff's Department to inquire about the status of 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, 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

FOIL-AO-1299

From: Robert Freeman
To: [redacted]
Date: 7/24/02 9:41AM
Subject: Dear Sillymen:

Dear Sillymen:

I have received your inquiry in which you asked "what can be requested from a college that falls under the category of system backups: what type of records in what area? Also when is the exemption for research in place so that there aren't copying fees?"

In this regard, first, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the New York Freedom of Information Law. That statute is applicable to agencies of state and local government in New York. As such, the State University and its branches, as well as community colleges, fall within the coverage of the Freedom of Information Law. That statute does not apply to private colleges or universities.

Second, while I do not know precisely what you mean by "system backups", I point out that the Freedom of Information Law pertains to all agency records, and that section 86(4) of that statute defines the term "record" expansively to include "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Therefore, if records are "backed up" and stored electronically, I believe that they are subject to whatever rights of exist under the law.

Lastly, there is no provision in the state's Freedom of Information Law involving the reduction or waiver of fees when records are sought for research purposes. Under that law, an agency may charge up to twenty-five cents per photocopy, or the actual cost of reproducing other records, i.e., those that cannot be photocopied, such as computer tapes or disks.

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-1314/25

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Elizabeth C. Armstrong
[redacted]

The staff of the Committee 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. Armstrong:

I have received your letter of July 16 and the materials attached to it. In addition, as you may be aware, the issue raised was also discussed with your daughter, Ms. Ann Gunn.

By way of brief background, at a meeting of the Village of Penn Yan Planning Board on July 1, proposed legislation concerning special use permits "was discussed at length, and one copy of the proposal was circulated to the public present at the meeting." Following the meeting, you requested a copy of the proposal. However, in response to the request, you were informed that the Village Attorney indicated that the document in question is "a 'work in progress' and not ready for public review yet."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all records maintained by or for an agency, such as a village, 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, as soon as a document is prepared for or maintained by an agency, it constitutes a "record" that falls within the coverage of the Freedom of Information Law. That a document is characterized as a "draft" or a "work in progress" is, in my view, not determinative of whether it must be disclosed or may be withheld.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If the proposal had not been discussed "at length" during an open meeting and not circulated by those present at the meeting, I would agree that it could be withheld. Although there is no exception in the Law dealing specifically with drafts or works in progress, §87(2)(g) pertains to internal governmental communications and authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

A draft proposal prepared by a government officer or employee reflects a recommendation that may be approved, modified or rejected and, therefore, may ordinarily be withheld. The facts in this instance, however, in my opinion, dictate that the proposal be disclosed. It has been advised on many occasions that insofar as the contents of records are disclosed through discussion at a meeting open to the public, they must be made available in response to a request made under the Freedom of Information Law. In short, public discussion reflective of the contents of the records results in a waiver of the ability to deny access. Viewing the matter from a different vantage point, since tape recordings of open meetings were found to be accessible to the public under the Freedom of Information Law more than twenty years ago (Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978), those portions of records read aloud or otherwise disclosed and captured on tape would be public. Similarly, but in a different context, it has been held that records that ordinarily may be withheld under the Freedom of Information Law but which are introduced during judicial or other public proceedings become accessible to the public, and the grounds for denial appearing in the Freedom of Information Law cannot be asserted [see e.g., Moore v. Santucci, 151 AD2d 677 (1989)].

Considering the issue from another perspective, I believe that the fact that the Planning Board authorized the "circulation" of the proposal to those present at the meeting resulted in a waiver of

the capacity of the Village to deny access to the proposal. In a case in which there was an "inadvertent disclosure" of a record, it was found that the disclosure did not create a right of access on the part of the person who viewed the record [see McGraw-Edison v. Williams, 509 NYS2d 285 (1986)]. Conversely, however, if a disclosure was not inadvertent, but rather purposeful, as in a situation in which a board authorizes circulation of or displays a record at meeting during which anyone present could have reviewed it, I believe that a public disclosure would have occurred and that the ability to deny access to that record would have been waived.

In sum, based on the facts as you presented them, I believe that the Village is required to disclose the record in question.

As you requested, 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
Woody Stenz
Betty Peruki

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO-36
FOIL-AO-13496

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

E-Mail

TO: Tracie McCumber <MCCUMBTR@sysadm.suny.edu>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. McCumber:

I have received your letter concerning your request made to Health Research Inc. ("HRI") for a copy of your personnel file pursuant to the Personal Privacy Protection Law. In response to the request, you were informed that "HRI is a private, not-for-profit corporation and as such not subject to the Public Officer's [sic] law which applies to State agencies."

You have sought assistance in the matter, and this regard, I offer the following comments.

It is noted at the outset that the Personal Privacy Protection Law has been the subject of few judicial decisions. However, there are several decisions rendered under the Freedom of Information Law that indicate, in my view, that HRI is required to comply with that statute. Because those decisions are pertinent in ascertaining whether HRI is subject to the Personal Privacy Protection Law, my initial remarks will focus on the Freedom of Information Law.

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 HRI is 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).

HRI was created as a membership corporation in 1953 and later designated as a not-for-profit corporation in 1973. Its 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 community college 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. That being so, I believe that HRI is an agency subject to the Freedom of Information Law. To suggest otherwise would, in my opinion, exalt form over substance.

There is precedent indicating in other instances that a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law. In Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, the state's highest court, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In 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, HRI would not exist absent its relationship with a state agency. It carries out its functions, powers and duties for the State Department of Health, and §53-a of the State Finance Law treats it as a state agency. In consideration of those factors, I believe that a court would determine that HRI is an "agency" with a responsibility to comply with the Freedom of Information Law.

Even if HRI is not an "agency", I believe that its records would fall within the scope of the Freedom of Information Law due to its relationship with State Department of Health, which is clearly an agency. As indicated at the outset, that 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 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.

For purposes of the Personal Privacy Protection Law, 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."

As indicated earlier, the State Finance Law characterizes HRI as a state agency. Further, HRI clearly is not an entity associated with the State Legislature or the judiciary, nor is it a unit of local government. In my view, if HRI is determined to be an agency under the Freedom of Information Law, it would constitute an agency subject to the Personal Privacy Protection Law.

Similarly, if records in possession of HRI can, in consideration of its relationship with the State Department of Health, be found to be "kept" or maintained for or on behalf of the Department, I believe that those records pertaining to a "data subject", "a natural person about whom information has been collected by an agency" [see §92(3)] that can be retrieved by means of a name or other identifier, would fall within the coverage of the Personal Privacy Protection Law. In a related vein, §94(1) requires that the Department of Health "cause the requirements of this article [the Personal Privacy Protection Law] to be applied to any contract it executes for the operation of a system of records, or for research, evaluation or reporting, by the agency or on its behalf."

In sum, I believe that HRI is subject to and required to comply with the Freedom of Information Law, and for the reasons expressed above, that it is likely that a court would determine that its records pertaining to data subjects fall within the coverage of the Personal Privacy Protection Law.

I hope that I have been of assistance.

RJF:jm

cc: Dolores M. Wilson
Donald Berens, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13497

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

E-Mail

TO: John W. 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 Mr. Kane:

I have received your letter relating to a request made under the Freedom of Information Law to the Fulton County Records Access Officer. Although you asked that he respond to the request, you were informed that a response would be given by an official of the County's Planning Department. "Because the planning department is handling [your] FOIL instead of the county designated records access officer", you asked whether "this [will] create a problem for [you] if [you] have to appeal."

From my perspective, there would be no problem concerning your right to appeal a denial of access in the situation that you described.

As you may be aware, the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural implementation of that statute. The Committee promulgated the appropriate regulations soon after the effective date of the Freedom of Information Law in 1978, and those regulations appear in 21 NYCRR Part 1401. One aspect of the regulations involves a requirement that each agency, such as a county, designate one or more persons as "records access officer." According to the regulations, the records access officer has the duty of "coordinating" an agency's response to requests.

In the context of your question and the facts that you presented, the Records Access Officer is not obliged to respond directly or personally to your request. Rather, his function is to coordinate the County's response, and it appears that he did so by forwarding your request to the entity within County government that maintains custody of the records sought. The recipient of the request at the Planning Department is required to respond to your request in a manner consistent with law. If he or she denies your request in whole or in part, that person is required to inform you of the denial in writing and of the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law.

In short, that the designated records access officer does not respond directly to a request in my view has no impact or bearing on the right of a person denied access to appeal the denial.

I hope that I have been of assistance.

RJF:jm

cc: Jon Stead

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13498

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

[redacted]
98-A-6826
Upstate Correctional Facility
P.O. Box 2001
Pine City, 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 [redacted]

I have received your letter in which you requested assistance in obtaining your "psychiatric admittance forms" and psychiatric reports from St. Vincent's Children Psychiatric Hospital in Manhattan.

It is noted that the Freedom of Information Law applies to agencies, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law would not apply to a private hospital, such as St. Vincent's Children Psychiatric Hospital.

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.

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 - 13499

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Jaime Grajales
98-A-4552
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. Grajales:

I have received your letter in which you requested intervention and assistance from this office. You wrote that the Sullivan County District Attorney's Office has not responded to 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 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

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1350

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. William Jones
90-A-1539
Green Have Correctional Facility
Stormville, NY 12582-4000

The staff of the Committee on Open 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 requested assistance form this office. You wrote that the Freedom of Information Law Officer at your facility has failed to "comply with the laws."

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1360

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Richard Winkler
81-B-2146
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Winkler:

I have received your letter and attached materials in which you requested an opinion regarding the availability of various records from the Village of Sleepy Hollow and the Westchester County District Attorney's Office.

In this regard, based on a review of the correspondence, I offer the following comments.

First, 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)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a recent decision by the Court of Appeals concerning complaint follow-up resports 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, 89 NY2d 267, November 26, 1996; emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that 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).

Fourth, regarding your requests for various statements, 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 asking an agency to state information, the agency would not be obliged to create a record to answer questions. In my view, that kind of inquiry would not constitute a request for records under the Freedom of Information Law.

Lastly, I believe that booking records, the records of arrest by the arresting agency, are generally available, unless they are sealed pursuant to §160.50 of the Criminal Procedure Law.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13502

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Lawrence Wright
94-A-5377
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wright:

I have received your letter in which you requested advice regarding responses from the New York City Police Department and the Queens County District Attorney's Office which indicated, respectively, that records of your interest had been destroyed and did not exist.

In this regard, I offer the following comments.

First and perhaps most important, the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute provides in part that an agency need not create a record in response to a request. If indeed the agencies do not maintain the records sought, the Freedom of Information Law would not apply.

Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13503

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Robert H. Stone
00-A-6270
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. Stone:

I have received your letter in which you requested this office to assist you "in forcing the inspector general to comply with [your] foil request." You wrote that you have not received a response to your request for records "related to [you] being designated a central monitor case."

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, 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 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 the records of your interest, one pertinent provision may be §87(2)(g), which enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Also of potential relevance is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1304

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Jeffery T. Glanda
00-A-1269
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. Glanda:

I have received your letter in which you requested assistance from this office in obtaining various records from the Essex County District Attorney's Office and the "Capitol [sic] Defender's Office."

In this regard, I offer the following comments.

First, 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)].

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 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.

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).

Fifth, with respect to your request to the Capital Defender's Office for your "financial disclosure statutes used to determine [your] assignment", 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.

Lastly, regarding your request for a Vaughn Index, I am unaware of any provision of the New York Freedom of Information Law or judicial decision that would require that a denial at the agency level identify every record withheld or a description of the reason for withholding each document be given. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

From: Robert Freeman
To: [redacted]
Date: 7/26/02 5:02PM
Subject: Dear Mr. Walker:

Dear Mr. Walker:

I have received your inquiry concerning your ability "to see the electronic files on the computer in our school which contains District Clerk's records."

In this regard, I do not believe that the District would be required to provide access to its computers, i.e., to permit to sit at the keyboard in front of the screen. However, the information stored in its computers would be available under the Freedom of Information Law to the same extent as it would if it appeared on paper.

I note that the Freedom of Information Law pertains to agency records, such as those of a school district, and that section 86(4) of the law defines the term "record" to mean "...any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever...." Therefore, records maintained electronically clearly fall within the coverage of the Freedom of Information Law. To gain access, records stored electronically may be printed out, or to the extent possible, transferred to a computer tape or disk. In that instance, the law permits an agency to charge a fee based on the actual cost of reproduction.

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-13506

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 29, 2002

E-MAIL

TO: Williams, Robert <RWILLIAMS@racing.state.ny.us>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Williams:

I have received your inquiry in which you asked whether "request letters under the Freedom of Information Law [are] themselves are FOIL-able."

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. From my perspective, with the exception of portions of certain kinds of requests, the records sought are accessible under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of the Racing and Wagering Board, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, or persons representing business entities. In those

many requests are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, Nay 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

As the issue pertains to the situation that you described, I note, too, that it has been held that the status or interest of the applicant ordinarily has no bearing on rights of access [see e.g., Farbman v. New York City, 62 NY2d 75 (1984); Burke v. Yudelson, 51 AD2d 673 (1976)]. Therefore, notwithstanding the potential use of the letter of the request, since the request was made by person acting in a business capacity, I do not believe that there would be a basis for a denial of access.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13507

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 29, 2002

Mr. Keith Werner
[redacted]

Dear Mr. Werner:

I have received your letter of July 22 in which you appealed this office due to the failure of certain entities to respond to your requests under the Freedom of Information Law.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions relating to the Freedom of Information Law. The Committee does not have general custody or control of records and it is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records.

The provision dealing with the right to appeal a denial of access to records, §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."

Since one of your requests involved an agency of Suffolk County, I note that the person designated to determine appeals is the County Attorney.

Second, 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."

In turn, §86(1) defines "judiciary" to mean:

> "..the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts are not subject to the Freedom of Information Law. This not to suggest that court records may not be accessible, for other statutes often grant access to those records (see e.g., Judiciary Law, §255, Family Court Act, §166). To seek court records, I recommend that a request be made to the clerk of the court, citing an applicable provision of law as the basis for the request.

Third, notwithstanding the absence of a response for records maintained by the Suffolk County Department of Social Services, if I interpret the request correctly, the Freedom of Information Law would not determine your ability to gain access to the records. Although that statute is based on a presumption of access, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §372 of the Social Services Law, which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4) of §372 states in relevant part that such records:

> "shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination or by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court or by a justice of the supreme court, or by a judge of the family court when such records are required for the trial of a proceeding in such court, after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information thus obtained without authorization so to do by the department, or by such judge or justice."

In consideration the foregoing, I do not believe that records maintained by entities having duties relating foster care can be disclosed, unless authorization to disclose is conferred by a court or by a department of social services.

Lastly, having reviewed your request to the New York City Clerk, I am unfamiliar with what a "street list" might be. Further, the voter registration records would not be maintained by that office, but rather by the New York City Board of Elections.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

There is

NO

FOIL AO-13508

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13509

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Leslie H. Tayne, P.C.
2171 Jericho Turnpike, Suite 240
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. Tayne:

I have received your letter of July 16, which reached this office on July 22. You have sought assistance on behalf of your clients, who, according to your letter, have been denied access to disciplinary records and psychological files pertaining to their son by the Baldwin Union Free School District.

In this regard, I offer the following comments.

First, insofar as information falling within the scope of the request is maintained by or for the District, I believe that it falls within the scope of the Freedom of Information Law. Section 86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the

agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, 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 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, perhaps most significant 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. A 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, in terms of rights of access, if a parent of student requests education 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, teacher or psychologist prepares notes 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.

In the event that the Freedom of Information Law governs rights of access rather than FERPA, two of the grounds for denial would likely be relevant 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 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 of records. More relevant in my view is the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and

> the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

In view of the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. I note that the provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives and Records Administration.

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.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

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, 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)].

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: Dr. Weiss, District Superintendent
Larry Reich

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1350

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Jamal Williams
00-A-0011
Collins Correctional Facility
P.O. box 340
Collins, NY 14034

Dear Mr. Williams:

I have received your letter of July 28 in which you appealed in relation to a request made on June 23 to the Schenectady Police Department under the Freedom of Information Law that had not been answered.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. If the City failed to respond to your request in a manner consistent with §89(3) of the Freedom of Information Law, such failure could, in my opinion, be deemed a denial of your request that you may appeal. The provision dealing with the right to appeal, §89(4)(a), states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days fully explain in writing to the person requesting the record the reasons fur further denial, or provide access to the record sought."

For your information, I believe that the Mayor has been designated to determine appeals.

Having reviewed your request, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) provides in part that an agency is not required to create a record in response to a request for information. Whether the City maintains records indicating the dates that certain individuals became informants or which describe the "involvement" between those persons and particular police officers is unknown to me. However, insofar as the City does not maintain records containing the information sought, the Freedom of Information Law would not be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3497
FOIL-AO-13511

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Hon. Robert S. Thompson
Zoning Board of Appeals
Village of Massapequa
208 Fillmore Street
Massapequa Park, NY 11762-1512

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Thompson:

I have received your letter of July 18. In your capacity as a member of the Zoning Board of Appeals of the Village of Massapequa, you have raised a series of questions relating to meetings of the Board. Insofar as those issues involve matters pertaining to the Open Meetings or Freedom of Information Laws, I will attempt to respond. Some of the issues that you raised are, in my view, unrelated to those statutes and, therefore, are beyond the jurisdiction or expertise of this office. To obtain information concerning the powers and duties of village zoning boards of appeals and their chairpersons, it is suggested that you review §§7-712, 7-712-a, 7-712-b and 7-712-c of the Village Law. In the following remarks, I will attempt to combine some of the issues and respond, but not necessarily in the order in which you presented them.

First, significant in relation to several questions is consideration of what constitutes a valid meeting, and it is emphasized that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings, such as "agenda sessions," held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, when a majority of the Board is present to discuss Board business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, because the "pre-discussion" is a "meeting", it must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law. Therefore, if a pre-discussion is scheduled to begin at 7:15, notice of the time and place must be given to that effect.

Second, with respect to voting by telephone, relatively recent amendments indicate, in my view, that meetings may be held and votes taken only when a majority of a public body has physically convened, or when a meeting is held by videoconference. 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, including the use of videoconferencing for attendance and participation by the members of the public body." 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 such a body, i.e., the Zoning Board of Appeals, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

The provisions in the Open Meetings Law concerning videoconferencing clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone, by mail, or by e-mail, would be inconsistent with law.

It is noted that the definition of the phrase "public body" [Open Meetings Law, §102(2)] refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, 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, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of a series of telephone calls or, for example, by e-mail. I note, too, that in order to have a quorum, "reasonable notice" must be given to all the members.

In the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the official convening of a public body for the purpose of conducting public business' (Public Officers Law §102[1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions to invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner was formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 Affd 45 NY2d 947).
>
> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

I direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote by phone, by mail, or by e-mail.

Third, with respect to the authority of the Chairman to make rules or take action unilaterally, unless such is authority is specifically conferred by law [see e.g., §7-712(11)(b) of the Village Law regarding the designation of an alternate member], based on §41 of the General Construction Law,

which was cited earlier, "not less than a majority of the whole number" of the Board may in my view exercise a power, authority or duty of the Board.

Next, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that meetings of public bodies be tape recorded. However, insofar as a tape recording is prepared, it would constitute a "record" that falls within the coverage of the Freedom of Information Law that must be made available for listening or copying (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978). If a transcript of a meeting has been prepared, again, I believe that it would be accessible. However, there would be no obligation to prepare a transcript of a tape recording of a meeting. I note, too, that it has been held that any person may record an open meeting of a public body, so long as the recording device is used in a manner that is neither disruptive nor obtrusive [Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985)].

With respect to requests for records, the regulations promulgated by the Committee on Open Government pursuant to the Freedom of Information Law (21 NYCRR Part 1401) require that each agency, such as a village, 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. In most villages, the clerk is the records access officer. If that is so in the Village of Massapequa, or if a person other than the Chairman of the Zoning Board of Appeals has been so designated, that person as records access officer, not the Chairman, would have the responsibility of dealing with requests for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Robert Freeman
To: Jason Penge
Date: 8/1/02 12:05PM
Subject: Re: Rebecca Buchner...

Dear Jason:

As I explained briefly to your mother, it is likely that portions of the records in question, at the very least, must be disclosed based on the following analysis.

First, the Freedom of Information Law (FOIL) is applicable to all agency records, and section 86(4) of that statute defines the term "record" expansively to mean: "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Therefore, the notes maintained by the DEC employee would constitute "records" that fall within the scope of the FOIL.

Second, in brief, FOIL is based on a presumption of access. Stated differently, all agency records must be made available, except those records "or portions thereof" that fall within a series of grounds for denial listed in section 87(2).

As I understand the situation, the only ground for denial of likely significance would be section 87(2)(g), which pertains to internal governmental communications. While that provision potentially serves as a basis for withholding, I emphasize that, due to its structure, it often requires substantial disclosure. Specifically, that provision enables an agency to withhold "inter-agency or intra-agency materials", such as the notes, except to the extent that those materials include any one of four categories of information. The first specifies that those portions of inter-agency or intra-agency materials consisting of "statistical or factual tabulations or data" must be disclosed. The quoted phrase has been construed by the courts to mean statistical or factual information, irrespective of the form in which it appears within a record. For instance, in the case of an inspection report, a written entry reflective of a factual observation would be accessible. Portions of the notes that could be withheld would involve expressions of opinion, advice, recommendation, conjecture and the like.

To obtain a more detailed explanation or analysis, you can go to our website, which is identified below, then to the FOIL advisory opinions. From there, you can click on to "I" and scroll down to "Inter-agency and Intra-agency materials - Statistics, Facts and Opinions Intertwined", as well as other topics relating to the subject.

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

OMI. AO. 3498
FOIL. AO-13513

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 5, 2002

Ms. Nicolette Booream
[redacted]

The staff of the Committee on 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. Booream:

I have received your letter of July 22 and the exhibits attached to it. You have sought a "determination" relative to issues raised concerning your requests for records of the Town of Claverack and the ability of the Zoning Board of Appeals to conduct executive sessions.

In this regard, it is emphasized at the outset that this office does not have the authority to render "determinations" or compel a governmental entity to comply with either the Freedom of Information or Open Meetings Laws. However, based on my understanding of the matters described, I offer the following comments.

One of the issues appears to involve fees for copies of records and when they should be paid. Although agencies in many instances seek payment following the preparation of copies, it has been held that an agency may seek payment in advance of making copies (see e.g., Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

Also relevant with respect to certain aspects of your requests for records may involve the extent to which they "reasonably described" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals, 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 Town, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. If, for example, building permits are kept chronologically, it is likely that those issued following a certain date could be found easily. However, if they are kept by address and hundreds of records would have to searched, one by one, to retrieve those of your interest, the request likely would not meet the standard of reasonably describing the records.

Another series of issues appears to relate to minutes of meetings. The Open Meetings Law provides guidance and contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be 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.e., motions, proposals, resolutions, action taken and the vote of the members, I believe that they would be appropriate and meet legal requirements. Most importantly, I believe that minutes must be accurate. There is nothing in the law dealing with the inclusion of the presence of a member of a town board in the minutes of a meeting of a zoning board of appeals.

Next, I believe that a zoning board of appeals may in limited circumstances enter into executive session. By way of background, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards of appeals. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law.

Due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than §108(1). Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a zoning board of appeals must conduct its business in public.

Lastly, the minutes that you attached indicate that executive sessions are held after meetings. Further, there is no reason given for conducting executive sessions. Here I point out that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. As suggested earlier, the ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Mary Jean Hoose
Zoning Board of Appeals
Jonathan D. Nichols

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3499
FOIL-AO-1351

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 5, 2002

E-Mail

TO: Richard Steger [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. Steger:

I have received your inquiry in which you asked "whether a three member board of assessment review has to take minutes as to how they came to a conclusion and how each member voted as to the decision to deny a request."

In this regard, a board of assessment review is in my view clearly a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)]. While meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

Moreover, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

The minutes are not required to indicate "how they came to a conclusion"; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes.

Lastly, since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

In sum, because an assessment board of review is a "public body" and an "agency", I believe that it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of the votes of each member in conjunction with §87(3)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

cc: Board of Assessment Review
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13515

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 5, 2002

Anthony C. Zacharakis, Esq.
Box 85
Tappan, NY 10983-0085

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Zacharakis:

I have received your letter and the correspondence attached to it. As I understand their contents, you have questioned the propriety of a delay by the Town of Orangetown in determining rights of access to records sought under the Freedom of Information Law.

In this regard, the Freedom of Information Law provides guidance concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: Hon. Charlotte Madigan
Louis E. Kayser

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1351/6

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 5, 2002

Mr. Sean M. Ryan
Attorney at Law
728 Ellicott Square Building
295 Main Street
Buffalo, NY 14203

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ryan:

I have received your letter in which you sought an advisory opinion relative to your "experiencing substantial delays in receiving records requested from the Erie County Department of Health."

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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: John Kociela

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13517

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 5, 2002

Mr. Tayt R. 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 information presented in your correspondence.

Dear Mr. Brooks:

I have received your letter of July 22 in which you requested an advisory opinion concerning a response to your request for "the contract between the ECAC and the County of Albany."

You indicated that last year you requested a similar contract between the ECAC and the Olympic Regional Development Authority (ORDA), and that although the request was initially denied, it was made available after this office "ruled" that you were entitled to gain access to that record. You added that the County withheld portions of the contract now at issue on the same basis as the initial denial of access offered by ORDA, that a denial was proper under §87(2)(d) of the Freedom of Information Law.

Having reviewed the materials attached to your letter and the advisory opinion addressed to you approximately a year ago, I offer the following comments.

First, it is emphasized that this office is authorized to provide advice and opinions concerning the Freedom of Information Law. It is not empowered to issue a ruling or otherwise compel an agency to grant or deny access to records.

Second, I believe that you have mischaracterized the document that is the subject of your inquiry. Although you referred to the document as a "contract between the ECAC and the County", the County is not a party to the contract; the parties to the contract are the ECAC and the SMG Management Group (SMG). SMG is a private corporation with which Albany County has contracted to manage and operate the Pepsi Arena, which is owned by the County. From my perspective, that distinction is critical and bears upon the extent to which the County must disclose the contract.

Third, in consideration of the foregoing, that the opinion rendered last year involved a contract between a governmental entity and the ECAC, but that the issue at hand involves a contract between private parties, a copy of which has been made available to the County, I believe that the

only question in terms of rights of access involves the extent to which deletions from the contract were properly made prior to disclosure of the remainder of the contract to you. The deletions, as you are aware, were made on the basis of §87(2)(d) of the Freedom of Information Law, which authorizes an agency to withhold records insofar as disclosure would "cause substantial injury to the competitive position" of a commercial enterprise, i.e., SMG. The opinion addressed to you last year exhaustively discussed the parameters of that exception and judicial interpretations associated with its application. I do not believe that reiteration of that discussion would serve any useful purpose. In short, insofar as it can be demonstrated that disclosure would cause "substantial injury" to SMG's competitive position, the deletions, in my view, would have properly been made.

I emphasize that the burden of defending the propriety of the deletions, should you seek judicial review of its determination, would rest on the County. 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).

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.).

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: Paul M. Collins
Hon. Thomas G. Clingan
Craig A. Denning

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13518

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 5, 2002

Mr. Bob J. O'Connor, Jr.
Labor Relations Specialist
Civil Service Employees Association
568 State Route 52
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. O'Connor:

I have received your letter and the materials attached to it. You referred to delays that you have encountered in your efforts to obtain records from the Village of Woodridge under the Freedom of Information Law. You have sought advice concerning the matter and also asked why this office did not respond to you after having received a copy of correspondence relating to your efforts.

In this regard, first, this office ordinarily takes no action when it receives copies of correspondence concerning requests made under the Freedom of Information Law. Written responses are prepared when persons or agencies request advisory opinions or when determinations of appeals appear to be inconsistent with law.

Second, since you did seek advice in your latest letter, this is to indicate 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..."

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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request

fails to include an estimated date for granting or denying access, 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 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-13519

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 6, 2002

Ms. Sandra J. Brady
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Brady:

I have received your letter of July 23 concerning a request for records directed to the Department of Taxation and Finance.

By way of background, in a letter of April 18, citing the Freedom of Information Law, you requested all records pertaining to you sent or received by named employees of the Department since April 1, 2001 and added that the records sought "are vital in the preparation" of certain proceedings in which you are involved. Although you received some of the records sought, you complained with respect to the delay in determining rights of access, and many records were withheld. You have asked that I "take appropriate action to bring the Department....into compliance with the FOIL laws..." and that I "provide [you] with a copy of [my] ruling on the Department of Taxation and Finance's failure to comply with the FOIL laws..."

In this regard, it is noted at the outset that this office is authorized to provide advice and opinions relating to public access to government records. Neither the Committee nor its staff is empowered to compel an agency to grant or deny access to records, to issue a "ruling", or to determine that an agency might have failed to 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 agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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.

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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.

In consideration of the nature of the records sought, the provision of primary significance under that statute is §87(2)(g), which enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The response by the Department's records access officer indicates that the records at issue were withheld "under Section 87(2)(g)iii", for they are "intra-agency materials, not final determination or policy..." In this regard, I point out that one of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court 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 intra-agency material does not reflect a final agency policy or determination would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal

> government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the records at issue consist of recommendations, advice, opinions or constructive material, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed, unless a separate exception is applicable.

Lastly, since you requested records pertaining to yourself, had you requested them on the basis of the Personal Privacy Protection Law (Public Officers Law, Article 6-A), the result would likely be different. The Freedom of Information Law deals with rights of access conferred upon the public generally; the Personal Privacy Protection Law deals with rights of access conferred upon an individual, a "data subject", to records pertaining to him or her. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of the Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

Under §95 of the Personal Privacy Protection Law, a data subject has the right to obtain from a state agency records pertaining to him or her, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of that section or §96, which would deal with the privacy of others.

Of potential relevance in relation to your request 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 as a "data subject", you may enjoy rights of access to some records about yourself, 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Jude Mullins

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13520

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 6, 2002

Mr. Dominic Bretti
80-C-0511
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. Bretti:

I have received your letters concerning denials of access by the City of Rome to a police report prepared approximately twenty years ago that identifies suspects and witnesses whose names became "a matter of public record" through testimony in a public proceeding. You also asked that I "define" the difference between "thorough search and a thorough and diligent search."

In this regard, I offer the following comments.

First, of likely relevance to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. Therefore, insofar as individuals testified or were identified during a public proceeding, it appears that there would be no basis for a denial of access.

In that decision, it was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintain records that had previously been disclosed, the agency would be required to respond to a request for the same records.

Second, assuming that records identifying witnesses or suspects 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.

The remaining provision pertinent to rights of access to the report, §87(2)(g), authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Lastly, I cannot define the difference between a "thorough search" and a "thorough and diligent search", and I know of no judicial decision that distinguishes the two phrases. Based on dictionary definitions, the term "painstaking" is used to describe both "thorough" and "diligent". Further, "thorough" is defined to mean "exhaustive" or "complete in all respects." Therefore, I believe that any search that is characterized as "thorough" would reflect compliance with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Corporation Counsel, City of Rome

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13521

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 6, 2002

Mr. William Evans
92-A-5030
P.O. Box 999
Coxsackie, NY 12051

Dear Mr. Evans:

I have received your letter in which you requested a certified copy of a determination rendered pursuant to the Freedom of Information Law by Nassau County in 1997. You were informed by the Deputy County Attorney that the County "does not maintain a certified copy" of the determination.

In this regard, pursuant to a records retention schedule adopted pursuant to law, this office disposes of determinations of appeals in January at least a year after the determinations were rendered. That being so, we have no determinations of appeals that are more than two years old. Similarly, if the County no longer maintains a copy of the determination of your interest, the Freedom of Information Law would not apply.

If, however, the County continues to maintain a copy of the record of your interest, §89(3) of the Freedom of Information Law requires that an agency make a copy and certify that it is a true copy. Specifically, that provision states in relevant part that "the entity shall provide a copy of such record and certify to the correctness of such copy if so requested...." In consideration of the language quoted in the preceding sentence, it is suggested that you might again seek a copy of the record with the certification described in §89(3). Additionally, 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 Deputy County Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eric Eichenlaub

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13522

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 6, 2002

E-Mail

TO: Caroline Hendrick [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. Hendrick:

I have received your inquiry concerning a delay by a town in responding to your request for certain records.

In this regard, 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."

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. In the situation that you described, I believe that the person in receipt of your request should have responded directly in a manner consistent with law or forwarded the request to the records access officer.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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)].

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 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).

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13523

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 6, 2002

Mr. Howard J. Harris
92-A-0992
Hudson Correctional Facility
Box 576
Hudson, NY 12534-9576

The staff of the Committee on Open 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 assistance concerning a request for certain statistical information from the Division of Parole. Specifically, you sought several breakdowns reflective of statistics pertaining to parolees and recidivism among parolees from age 45 to 55.

In this regard, the key issue in my view relates to §89(3) of the Freedom of Information Law, which provides in relevant part that "nothing" in that statute "shall be construed to require any entity to prepare any record not possessed or maintained by such entity..." Stated differently, the Freedom of Information Law pertains to existing records, and an agency, such as the Division of Parole, is not required to create a new record in response to a request.

I would conjecture that the Division of Parole does not maintain statistics that specifically involve the parameters reflected in your request. While it may have statistics relating to recidivism, it may not have developed statistics specifically pertaining to males within a certain age category. Rather than seeking specific information which likely does not exist and which the Division would not be required to prepare, it is suggested that you seek any recent statistics relating to parole and recidivism or that you contact the Division's records officer in an effort to ascertain the nature of statistics relating to parole and recidivism that have been developed or obtained by the Division.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13524

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 6, 2002

Mr. Mark Williams
89-A-8317
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. Williams:

I have received your letter in which you sought assistance in obtaining a record indicating an "arrest number." You wrote that the rap sheet obtained from the Division of Criminal Justice Services does not include that item.

In this regard, I would conjecture that an arrest number is designated by the arresting agency, i.e., a police department or the Division of State Police. If that is so, it is suggested that a request be made to records access officer at the police agency that made the arrest. It is noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable personnel at the agency to locate and identify the record of your interest. It is also suggested that you include reasonable proof of your identity since you would be requesting a record pertaining to yourself.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13525

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 6, 2002

Mr. Joseph Jehle
89-A-1698
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. Jehle:

I have received your letter and the materials attached to it. You have sought advice concerning a request made to the Office of the Suffolk County District Attorney for records that it submitted to the Board of Parole when that agency considered your release.

In this regard, in my experience, the kinds of records that you requested are typically prepared to assist the Board of Parole in reaching a decision concerning release and consist largely of recommendations or opinions. If that is so in this instance, it appears that the denial of your request was consistent with 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.

Perhaps most pertinent in consideration of the nature of the records sought 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. Therefore, insofar as the communications sent to the Board of Parole by the Office of the District Attorney consist of advice, opinions, recommendations and the like, I believe that the denial of access was proper.

In addition, as indicated in the response to your request, §87(2)(b) may also be relevant. That provision authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." To the extent that the records in question identify persons other than yourself, the cited provision may be applicable as a basis for a denial of access.

I hope that the foregoing serves to enhance your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: M. Tang
County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13526

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 6, 2002

Dale C. Mangan
[redacted]

The staff of the Committee on Open 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. Mangan:

I have received your letter of July 25 and the materials attached to it. You wrote that your request for "[a]ll legal bills billed to Southern Cayuga Central School District for legal expenses" during a certain period was denied, and that the District indicated that "[b]ills are confidential information." Following the denial of your request, you informed the District that you would be satisfied to gain access to "those portions that pertained to [you] and/or the Civil Rights Complaint [you] filed", and you added in your letter that you would like to obtain "the dates, times, and duration" of an attorney's "counsel to the district and the fees he charged for these services." Having spoken to the attorney, who cited attorney-client confidentiality as the basis for the denial, he indicated that he would need a written opinion from this office before reconsidering your request.

From my perspective, when the attorney client privilege is applicable, it is clear that a communication falling within the scope of the privilege may be withheld. Nevertheless, as in numerous other situations involving the Freedom of Information Law, the nature and content of a record determine the extent to which the record may be withheld. If indeed your interest involves the "dates, times and duration" of services rendered by the attorney, I believe that those portions of the records must be disclosed. In this regard, I offer the following comments.

First, and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [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. 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 situation at issue, the initial denied is based on a contention that the bills may be withheld in their entirety based on an assertion of the attorney client privilege. In my view, that contention is inconsistent with the judicial interpretation of the Freedom of Information Law.

By way of background, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared or imparted pursuant to an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with such an attorney-client relationship may be considered privileged under §4503 of the CPLR. 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 the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant 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.)...
>
> "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 being communicated and, consequently, 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.)"

In short, in Knapp, even though portions of the records containing the time billed and the amount paid for the time, it was determined that other aspects of billing statements indicating "the

general nature of legal services performed", as well as certain others, did not fall within the attorney client privilege and were available.

In the other decision dealing with the issue under the Freedom of Information Law, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], the matter 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). While 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.).

Although the County argued that the "description 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 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 determines 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...
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

In my view, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, I agree that references identifiable to students may properly be deleted. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

In short, based on the language of the Freedom of the Information Law and the decisions cited above, the items of your interest, and in many instances, additional information contained within the records at issue, must in my view be disclosed.

As you requested, copies of this opinion will be forwarded to the District's records access officer and its attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles Mellor
Matthew R. Fletcher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13527

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 7, 2002

Mr. Carlos Torres
94-A-5302
Green Haven Correctional Facility
Rt-216, P.O. Box 4000
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. Torres:

I have received your letter in which you sought clarification concerning a request made under the Freedom of Information Law. As I understand the matter, you requested motions and transcripts of judicial proceedings that "were generated by the court" from the Office of the Westchester County District Attorney. The request was denied.

In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law specifically excludes the courts from its coverage. Consequently, it had been contended that court records that came into the possession of an agency, such as an office of a district attorney, are not subject to the Freedom of Information Law. However, in a recent decision by the Court of Appeals, the state's highest court, it was determined that records of any nature, including court records, that are in the possession of an agency fall within the scope of the Freedom of Information Law [see Newsday v. Empire State Development Corporation, June 13, 2002, ___NY2d___]. Therefore, when court records come into the possession of the office of a district attorney or any agency, I believe that they are subject to rights conferred by the Freedom of Information Law.

Second, of likely relevance is the case of Moore v. Santucci [151 AD 2d 677 (1989)] in which it was held that if records had been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. It was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintains records that had previously been disclosed, the agency would be required to respond to a request for the same records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard Weill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13528

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 7, 2002

Mr. Rasool Salaam
99-A-0411
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. Salaam:

I have received your letter in which you sought assistance in obtaining videotapes of events occurring at your facility.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

> "...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution. Moreover, respondents' regulations require disclosure to news media of an inmate's 'name *** city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7 NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff under §87(2)(f).

Further, in another case involving videotapes of events occurring at a correctional facility, in the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. However, other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy and endanger life and safety [see 174 AD2d 212 (1992)].

In sum, based on the language of the Freedom of Information Law and its judicial interpretation, I believe that the Department is required to review videotapes falling within the scope of a request to attempt to ascertain the extent to which their contents fall within the grounds for denial appearing in the statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13529

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 7, 2002

Mr. Charles McAllister
96-A-1243
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. McAllister:

I have received your letter in which you sought an advisory opinion concerning rights of access to policies, directives, rules or regulations adopted by the Department of Correctional Services pertaining to certain topics or practices.

In this regard, first, it is emphasized that the Freedom of Information Law pertains to existing records. Insofar as the information of your interest does not exist in the form of a record or records, that statute, in my view, would not apply.

Second, insofar as the Department maintains the records that you described, 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 Department 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)].

Lastly, the remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of correction officers or others, it appears that §87(2)(f) would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carolyn Cushman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13536

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 7, 2002

Mr. Richard Winkler
81-B-2146
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Winkler:

I have received several letters from you concerning your efforts in gaining access to certain records from the Village of Sleepy Hollow and the Office of the Westchester County District Attorney.

Specifically, you requested "every statement" made to what had been the North Tarrytown Police Department by a witness who testified against you during a trial conducted in 1981. You also requested the "arrest and detention records" of the witness, and the Village denied access on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

In this regard, I offer the following comments.

First, of likely relevance to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. Therefore, insofar as the records sought were disclosed or introduced into evidence during a public proceeding, it appears that there would be no basis for a denial of access.

In that decision, it was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintain records that had previously been disclosed, an agency, such as the Village or the County, would be required to respond to a request for the same records.

Second, insofar as the statements have not been previously disclosed and continue to exist, 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 the witness's privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information or identify others, 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).

Second, with respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency or transmitted by the Division to another 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]. As you pointed out, however, while it has been held that criminal history records are, in general, exempt from disclosure, it has also been determined 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" [Thompson v. Weinstein, 150 AD 2d 782 (1989); William v. Erie County District Attorney, 255 Ad 2d 863 (1998). Therefore, insofar as your request involves records analogous to

those found to be available in the cases cited above, I believe that the Village or 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.

Next, certain information regarding a person incarcerated in a county jail would be accessible under §500-f of the Correction Law, which 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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: Hon. Philip Zegarelli
Angela Everett
Richard E. Weill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13531

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 7, 2002

Mr. Angel Alicea
89-B-2526
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. Alicea:

I have received your letter in which you sought assistance in relation to requests for records of the New York City Police Department.

As I understand your comments, your mother, acting on your behalf, obtained six "complaint follow-up" reports from the Department. After receiving the reports, you sent copies to the Department and requested "the original Complaint Reports that pertain to the six Complaint Follow-Up Reports". The request was denied, and you asked whether the records access officer should have reviewed the reports that you sent before determining that the other reports may be withheld. In addition, you asked whether the reasons for denying an appeal following a denial of access to records must be fully explained in writing.

In this regard, it is my understanding that the "complaint follow-up" report is the first report prepared by a police officer following a complaint; I do not believe that a different complaint report is prepared before the complaint follow-up report. If I am mistaken and if there are complaint reports, I believe that Department personnel are required to evaluate the contents of such reports and consider the effects of disclosure prior to determining rights of access. In the situation that you described, if such reports exist, I believe that it would have been appropriate to have reviewed the contents of the complaint follow-up reports before determining rights of access to complaint reports relating to the same incident or incidents.

With respect to a denial of an appeal, as you inferred, §89(4)(a) of the Freedom of Information Law requires that a determination affirming an initial denial of access to records must "fully explain in writing....the reasons for further denial..."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13532

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. Greg Gilchrist
95-A-4621
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. Gilchrist:

I have received your letter in which you sought assistance in obtaining copies of certain records. The correspondence attached to your letter indicates that copies of the records were not made available because of insufficient funds.

In this regard, the federal Freedom of Information Act, which applies only to federal agencies, authorizes an agency to waive fees in certain circumstances. However, there is no similar provision in the New York Freedom of Information Law. Therefore, an agency subject to the New York Freedom of Information Law may charge its established fees, even if a request is made by an indigent inmate (see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13533

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. Preston A. Smith
87-C-0186
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Smith:

I have received your letter and the materials attached to it. As I understand their contents, you have sought assistance in obtaining records relating to clothing issued to you at your facility since 1997, as well as a record authorizing an advance when you were unable to pay for an item.

From my perspective, the kinds of records in which you are interested should be disclosed, assuming that they can be found with reasonable effort. Relevant to the matter is §89(3) of the Freedom of Information Law, which requires that an applicant must "reasonably describe" the records sought. In considering that standard, the Court of Appeals, the state's highest court, has held 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 faculty, 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. For instance, if records involving the issuance of clothing can be located by means of the name of an inmate, retrieving those pertaining to you may be easy. However, they are kept chronologically and the records would have to be searched one by one, it is unlikely that the request would reasonably describe the records and that it could be rejected on that basis.

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-13534

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. Alphonso Ruise
96-A-2160
Gowanda Correctional Facility
Box 311
Gowanda, NY 14070

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ruise:

I have received your letter in which you sought guidance concerning an unanswered request made to the Office of the Schenectady County District Attorney for a cassette tape used during your trial, as well as the name of a person or agency that you might contact in order to have criminal evidence expunged.

In this regard, first, the Freedom of Information Law deals with rights of access to records; it does not include provisions relating to the expungement of evidence. Further, I know of no provision that would require the expungement of evidentiary material if a person has been convicted.

Second, of possible significance concerning the tape is Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintains records that had previously been disclosed, the agency would be required to respond to a request for the same records.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Office of the Schenectady County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13535

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. Jon-Adrian Velazquez
00-A-2303
Green Haven Correctional Facility
P.O. Box 4000
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. Velazquez:

I have received your letter, and in consideration of your remarks, I offer the following comments.

First, you referred to "private appellate counsel." In this regard, I point out that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to 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 state and local government; it would not apply to records of a private attorney or law firm, for example.

Second, with respect to the delay in determining rights of access by the New York City Police Department, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish 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.

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13536

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. John Barnes
98-A-2301
Franklin Correctional Facility
62 Bare Hill Road
Malone, N Y 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. Barnes:

I have received your letter and appreciate your kind words. You have sought assistance concerning a variety of issues relating to the Division of Parole, some of which pertain to the Freedom of Information Law. Those concerning that statute will be the focus of 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

For your information, I believe that the person at the Division of Parole designated to determine appeals is Terrence X. Tracy, Counsel to the Division.

Second, I agree that a request for a "case file" or "case records" pertaining to you would likely meet the requirement imposed by §89(3) of the Freedom of Information Law that a request must "reasonably describe" the records sought. As you pointed out, the Court of Appeals, the state's highest court, has determined that a request meets that standard when agency staff can locate and identify the records based on the terms of a request, irrespective of the volume of material [Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Lastly, the Freedom of Information Law deals with access to records; it does not include provisions pertaining to the correction or amendment of records. Therefore, while I believe that the Division may choose to amend its records, it is not required to do so by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13537

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. Maurice Covington
20515
P.O. Box 10
Valhalla, NY 10595

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Covington:

I have received your letter in which you sought guidance concerning requests for records that have not been answered.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

For your information, I believe that the person designated to determine appeals in Westchester County is the County Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: A. Zcanecki, FOIL Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13538

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. Steven C. Forshey
00-b-1330
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. Forshey:

I have received your letter concerning your unsuccessful attempts to gain access to records relating to your conviction. In this regard, I offer the following comments.

First, the statutes that you cited to seek the records are, respectively, the federal Freedom of Information and Privacy Acts, which apply only to records maintained by federal agencies. I point out, too, that although those statutes include provisions relating to the waiver of fees, the New York Freedom of Information Law contains no similar provision. Further, it has been held that an agency may charge its established fees under the New York law, even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

Second the Freedom of Information Law pertains to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> ".....the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, while the office of a district attorney or a public defender, for example, is an "agency", the courts fall beyond the coverage of the Freedom of Information Law. This is not to suggest that court records might not be available, for other provisions of law may grant access to those records (see e.g., Judiciary Law, §255). When seeking court records, it is suggested that you request them from the clerk of the court, citing an applicable provision of law as the basis of the request.

Insofar as the matter relates to agency records and the Freedom of Information Law, I note that that statute pertains to existing records. Therefore, if the records sought do not exist, the Freedom of Information Law would not apply. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification from an agency.

Of possible relevance to the matter is Moore v. Santucci [151 AD 2d 677 (1989)] in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintains records that had previously been disclosed, an agency would be required to respond to a request for the same records.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 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-13539

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. James Rizzo
95-A-3842
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953-0901

The staff of the Committee on Open 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 in which you questioned the status of copyrighted materials maintained by an agency in terms of rights of access to those records under the Freedom of Information Law.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, the only exception to rights of access pertinent to the matter would be §87(2)(d), which permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

Under the U.S. Copyright Act, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the U.S. Department of Justice, the most common basis for the assertion of the federal Freedom of Information Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted materials would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it appears that the work would be available for copying under the Freedom of Information Law.

In the only decision that has dealt with copyright in relation to the Freedom of Information Law, Sagaponack Homeowners Association v. Town of Southampton (Supreme Court, Suffolk County, NYLJ, September 29, 1998), the court emphasized that to withhold copyrighted material, it must be proven that disclosure would in fact "cause substantial injury to the competitive position" of the holder of the copyright.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13540

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. Larry Brown
93-B-1945
Mid-State Correctional Facility
P.O. Box 2500
Malone, 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. Brown:

I have received your letter in which you sought guidance concerning the time within which an agency must determine an appeal following a denial of access to records under the Freedom of Information Law.

In this regard, §89(4)(a) of that statute provides direction and states that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I note that it has been held that an agency's failure to comply with the Freedom of Information Law involves a matter distinct from and irrelevant to matters arising in separate proceedings [see Brusco v. NYS Division of Housing and Community Renewal, 170 AD2d 184, appeal dismissed, 77 NY2d 939 (1991)].

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-13511

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. Darrell Jones
93-A-1836
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. Jones:

I have received your letter and the materials attached to it. As I understand the matter, it involves a request for records that had previously been disclosed to you.

In this regard, relevant is the case of Moore v. Santucci [151 AD2d 677 (1989)] in which it was held that if records had been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. It was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is a allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintains records that had previously been disclosed, the agency would be required to response to a request for the same records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13512

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 13, 2002

Mr. John Thompson
00-R-6978
Mohawk Correctional Facility
6100 School Road
P.O. Box 8451
Rome, NY 13442-8451

The staff of the Committee on Open 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 complained that the senior parole officer located at your facility rejected your Freedom of Information Law request to review the contents of your "facility parole files," and that the records coordinator "has refused to honor the Freedom of Information Law."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce 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. That provision specifies that accessible records be made available for inspection and copying.

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-13543

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 13, 2002

Mr. Roy A. Mura
930 Rand Building
14 Lafayette Square
Buffalo, NY 14203

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mura:

I have received your letter in which you asked, in essence, whether agency personnel must search for records sought under the Freedom of Information Law. From my perspective, based on the language of the law and its judicial interpretation, the answer is clearly in the affirmative when records can be found with reasonable effort.

In this regard, first, §89(3) of the statute refers specifically to the obligation to search for records. That provision deals in part with the situation where agency staff cannot locate a record, in which case, on request, an agency "shall certify that...such record cannot be found *after diligent search*." That phrase indicates that it is not the applicant who makes or who is responsible for making a search for records. On the contrary, agency staff is required to engage in the search.

Second, the same provision also states that an applicant must "reasonably describe" the records sought. In considering that standard, the Court of Appeals indicated that agencies are required to search for records. The case involved a request by an inmate for records pertaining to himself that were maintained by the Department of Correctional Services. Based on the request, Department staff located approximately 2,300 hundred pages of documentation and asked which among those documents the inmate wanted. He indicated that he wanted all of them, and the Department denied the request at that time based on its contention that the request failed to reasonably describe the records. The Court rejected that argument, stating 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'])" [Konigsberg v. Coughlin, 68 NY2d 245, 250 (1986)].

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.

Based on the foregoing, 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 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 Konigsberg, it is clear that the inmate did not search for the records; Department staff conducted the search. Further, the Court provided guidance and direction concerning the extent to which an agency is required to search its records in responding to a request made under the Freedom of Information Law. In a decision rendered by the Appellate Division, 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 "because such records do not exist in a 'central file' and, further...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., 499).

As indicated in Konigsberg, only if it can be established that an agency maintains its records in a manner that renders its staff unable to locate and identify the records with reasonable effort would the request have failed to meet the standard of reasonably describing the records and would an agency not be required to engage in a search of its records.

In sum, as a general matter, searching for records is, based on the preceding commentary, an obligation imposed on agencies by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Roger A. Masse

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13514

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 13, 2002

Hon. Felix J. Catena
County Court Judge
County Court Chambers
Montgomery County Courthouse
Fonda, NY 12068

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Judge Catena:

I have received your letter concerning the disclosure of the contents of an application for a pistol license and related records to peace or police officers and others

As you are aware, the statute that deals with licenses pertaining to firearms is §400.00 of the Penal Law, and subdivision (5) states in relevant part that:

> "The application for any license, if granted, shall be filed by the licensing officer with the clerk of the county of issuance, except that in the city of New York, and in the counties of Nassau and Suffolk, the licensing officer shall designate the place of filing in the appropriate division, bureau or unit of the police department thereof, and in the county of Suffolk the county clerk is hereby authorized to transfer all records or applications relating to firearms to the licensing authority of that county. The name and address of any person to whom an application for any license has been granted shall be a public record."

Based on the foregoing, it is clear that the name and address of a person to whom a license is granted are accessible to the public. The decision to which you referred, Sportsmen's Association for Firearms Education, Inc. v. Kane [680 NYS 2d 411, aff'd 266 AD2d 396 (1998)] concluded that other information submitted or acquired in the licensing process is, by implication, beyond the scope of public rights of access. However, there is nothing in §400.00 of the Penal Law that *forbids* disclosure of that information. That being so, I do not believe that the information in question *must* be withheld in every instance, but rather that it *may* be withheld. In short, the custodian of the

records in question may, in my view, choose to disclose the records in question, in whole or in part, even though there may be no obligation to do so. I note, too, that the Freedom of Information Law is permissive, and that the Court of Appeals has held that an agency may withhold records in accordance with the grounds for denial, but that it is not required to do so [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. The only instance in which records must be withheld would involve the case in which a statute prohibits disclosure. Again, as I interpret §400.00 of the Penal Law, there is nothing in that statute that precludes the custodian of the records at issue from disclosing the records.

With respect to the situations that you described, as a general matter, the status or interest of persons seeking records under the Freedom of Information Law would be irrelevant in determining rights of access; if a record is accessible, it should be made available to any person [see e.g., Burke v. Yudelson, 51 AD2d 673 (1976); Farbman v. New York City, 62 NY2d 75 (1984)]. Conversely, if it is deniable based on one or more of the grounds for denial of access listed in §87(2), barring unusual circumstances, it should be withheld consistently, regardless of the interest of the applicant. However, when it is clear that a request has been made by a public officer or employee, not under the Freedom of Information Law, but rather in the performance of his or her official duties, it has been suggested that the request should not be equated with a request made by a member of the public. In that case and in the interest of governmental cooperation and efficiency, records may be shared unless there is a statute barring disclosure. To attempt to ensure that disclosures to government officials are appropriate, it has been recommended that requests for records that ordinarily may be withheld be made in writing on the official letterhead of a government agency, and that the disclosure also be made with a writing containing the *caveat* that the records would typically be withheld and that they are being made available only because they have been sought in the performance of one's official duties.

While the matter is unrelated to the Freedom of Information Law, I believe that a court may order disclosure in appropriate circumstances, i.e., in discovery, unless a statute forbids disclosure. Again, I do not believe that there is statutory direction prohibiting disclosure.

Lastly, I would conjecture that there are items obtained or prepared in the licensing process that are not provided directly by the applicant for the license. For instance, there may be investigative materials, comments offered by neighbors, employers, personal references and others that the applicant has no right to obtain. In my view, if that person does not have a right of access that can be waived or transferred to another person, his or her preference regarding disclosure should be irrelevant. Under §400(5), the only items that must be disclosed are the name and address of a licensee. The licensee's preference regarding disclosure should not be determinative.

I hope that the foregoing will be useful to you and that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1354/5

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 14, 2002

Mr. Roman Kevilly
97-A-0654
Oneida Correctional Facility
6100 School Road
Rome, NY 13440

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kevilly:

I have received your letter in which you complained that the Department of Correctional Services has refused to acknowledge the receipt of your Freedom of Information Law request.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 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

FOIL-AO-13546

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 14, 2002

Mr. Mario Stacchini
01-A-1842
Oneida Correctional Facility
Box 4580
Rome, NY 13442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Stacchini:

I have received your letter in which you requested assistance in obtaining the index of a 750 page MCI phone contract from the Department of Correctional Services. You wrote that the response to your request indicated "that there is currently no index" and the "office is not required by law to make a document that does not exist."

In this regard, the Freedom of Information Law pertains to existing records and §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. Therefore, if no index relating to the contract exists, the Department would not be required to prepare an index on your behalf.

When an agency indicated 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, you could request such a certification.

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 OML-AO-3502
FOIL-AO-13547

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 14, 2002

Mr. Shmuel Gerber
Bldg. 1C Room 202
CSI Association
College of Staten Island
2800 Victory Boulevard
Staten Island, NY 10314

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gerber:

I have received your letter in which you raised questions concerning "the so-called open voting requirement as it applies to elections of officers..."

You wrote that you are a student at the College of Staten Island, a unit of the City University of New York (CUNY), and that you were recently elected to serve on the Board of the College of Staten Island Association, Inc. ("the Association"). The Association "is in charge of overseeing the allocation and expenditure of student activity fees." You indicated that it has been advised that "the method of voting that best fulfills the requirements of the Open Meetings Law is a roll-call vote." However, you have contended that "it is not necessary for the vote to be announced exactly at the same time it is cast, but that the directors can pass a signed ballot to the secretary who then announces each vote." It is your view that an election carried out in that manner "would allow the directors to be less influenced by the vote of those called earlier in the roll call." To do so, you asked whether the following procedure would comply with law:

> "1) Every director (including the president) is handed a ballot which they fill in with their choice of candidate(s) and sign their (the voter's) name onto the ballot.
>
> 2) The ballots are all handed to the secretary, who announces who each director voted for.
>
> 3) Any director can ask for another ballot and change their vote, up until the time the president announces who has been elected (or that there is a failure to elect)."

In this regard, first, as you suggested in your letter, the Court of Appeals, the state's highest court, has held that an equivalent entity, an association at a CUNY community college authorized to review budgets and allocate student activity fees and disbursements, constitutes a "public body" required to comply with the Open Meetings Law [Smith v. CUNY, 92 NY2d 707 (1999)]. Since the Board of the Association is analogous to the entity found to be a "public body" subject to the Open Meetings Law in the decision cited above, I believe that it is required to comply with the Open Meetings Law. It is noted, too, that the same kind of entity, a CUNY student government association, has also been found to be subject to the Freedom of Information Law, and that in that decision, it was determined that its board could not elect its officers by secret ballot vote (Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000).

Second, with respect to the "open voting" requirement, I direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3), a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually concerning 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)].

There is nothing in either the Freedom of Information or Open Meetings Laws that specifies that a vote must be accomplished by means of a roll call or that a vote be "announced exactly as the same time it is cast." In my view, so long as a record is prepared that indicates the manner in which each member cast his or vote, an entity would be acting in compliance with the open vote requirements imposed by those statutes. I note that the decision cited above referred to "open voting" in the context of both open and executive sessions. Since the Open Meetings Law permits public bodies to vote in proper circumstances during an executive session [see §§105(1) and 106(2) and (3)], it is clear in my view that roll call voting in public is not required. That being so, I believe that the procedure that you proposed would be consistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1358

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 14, 2002

Thomas E. Fowler
Chief of Police
Town of Lancaster Police Department
Criminal Justice Building
525 Pavement Road
Lancaster, NY 14086

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Chief Fowler:

I have received your letter of July 26 and the correspondence attached to it. You asked whether, after reviewing the materials, I would concur with your policy of charging $3.00 to transport records from your facility to the Town Hall six miles away where records can be mailed in response to requests made under the Freedom of Information Law.

In my view, the charge is inappropriate. In your letter addressed to the Town Attorney on June 13, you expressed the view that the Freedom of Information Law does not require that records be mailed to those seeking copies of records. Very simply, I disagree. I believe that it is implicit that agencies must mail records to applicants. There are numerous instances in which those requesting records, for any number of reasons, cannot travel to a site to inspect records or to physically obtain copies. Persons may be disabled; they may reside long distances from the site of the records; they may work during business hours, precluding them from traveling to the site of the records; they may be incarcerated. As indicated in the opinion addressed to Mr. Sheehan last month, I believe that an agency may charge for postage. However, again, I also believe that, to give reasonable effect to the Freedom of Information Law and its intent, agencies are required to mail records to applicants.

I would conjecture that the Police Department and other entities within the Town of Lancaster that have facilities at locations other than the Town Hall, i.e., a Highway or Recreation Department facility, transfer items to the Town Hall where, in turn, they are transported to the post office to be mailed. If that is done as a matter of course, merely as part of the routine course of business or procedure of the Town, with no charge, I do not believe that a charge for carrying out the same procedure can be assessed when the item relates to a request made under the Freedom of Information Law. If the Police Department and other entities routinely charge a fee of $3.00 when any item is transferred from your facility to the Town Hall to be mailed, perhaps the practice would

be sustained if challenged. However, if there is a charge only in relation to items mailed in response to requests under the Freedom of Information Law, I believe that a court would find the charge to be unreasonable and inconsistent with law.

As in other situations in which a person believes that a municipality has acted unreasonably or failed to carry out a duty in a manner consistent with law, he or she could initiate a proceeding under Article 78 of the Civil Practice Law and Rules to attempt to compel compliance with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Richard J. Sherwood

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13549

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 14, 2002

Mr. James Lamb
DOTAuthority.com, Inc.
P.O. Box 319
Bowling Green Station
New York, NY 10274

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lamb:

I have received your letter in which in sought an advisory opinion concerning a response to your request by the Department of Transportation. The request involved copies of all "refund orders" issued by the Department's administrative law judges from June 1, 1998 to May 31, 2002. The Department rejected the request because it would "be necessary to conduct a record by record search of Department files in order to locate those NOV's [notices of violation] wherein a refund order was issued", and doing so "exceeds the requirements of FOIL." You were invited to inspect the orders so that you could locate those of your interest.

If I understand the matter accurately, the Department's response appears to be consistent with law.

From my perspective, the issue involves whether the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability

> under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the Department, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, the request would not in my opinion meet the standard of reasonably describing the records. That appears to be the situation in the case of your request, that voluminous records involving notices of violations would have to be searched and/or retrieved, one by one, in order to locate those that include refund orders. If that is so, the Department, based on case law, would not be required to engage in that degree of effort.

I note, too, that it has been held that an agency is not required to index its orders or determinations into topics or components in order to comply with the Freedom of Information Law [see D'Alessandro v. Unemployment Insurance Appeal Board, 56 AD2d 962 (1977); Wattenmaker v. NYS Employees' Retirement System, 95 AD2d 910 (1983)].

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: James Cantwell, Counsel
John Dearstyne, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13550

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 14, 2002

E-Mail

TO: William S. Hecht <wsh6@cornell.edu>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hecht:

I have received your letter in which you referred to a request made to the City of Syracuse for "the digital files of two maps that they had supplied...in a paper format two years ago." Based on a discussion with staff, you indicated that the "City's only hesitation has been that the maps might pose a security threat." Nevertheless, you wrote that the City determined that it would make available digital picture files rather than the raw data in the format that you requested. You added that the City would like you to "sign forms" to the effect that you "can not post the data to the internet."

In consideration of the foregoing, you raised the following questions:

> "Can they deny info based on the 'security' issue if the data is already publically [sic] available online or in a paper format?
>
> "Can a government agency COPYRIGHT other data than tax maps? Can the recent Suffolk County decision regarding the copyright of tax maps be applied to other data generated by a governmental agency?"

With respect to the first question concerning "security", perhaps of greatest significance 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." Although an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more of the grounds for denial [see §89(4)(b)], in the case of the assertion of that provision, the standard developed by the courts is somewhat less stringent. In citing §87(2)(f), it has been found that:

> "This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner's assertion that respondents are required to prove that a danger to a person's life or safety will occur if the information is made public (see, *Matter of Nalo v. Sullivan*, 125 AD2d 311, 312, *lv* denied 69 NY2d 612). Rather, there need only be a *possibility* that such information would endanger the lives or safety of individuals...."[emphasis mine; Stronza v. Hoke, 148 AD2d 900,901 (1989)].

The principle enunciated in Stronza has appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Divsion of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991), Fournier v. Fisk, 83 AD2d 979 (1981) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994], and it was determined in American Broadcasting Companies, Inc. v. Siebert that when disclosure would "expose applicants and their families to danger to life or safety", §87(2)(f) may properly be asserted [442 NYS2d 855, 859 (1981)]. Also notable is the holding by the Appellate Division in Flowers v. Sullivan [149 AD2d 287, 545 NYS2d 289 (1989)] in which it was held that "the information sought to be disclosed, namely, specifications and other data relating to the electrical and security transmission systems of Sing Sing Correctional Facility, falls within one of the exceptions" (id., 295). In citing §87(2)(f), the Court stated that:

> "It seems clear that disclosure of details regarding the electrical, security and transmission systems of Sing Sing Correctional Facility might impair the effectiveness of these systems and compromise the safe and successful operation of the prison. These risks are magnified when we consider the fact that disclosure is sought by inmates. Suppression of the documentation sought by the petitioners, to the extent that it exists, was, therefore, consonant with the statutory exemption which shelters from disclosure information which could endanger the life or safety of another" (id.).

In short, although §87(2)(f) refers to disclosure that *would* endanger life or safety, the courts have clearly indicated that *"would"* means *"could."* If records have been previously disclosed to the public, it would be difficult in my view for an agency to prove that disclosure of the records could now or in the future endanger life or safety. That would be particularly so if records have been made available via the internet. As you are aware, once the records can be acquired through a powerful search engine, such as Google, they remain available, even if they are removed from an agency's website.

Your remaining question involves the ability of a government agency to copyright records other than tax maps. It is my understanding that the ability of government agencies to copyright records that they prepare is being questioned in various contexts throughout the United States. Although it was held that Suffolk County could bring suit for copyright infringement relating to its tax maps, it is questionable whether other federal courts would reach the same conclusion. If indeed tax maps may be subject to copyright protection, I believe that other records prepared by government

agencies could also be copyrighted. Nevertheless, the authority of state and local government to copyright records that they produce must, in my opinion, eventually be resolved by the Supreme Court. Only then can an unequivocal response be offered.

Even when a work is copyrighted, I note that under the U.S. Copyright Act, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the Act 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)].

I hope that I have been of assistance.

RJF:jm

cc: GIS Coordinator, Water Department, City of Syracuse

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13561

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 14, 2002

Mr. Andrew Trubin
01-A-2556
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. Trubin:

I have received your letter in which you explained your difficulty in obtaining records from the New York County Clerk and from the Disciplinary Committee of the Appellate Division, First Department.

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 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.

With respect to records pertaining to the discipline of attorneys, §90(10) of the Judiciary Law states that:

> "Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting president justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Therefore, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable. If indeed your request involved records available under §90(10) of the Judiciary Law, it is suggested that you renew the request, citing and highlighting appropriate aspects of that statute.

With regard to your request for records from the New York County Clerk, I note that county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. An area in which the distinction between agency records and court records may be significant involves fees. Under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute". In the case of fees that may be assessed by county clerks, §§8018 through 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, the fees may exceed those permitted by the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

I hope that the foregoing serves to clarify your understanding and 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 - 13552

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Ronald Venticinque
00-A-3176
236 Institution Road
Southport Correctional Facility
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. Venticinque:

I have received your letter in which you sought guidance in obtaining records indicating the experience and qualifications of your former defense attorney and information on "other cases he handled."

In this regard, I note that the Freedom of Information Law pertains to agency records and that §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

As such, the Freedom of Information Law excludes the courts from its coverage. I am unaware of any agency that maintains records of cases managed by particular attorneys. However, I believe that records of or pertaining to an attorney's admission to practice law may be requested and obtained from the Office of Court Administration. To seek such a record, it is suggested that you write to the Office of Court Administration, Attorney Registration, 270 Broadway, New York, N.Y. 10007.

With respect to the discipline of attorneys, §90(10) of the Judiciary Law states that:

> "Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Based on the foregoing, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable.

Lastly, unless the attorney chooses to do so himself, there is likely no method of acquiring records that indicate the cases he has handled.

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-13553

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Diallo R.A. Madison
94-A-7376
Upstate Correctional Facility
P.O. Box 2000
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Madison:

I have received your letter in which you requested assistance in obtaining "a master index" and an "unusual incident videotape"from your 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.

I note that the subject matter list or master index is a categorization of the kinds of records maintained by an agency. The records referenced on the list may be accessible or deniable, in whole or in part, under other provisions of the Freedom of Information Law.

Second, with respect to access to access to the videotape, 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)(b) states that an agency may withhold records that:

> "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;"

A second provision of potential significance is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations of judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The 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.

Lastly, you wrote that you were informed that the videotape does not exist. 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 Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13554

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Dennis G. O'Hara
O'Hara & C'Connell
Suite One Hundred
200 Salina Meadows Parkway
Syracuse, NY 13212-4505

Dear Mr. O'Hara:

As you are aware, I have received your letter of July 30. In brief, you disagreed with the thrust of an advisory opinion addressed to you and Timothy D. Bunn, Deputy Executive Editor of the Syracuse Newspapers, relative to the ability to withhold "statements of legal services" under the Freedom of Information Law.

In an effort to be fair, I sought to review the decisions to which you referred. One of them, De La Roche, appears to have been incorrectly cited; I could not locate the decision based on the citation offered. The other, Licensing Corp. v. National Hockey League Player's Association, dealt with the attorney-client privilege, as well as discovery in a litigation context. Discovery, as you know, involves standards different from considerations regarding disclosure under the Freedom of Information Law. Further, the court offered a similar view as I did in the advisory opinion, that the issue, in part, involves the degree of detail in a billing statement.

More importantly, the cases to which I referred dealt specifically with the records at issue in consideration of the Freedom of Information Law, and the court in Orange County Publications emphasized, as did the Court of Appeals in Gould, that a blanket denial of access is inconsistent with law, and that an *in camera* inspection, therefore, would be necessary if an agency's denial of access is challenged in court to determine the extent to which records must be disclosed or, conversely, may be withheld. That decision also somewhat exhaustively provided what I view as the parameters pertinent in determining rights of access. In short, it is reiterated that an agency must, in my opinion, review the records in their entirety to determine which portions, if any, may justifiably be withheld.

You asked that I "elaborate on what independent grounds [I] feel a public employer should utilize to determine which phrases to redact from a detailed statement for legal services." I cannot do so. One firm's bill likely includes different phrases from those used by other firms; your considerations as counsel to school districts will be different from those of an attorney representing a public authority or serving as outside counsel to a county or state agency. From my perspective, Orange County Publications provides adequate guidance to reach reasonable decisions regarding disclosure. If you want to seek additional guidance from other sources, certainly you are free to do so.

All the best as always.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Timothy D. Bunn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3504
FOIL-AO-13555

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Ms. Lynette Burns
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Burns:

I have received your letter and the materials attached to it. In brief, you described a series of issues relating to the implementation of the Freedom of Information Law by the Town of Somers, and you asked that this office "guide the Supervisor and the Town Attorney on the Rules and Regulations encompassing the Freedom of Information Law including Executive Session."

In this regard, I offer the following comments.

First, since some aspects of your correspondence deal with situations in which the Town Clerk did not have physical possession of records or in which records were not maintained by a Town official, I note that the Freedom of Information Law is expansive in its scope. That statute pertains to records of an agency, such as a town, 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, records, or as in one instance to which you referred, survey documentation, 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)].

Second, under §30(1) of the Town Law, the clerk is the legal custodian of all town records, irrespective of who physically possesses the records or the location of the records.

Third, since there appears to be a degree of confusion regarding the functions of the "records management officer" and the "records access officer", I point out that those functions, although frequently carried out by the same person, are separate and distinct. The position of "records management officer" is a statutory creation and is described in Article 57-A of the Arts and Cultural Affairs Law, which is also known as the "Local Government Records Law." Section 57.19 of the Arts and Cultural Affairs Law states in relevant part that:

> "Each local government shall have one officer who is designated as records management officer. This officer shall coordinate the development of and oversee such program and shall coordinate legal disposition, including destruction of obsolete records. In towns, the town clerk shall be the records management officer."

With respect to the functions of the records access officer, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, such as a town, to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access officers shall not be construed to prohibit officials who have in the past been

authorized to make records or information available to the public form continuing from doing so."

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

"The records access officer is responsible for assuring that agency personnel...

(3) upon locating the records, take one of the following actions:
(i) make records promptly available for inspection; or
(ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
(4) Upon request for copies of records:
(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the requester to copy those records..."

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. As part of that coordination, 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. 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.

Fourth, reference was made to a situation in which an attorney seeking records was, according to your letter, informed that the request would not be honored until he identified his client. In my opinion, a condition of that nature cannot validly be imposed. In short, 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)].

Next, it is likely that some of the records that you requested may be withheld, likely in part. Several requests involved communications between government officers or employees, i.e., between Town officials or between Town and County officials.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent with respect to records described above is §87(2)(g), which enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Lastly, the structure of the Open Meetings Law is similar to that of the Freedom of Information Law. Under that statute, every meeting of a public body, such as a town board or a board of ethics, must be convened as an open meeting. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into executive session. Specifically, §105(1) states in relevant part that:

"Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

As you requested, and in an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, copies of this opinion will be forwarded to the Town Board, the Supervisor and the Town Attorney. In addition, copies of those statutes, the regulations promulgated by the Committee, and model regulations will be sent. The model regulations can be used by agencies as means of easily adopting proper procedures for the implementation of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Mary Beth Murphy
Ken Powell

encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13556

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Ms. Rhonda Klass
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Klass:

I have received your letter in which you asked that I "investigate" a matter relating to your request made under the Freedom of Information Law to the East Ramapo Central School District. In short, although the District acknowledged the receipt of your request in writing, the acknowledgment stated that "[a]s soon as the information is available, you will be notified in order to schedule an appointment", rather than indicating "a specific date."

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 conduct investigations, compel an agency to grant or deny access to records or otherwise comply with law.

Second, although I do not believe that the District was required to indicate "a specific date" to determine to grant or deny access, its response in my view was not fully consistent with law.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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.

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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 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: District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13557

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Danny Burstein
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Burstein:

I have received your letter and the correspondence attached to it. You have sought assistance regarding a "*de facto*" denial of your request made to the New York State Department of Health under the Freedom of Information Law. The request involves a list of emergency medical technicians (emt's), including their "levels of certification." Despite your efforts, your request, which was made on April 26, has neither been granted nor denied.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the

receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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. If no list exists that includes the elements to which you referred, the Department would not be required to create a list on your behalf [see Freedom of Information Law, §89(3)]. If such a list does exist, I believe that it should be disclosed, unless it includes home addresses and would be used for a commercial or fund-raising purpose [see §89(2)(b)(iii)].

In an effort to enhance compliance, copies of this opinion will be forwarded to Department officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Signor
James O'Meara

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13558

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Daniel Flagg
91-B-0788
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. Flagg:

I have received your letter in which you sought an advisory opinion regarding the availability of a variety of Department of Correctional Services' manuals and guidelines.

Since I am unfamiliar with the contents of the records of your interest, I cannot conjecture as to their availability. However, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

One provision that may be relevant is §87(2)(g), which enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Typically, agency guidelines, procedures, staff manuals and the like provide direction to an agency's employees regarding the means by which they perform their duties. Some may be "internal", in that they deal solely with the relationship between an agency and its staff. Others may provide direction in terms of the manner in which staff performs its duties in relation to or that affects the public, which would ordinarily be public. To be distinguished would be advice, opinions or recommendations that may be accepted or rejected. An instruction to staff, a policy or a determination each would represent a matter that is mandatory or which represents a final step in the decision making process.

While instructions to staff that affect the public and final agency policies or determinations are generally accessible, there may be instances in which those records or portions thereof may be withheld.

Another provision of potential relevance is §87(2)(e), which enables an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Perhaps most relevant would be §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the

> Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a 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 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 remaining provision that may be pertinent as a basis for denial is §87(2)(f). Again, that provision permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." If, for example, disclosure of an instruction to staff or policy would jeopardize the lives or safety of public employees or others, the cited provision might be applicable.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13559

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2002

Mr. Bill Hughes
The Journal News
20 South Broadway, Suite 416
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 facts presented in your correspondence.

Dear Mr. Hughes:

I have received your letter and the correspondence attached to it. You have sought an advisory opinion concerning a denial of access by the City of Yonkers to financial disclosure statements filed by its officers and employees. In the denial of your request, the City's Freedom of Information Officer wrote that:

> "The Yonkers City Code, Article VII, §7-17(F) specifically states that these reports are not public records. Furthermore, the City Code also states that the individuals whose disclosure sheets are sought, must be notified of the such request and be given the opportunity to request the deletion of any information not subject to release.
>
> "Your request for access and review of the Financial Disclosure Forms for all City employees is inappropriate. If you wish to make a request for a specific individual's Financial Disclosure Form, that request will be forwarded to the Board of Ethics for review and further to the individual for review per Article VII."

In this regard, I offer the following comments.

First, I do not believe that a provision of a city code can require that records be kept confidential. Based on judicial decisions, an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access

exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my opinion guarantee or require confidentiality.

Moreover, it has been held by several courts, including the Court of Appeals, the state's highest court, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with an ethics code must be disclosed; rather, I am suggesting that those records may in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, and that any local enactment that is inconsistent with that statute would be void to the extent of any such inconsistency.

Second, when the Ethics in Government Act went into effect, it created a New York State Temporary Commission on Local Government Ethics. Although the Commission no longer exists, various provisions concerning its former role are in my view relevant to an analysis of the issue. While the advisory jurisdiction of this office involves the Freedom of Information Law, in this instance, in order to provide advice concerning the matter, it is necessary to interpret certain provisions of the General Municipal Law.

The central issue involves which law applies -- the Freedom of Information Law, the General Municipal Law, or perhaps a local enactment.

By way of legislative history, when a municipality elected to file financial disclosure statements with the Commission when it existed, §813 of the General Municipal Law provided direction. Specifically, paragraph (a) of subdivision (18) of that statute states that:

> "Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection are:
>
> (1) the information set forth in an annual statement of financial disclosure filed pursuant to local law, ordinance or resolution or filed pursuant to section eight hundred eleven or eight hundred twelve of this article except the categories of value or amount which shall remain confidential and any other item of information deleted pursuant to paragraph h of subdivision nine of this section, as the case may be;

> (2) notices of delinquency sent under subdivision eleven of this section;
>
> (3) notices of reasonable cause sent under paragraph b of subdivision twelve of this section; and
>
> (4) notices of civil assessments imposed under this section."

As such, §813(18)(a) governed rights of access to records of "the commission".

Notably, in a memorandum prepared by the Commission in April of 1991 and transmitted to me, the Commission wrote that "The Act does not specifically address the public availability of annual financial disclosure statements filed with a municipality's own local ethics board." That memorandum states, however, that "the Act does authorize a Section 811 Municipality to promulgate rules and regulations, which 'may provide for the public availability of items of information to be contained on such form of statement of financial disclosure'." Section 811(1)(c) authorizes the governing body of a municipality to promulgate:

> "rules and regulations pursuant to local law, ordinance or resolution which rules or regulations may provide for the public availability of items of information to be contained on such form of statement of financial disclosure, the determination of penalties for violation of such rules or regulations, and such other powers as are conferred upon the temporary state commission on local government ethics pursuant to section eight hundred thirteen of this article as such local governing body determines are warranted under the circumstances."

In addition, §811(1)(d) states in part that if a local board of ethics is designated to carry out duties that would otherwise be performed by the Commission:

> "then such local law, ordinance or resolution shall confer upon the board appropriate authority to enforce such filing requirement, including the authority to promulgate rules and regulations of the same import as those which the temporary state commission on local government ethics enjoys under section eight hundred thirteen of this article."

In turn, §813(9)(c) states in relevant part that the Commission shall "[a]dopt, amend, and rescind rules and regulations to govern procedures of the commission..." As such, it appears that the regulatory authority of the Commission was and, therefore, a local board of ethics, is restricted to the procedural implementation of the Ethics in Government Act. In my view, issues concerning rights of access to records do not involve matters of procedure, but rather matters of substantive law that are governed by statute.

In my opinion, the governing statute is the Freedom of Information Law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Under §813(18)(a)(1) of the General Municipal Law, financial disclosure statements filed with the Commission were available, except those portions indicating categories of value or amount or when it is found that reported items "have no material bearing on the discharge of the reporting person's official duties." In my view, the same information that was exempted from disclosure could be deleted from a financial disclosure statement maintained by a municipality under the Freedom of Information Law on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b) and 89(2)(b)]. Rather than being "confidential", I believe that financial disclosure statements would be accessible, except to the extent that disclosure would result in an unwarranted invasion of personal privacy in accordance with the preceding commentary.

Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating findings of misconduct or the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

The other provision of relevance, §87(2)(g), states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Records prepared in conjunction with an inquiry or investigation would in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. Factual information would in my view be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

Third, with respect to a requirement that you request a specific financial disclosure statement rather than all such statements filed during a given year, for example, pertinent is §89(3) of the Freedom of Information Law. That provision states in part that an applicant is required to "reasonably describe" the records sought. In this regard, it I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise,

> potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. In this instance, if all of the statements are filed with the City's Board of Ethics, for example, it is likely that they could be found with reasonable effort. If that is so, I believe that the request would meet the standard of "reasonably describing" the records.

Lastly, with respect to the delay in determining rights of access, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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, 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)].

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: William Mooney
Kevin Crozier

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC - AO - 3507
FOIL-AO-13560

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2002

Ms. Sharon L. Brin
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Brin:

I have received your letter in which you raised a variety of issues relating to meetings of the Board of Education of the East Greenbush Central School District and access to District records. In consideration of your remarks and the materials attached to your letter, I offer the following comments.

First, 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. That right is 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, the public would not have the right to attend.

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, that statute is silent with respect to the issue of public participation. Consequently, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, it has been advised that it should do so based upon 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., County Law, §153; Town Law, §63; Village Law, §4-412; Education Law, §1709(1)], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School

District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I note that §103 of the Open Meetings Law provides that meetings of public bodies are open to the "general public." As such, any member of the public, whether a resident of the municipality in which a public body functions or of another jurisdiction, would have the same right to attend. That being so, I do not believe that a member of the public can be required to identify himself or herself by name or by residence in order to attend a meeting of a public body. Further, since any person can attend, I do not believe that a public body could by rule limit the ability to speak to residents only. There are many instances in which people other than residents, such as those who may own commercial property or conduct business and who pay taxes within a given community, attend meetings and have a significant interest in the operation of a municipality or school district.

In short, in my view, the public does not have the right to speak at meetings of public bodies. Nevertheless, I believe that a public body may choose to permit the public to participate in conjunction with reasonable rules that treat members of the public equally and without regard to residency.

Second, according to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, the District is required to accept requests during its regular business hours. If a person cannot personally submit a request, he or she may request records by mail.

Third, with respect to fees, since its enactment in 1974, the Freedom of Information Law has authorized agencies to charge up to twenty-five cents per photocopy up to nine by fourteen inches [see §87(1)(b)(iii)]. Although the District had charged five cents per photocopy, I believe that it has clearly had the authority to charge up to twenty-five cents and that its change in policy is, therefore, consistent with law.

Fourth, a response to a request indicating that an agency "will report to you shortly" is, according to the law, inadequate. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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.

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

Next, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your representative, there must be a demonstration that neither you nor your representative possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, in consideration of certain aspects of your request, 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 is no record indicating the "legal cost of cat dissection debate"during a particular time period, the District would not be required to prepare a record containing the information sought on your behalf.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information and Open Meetings Laws and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence A. Edson, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13561

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2002

Hon. Sandra R. Galef
Member of the Assembly
Room 540
Legislative Office Building
Albany, NY 12248

Dear Assemblywoman Galef:

I have received your letter of August 13, as well the materials attached to it. In brief, a constituent, Mr. Nicholas Evanchik, has contended that the Freedom of Information Law should be strengthened and that the Village of Briarcliff Manor has denied access to records in a manner inconsistent with law. Further, in a letter that he addressed to the Mayor and Trustees of the Village, he wrote that I prepared an opinion advising "that access should be allowed."

In this regard, first, I agree with Mr. Evanchik's contention that the Freedom of Information Law should be strengthened. As you are aware, the Committee on Open Government prepares an report to the Governor and the State Legislature in which numerous proposals are offered to improve the operation of the Freedom of Information and Open Meetings Laws, as well as other statutes dealing with the accountability of government. Enclosed is a copy for your consideration, and I will send a copy to Mr. Evanchik as well.

Second, I believe that Mr. Evanchik's characterization of my opinion is inaccurate. In a written advisory opinion addressed to him on March 20, I offered remarks concerning access to "an outside appraisal for a property located" within the Village of Briarcliff Manor. While it was advised that portions of that record may be accessible, it was specified that others, notably those "reflective of opinion, advice, recommendation and the like," could in my view be withheld. In short, it was not advised that "access should be allowed", but rather that the contents of the record in question serve as the means of determining the extent to which it must be disclosed or, conversely, may be withheld. An appraisal by its nature includes the opinion offered by an appraiser regarding the value of real property. Information of that nature, as explained in the advisory opinion, may be withheld.

It is noted that Mr. Evanchik's objections expressed in his letter to the Mayor and Trustees have been discussed with Michael Blau, the Village Manager. Based on my conversation with Mr. Blau, I believe that he understands and concurs with the advisory opinion rendered by this office in March.

I hope that I have been of assistance. If you would like to discuss this or any other matter, as always, I am at your service.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Nicholas Evanchik
Hon. Keith Austin
Michael Blau

FOIL-AO-13562

From: Robert Freeman
To: twhs@imcnet.net
Date: 8/19/02 9:48AM
Subject: Dear Ms. Shfer:

Dear Ms. Shfer:

I have received your inquiry concerning your ability to "look up and research old birth, death and marriage records in a town or government agency."

In this regard, birth records are generally available only to the subjects of those records or to the parents of minor children pursuant to section 4173 of the Public Health Law. Death records are available only in specified circumstances, i.e., to next of kin, pursuant to section 4174 of the Public Health Law. Portions of marriage records are available to any person under the Freedom of Information Law and section 19 of the Domestic Relations Law; other aspects of those records are available on a showing of a "proper purpose."

Notwithstanding the foregoing, "old" birth, death and marriage records may be available for genealogical purposes from the State Department of Health and local registrars of vital records (city and town clerks). To obtain additional information regarding genealogical searches, it is suggested that you go the Department of Health website, which can be located at <www.health.state.ny.us>. When at the website, click first onto "info for researchers", then to "vital records" and finally to "genealogy copies."

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-13563

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2002

Hon. Lorraine DeMarfio
Village Clerk
Village of Fleischmanns
P.O. Box 339
Fleischmanns, NY 12430

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. DeMarfio:

I have received your letter of July 26, which, for reasons unknown, did not reach this office until August 9. You have sought guidance concerning a request for check stubs relating to a police officer employed by the Village. Although you wrote that you enclosed a sample of a check stub, none was included with the material that you sent. Nevertheless, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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 check stubs 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. Further, in a decision in which the same conclusion was reached, the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

With regard to the fact that the check stubs pertain to a police officer, decisions rendered by the Court of Appeals, the state's highest court, indicate that the name and gross wages of a police officer, and perhaps other items as well, must be disclosed. In Capital Newspapers v. Burns, supra, the issue involved records reflective of the days and dates of sick leave claimed by a particular police officer. The Appellate Division, as I interpret its decision, held that those records were clearly relevant to the performance of the officer's duties, for the Court found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [109 AD 2d 92, 94-95 (1985)].

Perhaps more importantly, in a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals affirmed and found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding commentary offered by the State's highest court, it might appropriately be contended that the need to enable the public to make informed choices and provide a mechanism for exposing waste or abuse must be balanced against the possible infringement upon the privacy of a public officer or employee. The magnitude of an invasion of privacy is conjectural and must in many instances be determined subjectively. In this instance, it is clear in my view that the names, titles and gross wages of public employees, including police officers, must be disclosed. Other items, those have no relationship to one's duties, such as deductions or net pay, may in my view be deleted prior to disclosure of other aspects of 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-13564

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2002

Mr. Steven Forshey
00-B-1330
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. Forshey:

I have received your letter in which you requested that this office take "appropriate action" to assist you in obtaining "documents that were involved in [your] criminal case." You wrote that several agencies have indicated that they do not maintain records of your interest.

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 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 indeed an agency does not maintain the records sought, the Freedom of Information Law would not apply and an agency would not be obliged to prepare a record containing the information sought.

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 hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13565

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2002

Mr. Julio C. Borrell
98-A-6799
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. Borrell:

I have received your letter in which you requested that this office contact the Social Security Administration to assist you in obtaining the home and employment addresses and telephone numbers of a particular person.

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, 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."

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, the Freedom of Information Law does not apply to federal agencies such as the Social Security Administration.

While the Social Security Administration is subject to the federal Freedom of Information and Privacy Acts, I believe that the items of your interest could be withheld by that agency. Like the New York Freedom of Information Law, the comparable federal statutes authorize federal agencies to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy."

I regret that I cannot be of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO-13566

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2002

Mr. Wayne Hunter
01-A-6829
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 facts presented in your correspondence.

Dear Mr. Hunter:

I have received your letter and attached materials in which you explained that you "tried several times" to obtain information from the New York County District Attorney's Office. You wrote that you requested "the employment status of [an] alleged undercover police officer" and "information about a known drug location."

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

In terms of rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With certain exceptions, the Freedom of Information Law 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.

With respect to a "known drug location", an issue in my view is whether the request "reasonably describes "records as required by §89(3) of the Freedom of Information Law. In consideration of that standard, a request should include significant detail to enable agency staff to locate and identify the records.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13567

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2002

Mr. Nashon Jackson
95-A-2578
Shawangunk Prison
P.O. Box 800
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. Jackson:

I have received your letter and attached materials in which you alleged "that the Department of Correctional Services is ignoring [your] appeal" following a response from the records access officer. You wrote that the records access officer responded to your Freedom of Information Law request by indicating that "your letter does not request copies of existing documents, but rather poses questions which require that a response be prepared."

It appears that your Freedom of Information Law request asked whether "Central Office has considered [you] as part of an "identifiable group of inmates..." You wrote that you also requested a "redacted copy of the computer generated names at Shawangunk, if any, containing [your] name and number."

In this regard, I offer the following comments.

First, it is noted at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute 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, an agency would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest.

Assuming that the list of names you seek exists or can be generated, I believe that it 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, unless a different provision may be asserted as a basis for a denial of access.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Daniel F. Martuscello III

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13568

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2002

Mr. Jerry McBee
01-A-3436
Green Haven Correctional Facility
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McBee:

I have received your letter in which you sought an opinion regarding the propriety of a denial of your request for witness statements from a district attorney's office.

In this regard, I offer the following comments.

The decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], which involved a request made to the office of a district attorney, may be pertinent to the matter. In Moore, it was found that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

Based on the foregoing, insofar as witnesses' statements are submitted into evidence or disclosed by means of a public judicial proceeding, I believe that they must be disclosed.

On the other hand, if witness statements have not been previously disclosed, three grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records that have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

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
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13569

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Walter Miles
98-A-1718
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. Miles:

I have received your letter in which you sought assistance in obtaining records indicating jail time from the New York City Department of Correction, the New York County Court Clerk and from Washington, DC. You indicated that your requests to the Department and the Clerk made pursuant to the Freedom of Information Law had not been answered.

In this regard, first, I note that the Freedom of Information Law is applicable to agency records and that §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, as a general matter, the Freedom of Information Law applies to records maintained by entities of state and local government in New York, but it excludes the courts from its coverage. This is not to suggest that court records may not be accessible, for other provisions of law often require the disclosure of court records (see e.g., Judiciary Law, §255). When seeking court records, it is suggested that a request be made to clerk of the court, citing an applicable provision of law as the basis for the request.

Second, as the Freedom of Information Law applies to agencies, such as the Department of Correction, I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person. While I believe that the Department official in receipt of your request should have responded in a manner consistent with law or forwarded the request to the records access officer, if you did not send the request to the records access officer, it is suggested that you do so.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Antenen, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13570

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Terence Murphy
88-A-2495 B-2
2911 Arthur Kill Road
Staten Island, NY 10309-1101

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Murphy:

I have received your letter in which you sought assistance in obtaining certain records from your facility and enclosed a release to enable me to obtain them on your behalf.

In this regard, this office does not acquire records on behalf of individuals. However, in an effort to assist you, I offer the following comments.

You have asked whether "electronic data stored in the state prison Health Services system computer that contains [your] name, id # & treatment info considered a medical record". If it is not so considered, you asked whether it would be available under the Freedom of Information Law. While I am not an expert with respect to the Public Health Law, it appears that the material at issue would constitute patient information that would likely be available to you pursuant to §18 of the Public Health Law. Enclosed is a copy of paragraph (e) of subdivision (1) of that statute, which defines "patient information." If medical records were acquired from another source, i.e., a hospital outside of government that would be available to you under §18 from that hospital, it has been held that a state agency in possession of the records is required to disclose them under the Freedom of Information Law in accordance with the direction provided in §18 [see Mantica v. Department of Health, 94 NY2d 58 (1999)].

If the data does not constitute patient information, I believe that it could nonetheless be characterized as a "record" for purposes of the Freedom of Information Law. Section 86(4) of that 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 on the foregoing, the data would, in my view, clearly constitute an agency record, again, even if it is not subject to the Public Health Law. In that event, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 would be §87(2)(g), which would require the disclosure of factual information but would permit the agency to withhold other aspects of the records. 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: A. Cole
Karen Streichert

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13571

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Rose Ann Camardella
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Camardella:

I have received your letter of July 25 in which you sought an advisory opinion concerning a request for records made to the Division of State Police. In brief, the records relate to your arrest by State Police in March of 1982.

In this regard, I offer the following comments.

First, it is emphasized at the outset that the Freedom of Information Law pertains to existing records. Since twenty years have passed since the arrest, it is possible that some records pertaining to the incident might have legally been disposed of or destroyed. To that extent, the Freedom of Information Law would no longer apply. I note, too, that §89(3) of that statute provides in part that an agency is not required to create or prepare a record in response to a request.

Second, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was previously made available to you or your attorney, i.e., in conjunction with a criminal proceeding, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request

> for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Next, insofar as records of your interest remain in the custody of the Division and are neither in your possession nor that of your representative, they 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. I am unfamiliar with the contents of any such records and, therefore, cannot conjecture as to the extent to which they should be disclosed. However, the ensuing paragraphs will consider the grounds for denial that may pertinent. It is assumed for purposes of my comments that you were convicted. If you were not convicted and charges were dismissed in your favor, many of the records of your interest would have been available to you pursuant to §160.50 of the Criminal Procedure Law and would be shielded from public access.

Of likely significance is a decision rendered by the Court of Appeals, the state's highest court, concerning records prepared by police officers in which it was held that a denial of access to those records in their entirety 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. One of the categories of the records sought involves recommendations made by the office of a district attorney. Those portions of the records could, in my view, be withheld. However, other portions might be accessible, for in its analysis of the matter, it was determined that the agency could not claim that the records can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness, or others interviewed in an investigation.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, in a case cited earlier, Moore, it was held that records introduced into evidence or otherwise disclosed during a public proceeding remain public, even if they ordinarily could have been withheld under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Laurie Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13572

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

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 facts presented in your correspondence.

Dear Mr. Henriquez:

I have received your letter and the attached materials in which you explained that your requests for records have been denied by various agencies. You requested that this office "mark off which of [your] 10 questions should have been answered..."

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 and perhaps most important, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency need not create a record in response to a request. If indeed an agency 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. Similarly, that statute deals with requests for records. While agency staff *may* answer questions, the Freedom of Information Law does not require that they do so. In the future, rather than seeking answers to questions, it is suggested that you seek existing records.

Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

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.

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.

Lastly, as requested, enclosed please find the letters you attached to your correspondence to this office.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13573

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2002

Ms. Karen Mullally
86-G-0489
Bedford Hills Correctional Facility
P.O. Box 1000
Bedford Hills, NY 10507

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Mullally:

I have received your letter in which you requested this office to assist you in obtaining records from the Onondaga 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13574

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2002

Mr. Cy Greene
85-A-3874
P.O. Box 2000
Southport Correctional Facility
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. Greene:

I have received your letter in which you requested this office to contact the Kings County District Attorney's office "regarding the delay and/or status of [your] foil request 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.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13525

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2002

Mr. Martus Granirer
President
West Branch Conservation Association
100 South Mountain Road
New City, NY 10956

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Granirer:

I have received your letter of August 8. In brief, you referred to "a very good Geographic Information System (GIS)" developed by the Rockland County Department of Planning and raised the following questions:

> "1. Is Rockland County's GIS data a public record, as that term is used in the Freedom of Information Law?
>
> 2. If so, can Rockland County charge me any more than the actual cost of reproducing the records?
>
> 3. Is it lawful for Rockland County to demand that I save it harmless from claims that might arise from my having or using the GIS data?
>
> 4. Can Rockland County prohibit my copying that data for others?
>
> 5. Can Rockland County forbid my altering the GIS data?"

In this regard, it is noted at the outset that several bills have been introduced over the course of years in the State Legislature that focus on GIS and what some view as impediments to the development or use of GIS caused by the Freedom of Information Law. As yet, however, none of the legislation has been enacted.

With respect to your questions, first, the Freedom of Information Law pertains to agency records, such as those of a county, 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, I believe that that an agency must 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 is a decision rendered a year 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. In that case, 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."

When requests involve similar considerations, in my opinion, responses to them 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.

Second, with regard to fees for the reproduction of GIS data, §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, a disk or cd) 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)].

With respect to your remaining questions, 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 generally irrelevant.

In my view, an agency cannot condition disclosure on a requirement that an applicant sign a document that saves the agency harmless in relation to the use of records by a member of the public who has obtained the records under the Freedom of Information Law. Further, once an applicant obtains a record, I believe that he or she may do with it as that person sees fit.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Patricia Zugibe, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3508
FOIL-AO-13576

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2002

Mahlon R. Perkins, Esq.
P.O. Box 27
Dryden, NY 13053

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Perkins:

I have received your letter of August 7 and the materials attached to it. You have sought an advisory opinion in your capacity as attorney for the Town of Caroline concerning the status of a volunteer ambulance corporation under the Freedom of Information and Open Meetings Laws.

By way of background, you wrote that:

> "The town has three fire districts which cover most, but not all of the town. For many years ambulance service was provided to the town by the Slaterville Volunteer Fire Co. Inc. Slaterville Volunteer Fire Co., Inc. is the fire department which provides fire protection to the Slaterville Fire District. The other two fire districts do not provide ambulance service.
>
> "In 2001 the members of Slaterville Volunteer Fire Co., Inc. formed Slaterville Ambulance, Inc. under the not-for-profit corporation law. Members of Slaterville Volunteer Fire Co., Inc. are also members of Slaterville Ambulance, Inc. Slaterville Ambulance, Inc. does not contract with any other municipality or fire district to provide ambulance service. I believe that the vast majority of their funding comes from the contract with Town."

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the 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."

In consideration of 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. Although there appears to be no ambulance district in this instance, critical in my view is that Slaterville Ambulance, Inc. was formed by the volunteer fire company, which is clearly an agency, and that the members of the two

entities are the same. In consideration of those factors, I believe that the entity in question would be found to constitute an "agency" or, in the alternative, that its records would fall within the coverage of the Freedom of Information Law.

As you may be aware, 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."

Since the fire company is the corporate parent of the ambulance corporation, and particularly if the offices of the two corporations are in the same premises, their leadership and members are the same or overlap, and their records are overseen, used and administered by the same persons, it would appear that the records are kept by or for the fire company and, therefore, fall within the coverage of the Freedom of Information Law. In short, the ambulance corporation does not appear to stand alone, but rather is analogous to a subsidiary of the fire company.

Next, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

While there is no judicial decision of which I am aware dealing with the status of the governing body of an ambulance corporation, the entity at issue appears to be subject to the Open Meetings Law. If, like the fire company, the ambulance company performs its functions exclusively for a municipality, I believe that it would be found that it conducts public business and performs a governmental function for a municipality and that, therefore, the meetings of its governing body would be subject to the Open Meetings Law.

Lastly, it has consistently been advised that portions of records identifiable to those in receipt of emergency services provided by a fire or ambulance company may be withheld.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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.

Relevant 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 provision of subdivision two of section eighty-nine of this article..."

In addition, §89(2)(b) lists a series of examples of unwarranted invasions of personal privacy, the first two of which pertain to:

> "i. disclosure of employment, medical or credit histories or personal references or applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

From my perspective, a record of a medical emergency call consists in part of what might be characterized as a medical record or history relating to the person needing care or services [see Hanig v. NYS Department of Motor Vehicles, 79 NY2d 106 (1992)].

In my opinion, portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, for disclosure of a name coupled with those details in my view represents a personal and somewhat intimate aspect of the individual's life. However, I believe that other aspects of the records, such as the locations of calls, 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 a location or a brief description of an event would not likely constitute an unwarranted invasion of personal privacy. Nevertheless, the personally identifiable details described earlier could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bradley M. Pinsky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13527

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2002

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 Zimbo:

I have received your communication in which you asked "what is counted as five days" in relation to a request made under the Freedom of Information Law.

Section 89(3) of that statute refers to "five business days" and states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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.

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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, a government agency is responsible for complying with the Freedom of Information Law. If the person who typically responds to requests, the "records access officer", is absent, there should be a designation of a person or persons to respond in a manner consistent with law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13578

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2002

Mr. John Turner
99-A-6519
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. Turner:

I have received your letter in which you requested this office to "reverse the records access officer's denial" of your request concerning a variety of records pertaining to you and your medical treatment.

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, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With 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
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13579

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2002

Mr. Deshon Holloway
96-A-5863
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. Holloway:

I have received your letters in which you explained that Mrs. Favre, the records access officer at your facility, refuses to process your Freedom of Information Law requests because you have not returned certain documents. You wrote that you appealed to Mr. Annucci, explaining that you returned such documents, but that he agreed that your ensuing requests for records would not be processed until the documents in question are returned to the records access officer. You asked that this office contact Mrs. Favre to "resolve" the current situation.

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 a records access officer's refusal to process your Freedom of Information Law requests because of your alleged failure to return records that you inspected on a previous occasion, somewhat analogous is the situation when an agency produces copies of records in response to a request but the applicant for the records has not paid the requisite fee. It has been advised in that instance that the agency can refuse to honor further requests until the fee is paid.

There is no judicial decision of which I am aware that is pertinent to the matter. However, when a request for copies of records is served upon an agency, both the agency and the applicant bear a responsibility. The agency is responsible for compliance with the Freedom of Information Law by retrieving the records sought and disclosing them to the extent required by law. The agency is also required to produce copies of records "[u]pon payment of, or offer to pay, the fee prescribed therefor" [see Freedom of Information Law, §89(3)]. Concurrently, if the applicant requests copies, I believe that he or she bears the responsibility of paying the appropriate fee.

If an agency has prepared copies of records in good faith and the applicant fails or refuses to pay the fee, I do not believe that the agency would be required to make available those copies that have been prepared. In my view, it follows that an agency should not be required to honor ensuing requests until the applicant has fulfilled his or her responsibility by tendering the fee for copies previously made. Likewise, when an applicant inspects records and fails to return them, I believe an agency could choose not to process subsequent requests until the records are returned.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13580

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2002

Mr. Jaime Grajales
98-A-4552
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. Grajales:

I have received your letter and attached materials in which you requested that this office compel the Sullivan County District Attorney's office "to honor [your] foil request."

You wrote that you requested records that "were used during the testimony of the People's witness and turned over to [your] attorney." You also requested records of grand jury testimony.

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 decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], which involved a request made to the office of a district attorney, may be pertinent to the matter. In Moore, it was found that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

Based on the foregoing, insofar as witnesses' statements are submitted into evidence or disclosed by means of a public judicial proceeding, I believe that they must be disclosed.

On the other hand, if witness statements have not been previously disclosed, three grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records that have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Second, with respect to records of grand jury testimony, 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.

Lastly, in Moore v. Santucci, 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 Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13581

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2002

Mr. Dominic Bretti
80-C-0511
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bretti:

I have received your letter in which you asked whether, in my view, "original stenotype paper notes taken by a court reporter at [your] trial over twenty-two years ago that are now in the possession of the Office of Court Administration [are] subject to the Freedom of Information Law."

From my perspective, the answer is not clear. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts are not subject to the Freedom of Information Law. However, it has been determined that the Office of the Court Administration ("OCA") is not a court, but rather is an "agency" that falls within the coverage of that statute [see Babigian v. Evans, 427 NYS2d 699, aff'd 97 AD2d 992 (1983) and Quirk v. Evans, 455 NYS2d 918, 97 AD2d 992 (1983)]. In Babigian, the initial decision concerning the issue, the matter involved records relating to employees; it did not deal with what would typically be records maintained by a court that were also maintained by OCA. I point out that the court in Babigian in a footnote cited and apparently relied on an advisory opinion rendered by this office concerning the development of the legislation that was later enacted as the Freedom of Information Law. A portion of the passage cited by the court referred to the negotiations on the bill that became law that suggested that:

> "During the negotiations, the status of the administrative branches of the court system were discussed in relation to the definitions of both 'judiciary' and 'agency.' The reason for the exclusion of the courts from the Freedom of Information Law is based upon the notion that there are numerous statutes in the Judiciary Law and court acts which specifically direct that records be available or confidential. Consequently, neither the original Freedom of Information Law nor the Law as amended would affect rights of access to court records, even if the courts were included in the Law" (id., 690).

From my perspective, the early opinion and the Babigian decision established a line of demarcation between those records maintained by OCA as an agency carrying out its administrative functions and, by implication, others which may ordinarily be characterized as court records.

The preceding remarks were cited in Daily News Publishing Co. v. Office of Court Administration [718 NYS2d 800 (2000)], and the court concurred. That case dealt with a request for OCA's Criminal Records Information Management System (CRIMS) database which electronically stores data extracted from criminal court case records. In short, because the records at issue were court records that were transferred from paper to electronic files and stored by OCA, it was determined that they were not subject to the Freedom of Information Law.

Second, however, the Court of Appeals in Newsday v. Empire State Development Corporation (__NY2d__, June 13, 2002) dealt with a request for copies of subpoenas issued by a court and served upon a state agency by the office of a district attorney. In concluding that those records, despite having been prepared by and emanated from a court, are agency records subject to the Freedom of Information Law, it was stated that:

> "To be sure, had the subpoenas remained in the exclusive possession of the court on whose behalf they were issued, they would have been immune from compulsory disclosure under FOIL. That, however, would not have been due to the fact that it was the court that produced them, but because the Judiciary is expressly excluded from agency status under FOIL. Therefore, no 'information **** in any physical form' held or kept by a court as such is subject at all to FOIL, any more so than would records held or kept by a private person or any non-governmental entity. The immunity of the subpoenas from FOIL when once possessed by a court, however, does not run with those records. When they were served upon ESDC, a FOIL-defined agency, they were fully subject to FOIL disclosure in the absence of any showing by ESDC that some statutory exemption applies."

Based on the foregoing, records maintained by or for an agency, irrespective of their origin, appear to be subject to rights conferred by the Freedom of Information Law.

Notwithstanding the decision rendered in Newsday, the situation described in Daily News concerning OCA's possession of court records is, in my view, unique. In Newsday, a state agency was the subject of investigation and subpoenas were served on the agency in conjunction with the investigation. The agency bore certain legal obligations once the subpoenas were served. In Daily News, OCA merely served as a storehouse for court records. In my view, in consideration of the unusual function of OCA, despite the holding in Newsday, it is questionable whether a court would find that court records kept by OCA in its capacity as a repository or storehouse of records are agency records subject to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13582

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 22, 2002

Mr. Bill Freda
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Freda:

I have received your correspondence involving frustration in attempting to obtain records, particularly collective bargaining agreements, from the Village of Valley Stream. Most recently, the Village Clerk wrote that the agreements were unavailable because they were not "on file in [his] office."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, once a collective bargaining exists, it should be disclosed, for none of the grounds for denial of access would apply.

Second, the Freedom of Information Law pertains to all records of an agency, such as a village, irrespective of where they are kept or filed. Section 86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found, for example, 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, if the agreement exists, but it is maintained outside of the office of the Clerk, I believe that the Village is required to direct the person in possession of the agreement to make it available to you or to acquire it so that it can be disclosed to you.

I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records. Again, in this instance, if the agreement is kept in a location other than the office of the clerk, it would be the responsibility of the records access to take the action described in the preceding paragraph.

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.

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, 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)].

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on

> Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: Vincent W. Ang

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13583

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 22, 2002

Mr. D. Jones
93-A-1836
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. Jones:

I have received your letter and the materials attached to it. As I understand the matter, you have sought assistance concerning your efforts in obtaining a voucher prepared by a police officer from the Office of the New York County District Attorney pertaining to the recovery of money found in your possession that was stolen from the victim of a crime.

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. If I have correctly interpreted the contents of your correspondence, you were convicted of the crime that you described. If that is so, it seems unlikely at this juncture that any of the grounds for denial would be applicable.

I note that in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also held that if a record was disclosed in connection with a judicial proceeding to you or your attorney, an agency may not be required to make the same record available a second time. Specifically, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and

> currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13584

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominiek Tocci

Executive Director

Robert J. Freeman

41 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 22, 2002

E-Mail

TO: Greg Waldron <gregwaldron@e-badge.com>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Waldron:

I have received your communication concerning rights of access to portions of W-2 and 1099 forms that indicate the gross wages of officers and employees of the Town of Walton. As I informed you during our conversation, the Town Attorney, Mr. Francis Wood, contacted me yesterday and raised the same issue. I advised him, as I will here in detail in the ensuing remarks, that some elements of the records in question may be deleted, but that those portions or boxes on the forms identifying public officers or employees and their gross wages must, based on the Freedom of Information Law and its judicial construction, 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 issue, in my view, involves the application of §87(2)(b), which states that an agency may withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy."

Although tangential to the matter, 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 officers or employees by name, public office address, title and salary must in my view be maintained and made available.

It has been contended that W-2 forms are specifically exempted from disclosure by statute on the basis of 26 USC 6103 (the Internal Revenue Code) and §697(e) of the Tax Law. In my opinion, those statutes are not applicable in this instance. In an effort to obtain expert advice on the matter, I contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue. I was informed that the statutes requiring confidentiality pertain to records received and maintained by the Internal Revenue Service; those statutes do not pertain to records kept by an individual taxpayer [see e.g., Stokwitz v. Naval Investigation Service, 831 F.2d 893 (1987)], nor are they applicable to records maintained by an employer, such as a town. 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 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. Further, the same conclusion was reached in a judicial proceeding, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

Lastly, in a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals has stated that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding commentary offered by the State's highest court, it might appropriately be contended that the need to enable the public to make informed choices and provide a mechanism for exposing waste or abuse must be balanced against the possible infringement upon the privacy of a public officer or employee. In consideration of the public's interest in knowing of the manner in which taxpayers' dollars are being allocated or spent, as well the thrust of numerous judicial decisions, again, I believe that those portions of the forms in question that specify the names of public officers and employees and their gross wages must be disclosed.

Similarly, in my view, records or portions of records reflective of other payments or reimbursements must be disclosed. Conversely, items indicating the manner in which a public officer or employee spends or allocates his or her wages, i.e., deductions made for contributions to charity, alimony, garnishments and the like, are irrelevant to one's duties and may in my view be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

RJF:jm

cc: Tom and Denise Dailey
Hon. Joseph Hanley
Francis Wood

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13585

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 22, 2002

Mr. Loral Richard Huffman
99-B-0070
Five Points Correctional Facility
Caller Box 400, State Route 96
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. Huffman:

I have received your letter and the attached response from the Bronx County District Attorney's Office FOIL Appeals Officer denying your request for records. You asked that this office "respond as to procedure to appeal this denial of 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.

When an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

If an appeal is denied, the applicant would have exhausted his or her administrative remedies. At that point, the applicant could seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

Since I am unfamiliar with the records that you have requested, I cannot conjecture as to their availability. However, I offer the following comments.

The decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], which involved a request made to the office of a district attorney, may be pertinent to the matter. In Moore, it was found that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

Based on the foregoing, insofar as witnesses' statements are submitted into evidence or disclosed by means of a public judicial proceeding, I believe that they must be disclosed.

On the other hand, if witness statements have not been previously disclosed, three grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records that have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another ground for denial that may be pertinent is §87(2)(f), which states that an agency may withhold records that:

"if disclosed would endanger the life or safety of any person."

Lastly, as requested, enclosed is the response from the District Attorney's Office that you attached to your letter.

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 - 13586

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 22, 2002

Mr. Alfred Thomas Mower
87-A-8232
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. Mower:

As you are aware, this office has received your letter in which you questioned whether the New York State Board of Examiners of Sex Offenders is required to comply with the Freedom of Information Law in response to your request for records pertaining to yourself. You also questioned the availability of written statements by a facility parole officer contained in an inmate status report "used by the Division of Parole."

In this regard, I offer the following comments.

First, with respect to your ability to obtain records regarding yourself from the New York State Board of Sex Offenders, in my opinion, the availability of those records would be dependent upon their contents and whether they were generated pursuant to the "Sex Offender Registration Act."

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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." Section 50-b of the Civil Rights Law prohibits agencies from disclosing records that identify victims of sex offenses. Consequently, the Freedom of Information Law in my view provides no rights of access to those records.

I note that in Fappiano v. New York City Police Department [95 NY2d 738 (2001)], it was held that an exception authorizing disclosure to persons "charged" with a sex offense did not apply to those seeking post-conviction relief. The Court, however, was careful to point out that §50-b does not authorize a "blanket denial" of access and that it applies only to records which if disclosed would identify the victims of sex offenses.

With respect to records generated pursuant to the "Sex Offenders Registration Act", Article 6-C of the Correction Law, in my view, disclosure of those records are governed by the Act itself.

By way of brief background, subdivision (1) of §168-b of the Act directs the Division of Criminal Justice Services to "establish and maintain a file of individuals required to register" under the Act and includes guidelines concerning the content of what is characterized as the "registry." Subdivision (2) states that:

> "The division is authorized to make the registry available to any regional or national registry of sex offenders for the purpose of sharing information. The division shall accept files from any regional or national registry of sex offenders and shall make such available when requested pursuant to the provisions of this article. *The division shall require that no information included in the registry shall be made available except in the furtherance of the provisions of this article*" (emphasis added).

Based on the sentence highlighted above, it is the position of both the Department of Law and the Division of Criminal Justice Services, and this office concurs, that information contained in the registry is to be disclosed only pursuant to the provisions of the Act, "only in the furtherance of the provisions of this article", which, again, is Article 6-C of the Correction Law.

While the Freedom of Information Law deals generally with access to records, agencies' obligations to disclose records, and their ability to deny access, according to the rules of statutory construction (see McKinney's Statutes, §32), the different or "special" statute prevails when such a statute pertains to particular records. Since information contained in the registry may be disclosed only in furtherance of the Act, the Freedom of Information Law, in my view, does not apply to that information.

Second, with regard to the availability of a report by a facility parole officer about an individual, several grounds for denial in the Freedom of Information Law may be applicable.

For instance, §87(2) allows an agency to deny access to records or portions thereof that:

> "(b) if disclosed would constitute an unwarranted invasion of personal privacy...
>
> (e) 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;
>
> (f) if disclosed would endanger the life or safety of any person..."

Section 87(2)(g) of the Freedom of Information Law also 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.

Lastly, although §95(1) of the Personal Privacy Protection Law generally grants rights of access to records to a person to whom the records pertain, §95(7) provides that rights of access "shall not apply to public safety agency records". The phrase "public safety agency record" is defined by §92(8) to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal

> conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty seven-a, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

Therefore, while the Personal Privacy Protection Law applies to records maintained by state agencies, rights of access conferred by that law do not include records of agencies or units within agencies whose primary functions involve investigation, law enforcement or the confinement or persons in correctional facilities.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13587

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Joseph Capaldo
89-C-969
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Capaldo:

I have received your letters concerning your ability to obtain a copy of a letter sent to the Division of Parole by a judge that you might use for a parole appeal and whether you may appeal a denial of access to the letter. Access was denied on the ground that "Letters of recommendation are received under promise of confidentiality."

In this regard, I offer the following comments.

First, I note that the regulations promulgated by the Division of Parole state that, prior to a parole hearing, 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..." [9NYCRR §8000.5 (c) (2) (i)].

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 regulations cited in the denial of your request refer to a promise of confidentiality. Based on judicial decisions, 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)].

Section 87(2)(a) of the Freedom of Information Law pertains to records that may properly be characterized as "confidential", for it involves records that "are specifically exempted from disclosure by state or federal statute." From my perspective, there is no statute that would exempt the record in question from disclosure. Section 259-a of the Executive Law requires that the Division of Parole maintain certain kinds of records. Section 259-k provides in subdivision (2) that the Board of Parole "shall make rules for the purpose of maintaining the confidentiality of records, information contained therein and information obtained in an official capacity by officers, employees or members of the division of parole." The Division's regulations, 9 NYCRR §8000.5(c), pertain to disclosure of case records maintained by the Division. That provision confers limited rights of access to case records and states in paragraph (2)(ii) that "any record of the division of parole not made available pursuant to this section shall not be released, except by the chairman upon good cause shown." Section 8008.2(a) of the regulations defines the phrase "case record" to include: "...any memorandum, document or other writing pertaining to a present or former inmate, parolee, conditional releasee or other releasee, and maintained pursuant to sections 259-a(1)-(3) and 259-c(3) of the Executive Law."

The statutes and regulations that preceded those cited above and which pertained to the Board of Parole when it was part of the Deaprtment of Correctional Services included essentially the same direction. However, insofar as the regulations conflicted with the Freedom of Information Law, they were found more than twenty years ago to be invalid. Specifically, in Zuckerman v. Board of Parole, the court found that:

> "Section 221 of the Correction Law, entitled 'Records', requires the commissioner to keep complete records 'of every person released on parole or conditional release'. The statute also requires the commissioner to make rules as to the privacy of these records. Under the authority of these two statutory mandates (7 NYCRR 5.1 [a], the following regulation was promulgated: 'Department records. Any department record not otherwise made available by rule or regulation of the department shall be confidential for the sole use of the department.' (7 NYCRR 5.10). The minutes of board meetings are *not* 'made available by rule or regulation' and, therefore, Special Term held that the minutes are private.

> "It would seem clear that section 29 of the Correction Law exempts from disclosure those specifically enumerated statistics and, further, that section 221 exempts those records dealing with parolees. Minutes of Parole Board meetings are not *specifically* exempted by either of these statutes. Applying the rule of *ejusdem generis* (McKinney's Cons Laws of NY, Book 1, Statutes, §239, subd b), the nonexclusive list contained in subdivision 1 of section 29 of the Correction Law could not be construed to include those minutes.
>
> "It would therefore appear that this regulation, as applied to the minutes of Parole Board meetings, is invalid on two grounds. As shown above, the regulation makes *all* records private initially and is not limited solely to those categories of information specifically set forth or included by reasonable implication in the statutes. Furthermore, by making *all* records initially confidential in a broad and sweeping manner, the regulation violates the clear intention of the Freedom of Information Law (see Public Officers Law, §85). It is established as a general proposition that a regulation cannot be inconsistent with a statutory scheme (see e.g. *Matter of Broadacres Skilled Nursing Facility v. Ingraham*, 51 AD2d 243, 245-246)...This conclusion is further reinforced by the general rule that public disclosure laws are to be liberally construed..." [53 AD 2d 405, 407(1976); emphasis supplied by the court; see also Morris v. Martin, 440 NYS 2d 1026 (1982)].

In sum, based upon the direction provided judicially, I do not believe that the record in question can be characterized as being exempted from disclosure by statute or that the regulations serve to enable the Division to withhold records that would otherwise be available under the Freedom of Information Law.

This is not to suggest that the record at issue must be disclosed. I am unaware of its contents, and there may be grounds for a denial of access. I merely suggesting that the basis for denial offered in response to your request appears to be inappropriate.

Lastly, the provision dealing with the right to appeal a denial of access to records is found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business 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: Sharon Low
Ann Crowell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13588

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Shedrick Wooden
99-B-0331
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. Wooden:

I have received your letter in which you sought guidance concerning a failure to respond to a request.

In this regard, first, I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency must designate one or more persons as "records access officer". The records access officer has the duty of coordinating an agency's response to requests for records, and requests should ordinarily be made to him or her. While I believe that the person in receipt of your request should have responded in a manner consistent with law or forwarded the request to the records access officer, it is suggested that you renew your request and send it to the Monroe County 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 [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13589

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Robert Hawley
[redacted]

Dear Mr. Hawley:

Your communication that you sent to this office has been located. There was no response given because there was no request for an opinion or any other information.

However, having reviewed the materials, I note that the Freedom of Information Law pertains to existing records. Moreover, §89(3) states that an agency is not required to create a record in response to a request.

When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) 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. Douglas G. Marchionda, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13590

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Paul A. Argentieri
Attorney at Law
188 Main Street
Hornell, NY 14843

The staff of the Committee 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. Argentieri:

As you are aware, I have received your letter of August 2 and the materials relating to it. Based on our conversations, although other records are of interest, it appears that your focus involves a document prepared by an employee of the Hornell City School District in 1993.

By way of background, during our discussions of the matter, you indicated that a parent about to enroll his or her children in a school in the District identified a janitor and informed a guidance counselor and the school principal that the janitor is a pedophile. Following the receipt of that information, the principal apparently prepared a paper of some sort in which he memorialized the information acquired from the parent. The janitor was arrested some fourteen months later and pleaded guilty to sex abuse charges. You wrote that lawsuits were commenced in 1994 against the District based on claims that the "their janitor was a pedophile and for them failing to act and/or counteract to protect the students." The document prepared by the principal is the record of your primary interest, and you have sought an advisory opinion concerning rights of access to it.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all records of an agency, such as a school district, 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 my view, if the document in question continues to exist, irrespective of its form or characterization, it would constitute a "record" that falls within the coverage of the Freedom of Information Law.

or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Because the matter involves a school district and a sex offense, I note that I am mindful of the provisions of both the Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g) and §50-b of the Civil Rights Law. The former, for purposes of disclosure to third parties, states, in brief, that those portions of education records, records maintained by an educational agency that are personally identifiable to a student or students, cannot be disclosed without the consent of the parent of a minor student or the student if he or she has reached majority. The latter prohibits a public officer or employee from disclosing records that would identify or tend to identify the victim of a sex offense. When either statute applies, records may be withheld pursuant to the first 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."

Since the writing prepared by the principal was authored in 1993, long before any arrest, and since you indicated that it does not identify any victim of a sex offense, I do not believe that §50-b of the Civil Rights Law would be applicable. FERPA would appear to applicable if the writing includes personally identifiable information pertaining to the person or persons who provided the information to the District. The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR § 99.3).

Based upon the foregoing, references to students' names, parents' names, or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law unless an exception authorizes disclosure.

In short, insofar as the writing includes personally identifiable information relating to a student, including the name of a parent, I believe that deletions must be made to comply with FERPA, unless consent to disclose is obtained from the parent/student.

Also relevant in analyzing rights of access is §87(2)(g) of the Freedom of Information Law. The writing prepared by the principal would in my view clearly constitute "intra-agency material", and the cited provision provides that the content of such material determines the extent to which it may be withheld. Specifically, §87(2)(g) permits an agency to deny access to:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Based on the foregoing, it appears that any factual information contained within the writing would be accessible, following the deletion of personally identifiable details regarding the person reporting the information to the principal and his or her child.

I point out, too, that the Court of Appeals has sought to distinguish factual information from other aspects of internal governmental communications. In Gould v. New York City Police Department, 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)" [89 NY2d 267, 276-277 (1996)].

Additionally, if the Court determined that portions of intra-agency materials that reflected information or opinions of persons who are not government officers or employees could not be withheld under §87(2)(g). In its discussion of the matter, it was stated that:

> "...the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data,' as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witnesses'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.." (id., 277).

Therefore, if, for example, a parent offered information that was recorded in writing by a District official, I do not believe that §87(2)(g) would serve as a basis for a denial of access.

The remaining documents in which you expressed interest involve the file concerning the lawsuit filed in 1994.

I am unaware of whether or the extent to which records contained in the file tend to identify a victim of a sex offense. If a record includes such information, and if §50-b of the Civil Rights Law applies, the record would be beyond the scope of rights of access. Judicial decisions focusing on that statute have dealt primarily with disclosure in the context of criminal proceedings. Although one decision of which I am aware indicated that the confidentiality accorded by §50-b applies to civil actions as well as criminal proceedings (Deborah S. v. Diorio, 153 Misc.2d 708, 719), I know of no decision that focuses squarely on the situation in which a victim or that person's representative initiates a civil proceeding, and whether such action may create a waiver of the application of §50-b. If there is a waiver, rights of access would be determined by the Freedom of Information Law and other statutes; if there is no waiver, a record including information that would tend to identify a victim of a sex offense must, according to the Court of Appeals, be withheld.

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."

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)].

Insofar as §50-b does not bar disclosure, it appears that the records in question would be available in great measure. I note that the papers that you attached refer to a decision involving court records in possession of an agency. Although the Appellate Division found that court records maintained by an agency fell outside the coverage of the Freedom of Information Law, the Court of Appeals recently reversed that holding. Newsday v. Empire State Development Corporation (__NY2d__, June 13, 2002) dealt with a request for copies of subpoenas issued by a court and served upon a state agency by the office of a district attorney. In concluding that those records, despite

having been prepared by and emanated from a court are agency records subject to the Freedom of Information Law, it was stated that:

> "To be sure, had the subpoenas remained in the exclusive possession of the court on whose behalf they were issued, they would have been immune from compulsory disclosure under FOIL. That, however, would not have been due to the fact that it was the court that produced them, but because the Judiciary is expressly excluded from agency status under FOIL. Therefore, no 'information **** in any physical form' held or kept by a court as such is subject at all to FOIL, any more so than would records held or kept by a private person or any non-governmental entity. The immunity of the subpoenas from FOIL when once possessed by a court, however, does not run with those records. When they were served upon ESDC, a FOIL-defined agency, they were fully subject to FOIL disclosure in the absence of any showing by ESDC that some statutory exemption applies."

Based on the foregoing, records maintained by or for the District, irrespective of their origin, are subject to rights conferred by the Freedom of Information Law.

The records in question involve litigation. In this regard, 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.

As indicated earlier, §87(2)(a) of the Freedom of Information Law pertains to records that are "specifically exempted from disclosure by state or federal statute." 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 the 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.

When the records in question were communicated between the District and litigants, any claim of privilege or its equivalent was in my view effectively waived. Once records in the nature of attorney work product or material prepared for litigation are transmitted to an adversary, 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.

Lastly, I am unaware of whether there may have been judicial intervention concerning disclosure, i.e., through the issuance of an order to seal records. However, I point out that Part 216 of the Uniform Rules of Trial Courts in civil actions states in relevant part that:

> "Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records,

> whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David C. Smith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13591

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Luis Morales
97-A-0308
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

Dear Mr. Morales:

I have received your letter in which you explained that your mail is being "read illegally" and that you would like to know how "to file a report for the illegal mail tampering" at your facility. You also wrote that the records access officer at your facility responded to your request by stating that "there is no mail watch for you", but that you subsequently learned that your mail was being monitored.

In this regard, I note that this office provides advisory opinions on issues related to the Freedom of Information Law and the availability of records. This office has no expertise or knowledge regarding the monitoring of mail at a correctional facility.

However, having reviewed your correspondence, I point out 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 a record in response to a request for information. It appears that you asked the records access officer to answer a question. If that is so, the request would not involve existing records, and the Freedom of Information Law would not apply.

I hope that the foregoing serves to clarify misunderstandings and that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13592

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Willie Clark
98-b-2151
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. Clark:

I have received your letter in which you explained that you have not received responses to your Freedom of Information Law requests and asked this office to help you obtain minutes of your arraignment from the Town of Lockport Town Court and a videotape "concerning [your] criminal trial" from the Niagara 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

Second, with respect to obtaining minutes of your arraignment, the New York Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts 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, §225) 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.

Lastly, regarding your request for a videotape, since I am unfamiliar with its content, I cannot conjecture as to its availability.

However, in an effort to be helpful, I note that in a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

> "...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution. Moreover, respondents' regulations require disclosure to news media of an inmate's 'name *** city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7 NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff [see Freedom of Information Law, §87(2)(f)].

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13593

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Richard W. Dunnigan
90-B-3027/11-3-3
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 facts presented in your correspondence.

Dear Mr. Dunnigan:

I have received your letter in which you questioned the propriety of a denial of your request for "an index or listing (not the record itself) of all records that are available from the Suffolk County Medical Examiner's Office."

In this regard, as a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to a list maintained by an agency. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87 (3) (c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

I hope that I have been of assistance.

Sincerely,

David Treacy

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13594

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Michael Johnson
01-B-1446
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. Johnson:

I have received your letter in which you asked for "information on how to get a [1994] year book" from a high school in Brooklyn. You requested this office to contact you if we obtain a copy of the yearbook.

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. Similarly, this office does not maintain or obtain records of other agencies. Requests for records from a public high school, for instance, should be submitted directly to the school district. However, based on a review of the correspondence, I offer the following comments.

With respect to the availability of the yearbook, first, the Freedom of Information Law pertains to agency records. A school district clearly is an "agency" [see Freedom of Information Law, §86(3)], and §86(4) of that statute defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, assuming that the district or the high school maintains a copy of the yearbook, I believe that it would constitute a "record" that falls within the scope of rights conferred by the Freedom of Information Law.

Second, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could justifiably be asserted to withhold a yearbook.

While records identifiable to students ordinarily may be withheld pursuant to the federal Family Educational Rights and Privacy Act (20 USC §1232g), in the case of a yearbook, by its nature, those identified have consented to disclosure. Moreover, any purchaser of a yearbook has acquired personally identifying details concerning students that appear throughout the yearbook, i.e., through photographs of individuals, classes, teams, clubs, etc. Because those details have been and could be made known to any purchaser of a yearbook and any others with whom the contents of the yearbook have been shared, I do not believe that the district would have any basis for denying access to a yearbook.

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-13595

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. William DelVecchio
01-A-3643
Washington Correctional Facility
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. DelVecchio:

I have received your letter in which you asked that I obtain certain materials for you from your facility.

In this regard, first, the Committee on Open Government is authorized to provide advice and guidance concerning the Freedom of Information Law; it is not empowered to obtain records on behalf of an individual or to compel a government agency to grant or deny access to records.

Second, the nature of the records of your interest is unclear. However, I point out that the regulations promulgated by the Department of Correctional Services indicate that requests for records kept at a facility should be made to the Superintendent or his designee. Further, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

For your information, the person designated to determine appeals at the Department of Correctional Services is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13596

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Ms. Mary O. Reynolds
Attorney-at-Law
P.O. Box 612
Montour Falls, NY 14865

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Reynolds:

I have received your letter and the materials attached to it. You have sought an opinion concerning a response to your request for records made under the Freedom of Information Law by the Summer Hill Town Attorney. He indicated that you must complete a form that he enclosed, and that the Town "can charge a reasonable fee for the time incurred in locating these records."

In this regard, first, it appears that the form has been adopted in relation to the use of the federal Freedom of Information Act, which applies only to federal agencies. The federal Act includes provisions pertaining to fee waivers when requests are made by the news media or for a public interest purpose, and to administrative and search fees. There are no similar provisions in the New York Freedom of Information Law.

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 (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]; 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 proper standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above.

Second, from my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, searching for records or charging more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed. In this instance, I know of no statute that would authorize the Town 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 Gandin, Schotsky & Rappaport v. Suffolk County, 226 AD2d 399 (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may

charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
>
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Donald C. Armstrong
Hon. Kathy Fuller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13597

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Freddie Franklin
85-A-1567
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. Franklin:

I have received your letter in which you asked, in light of the decision of the Court of Appeals in Newsday v. Empire State Development Corporation (___NY2d___, June 13, 2002), whether you may submit a request under the Freedom of Information Law for plea minutes relating to a witness in your case from the Office of the New York County District Attorney.

That agency denied your request last year on the ground that the records are court records and, therefore, fall outside the coverage of the Freedom of Information Law. However, as you are aware, in Newsday, the Court of Appeals determined that records in possession of an agency, such as an office of a district attorney, are subject to rights conferred by that statute, irrespective of their origin. Specifically, it was stated that:

> "To be sure, had the subpoenas remained in the exclusive possession of the court on whose behalf they were issued, they would have been immune from compulsory disclosure under FOIL. That, however, would not have been due to the fact that it was the court that produced them, but because the Judiciary is expressly excluded from agency status under FOIL. Therefore, no 'information **** in any physical form' held or kept by a court as such is subject at all to FOIL, any more so than would records held or kept by a private person or any non-governmental entity. The immunity of the subpoenas from FOIL when once possessed by a court, however, does not run with those records. When they were served upon ESDC, a FOIL-defined agency, they were fully subject to FOIL disclosure in the absence of any showing by ESDC that some statutory exemption applies."

In consideration of the determination rendered by the state's highest court and the reliance on by the Office of the District Attorney upon prior decisions that were effectively reversed by that determination, I believe that you may resubmit a request for the records in question to that agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary Galperin
Tara Christie Miner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13598

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. William A. Eldridge
01-A-3164
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Eldridge:

I have received your letter in which you sought advice concerning your ability to gain access to DD5's and other police reports under the Freedom of Information Law following a trial.

In this regard, first, pursuant to regulations promulgated by this office (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should be directed to that person.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of all of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records falling within the scope of your request, relevant is a decision by the Court of Appeals concerning DD5's, which are also known as "complaint follow up reports", prepared by police officers and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of

Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an

unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his

counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13599

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. R. Glover
80-A-4216
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. Glover:

I have received your letter in which you inquired with respect to rights of access to records concerning the education and psychological evaluations of employees of the Department of Correctional Services. In addition, you asked whether you may seek various court records under the Freedom of Information Law.

In this regard, first, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

In view of the foregoing, the courts are not subject to the Freedom of Information Law.

The preceding commentary is not intended to suggest that the court records cannot be obtained. Although the courts are not subject to the Freedom of Information Law, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). It is suggested that

you request the court records from the clerk of the court in which the proceeding was conducted, citing an applicable provision of law as the basis for the request.

Second, with respect to the information of interest concerning Department employees, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Relevant to the matter is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981 Seelig v. Sielaff, 200 AD 2d 298 (1994)].

I note that it has been held that disclosure of a public employee's general educational background would not constitute an unwarranted invasion of personal privacy and must be made available [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. However, records concerning one's medical or psychological condition or makeup in my view could clearly be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. It is also noted that §50-a of the Civil Rights Law states in part that personnel records pertaining to correction officers are confidential insofar as those records are "used to evaluate performance toward continued employment or promotion."

Lastly, as you requested, enclosed is a guide to the Freedom of Information Law, "Your Right to Know."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

FOIL-AO-13600

From: David Treacy
To: pecceo@midtel.net
Date: 8/26/02 4:34PM
Subject: FOIL questions

Dear Ms. Tichy:

Your questions have been forwarded to this office. I offer the following comments in response to them.

1) You asked whether "draft zoning amendments" that are "strictly a working document at the Planning Board Level", are available under FOIL.

First, the characterization of a record as "draft" or "preliminary" is not determinative of rights of access. I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) of the Law defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when information is maintained by an agency in some physical form (i.e., drafts, worksheets, computer disks, etc.), I believe that it would constitute a "record" subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my opinion, one ground for denial would be relevant to an analysis of rights of access to the records. However, an assertion of the ground may not justify a blanket 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.

While draft legislation may appear to be deniable, frequently drafts are discussed in detail, during one or more meetings open to the public. Insofar as a draft has been read or otherwise disclosed during an open meeting, I believe that the ability to deny access would have effectively been waived.

2) You also asked for suggestions on "how to prevent the public" from misconstruing the status of the draft zoning amendments. You expressed concern that the public may inaccurately conclude that the document, "which is still under major renovation," is a proposed law. I would suggest that the record be stamped or marked "draft" or "preliminary" prior to disclosure. This would inform the public of the status of the record and suggest that the contents are subject to revision.

3) Lastly, you asked whether a village is required to have a "local code and subsequent maps" available for purchase or whether it is "merely a document that can be foiled." All records are subject to FOIL, and I am unaware of any provision of law that would require a Village to have such records available for purchase in advance of a request made under FOIL.

I hope that I have been of assistance. Should any questions arise, please feel free to contact me.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13601

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Jerald Miller
00-A-0607
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024-0618

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Miller:

I have received your several recent letters and attached material in which you question the propriety of a response to your Freedom of Information Law request and seek an opinion regarding the applicability of Penal Law §240.65.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law provides in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added]. In the context of your correspondence, it appears in one instance that an approximate date has not been given. Rather, the response from J. Thomas stated in pertinent part that it would "take at least several weeks to process your request."

Further, Mr. Anthony J. Annucci in response to your appeal stated in pertinent part that "[S]uch response is appropriate based upon the scope of your request."

In a case that described an experience that may have been 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)."

With respect to the applicability of Penal Law §240.65, that statute 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.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13602

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 27, 2002

Mr. J. Doane
98-B-1154
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. Doane:

I have received your letter in which you sought guidance concerning your ability to obtain records pertaining to your stay in facilities operated by the Division for Youth.

In this regard, first, the Division for Youth was abolished as an agency in 1997, but its "functions, powers, duties and obligations" were transferred to the Office of Children and Family Services (Chapter 436, Laws of 1997).

Second, the statute that generally deals with public access to government records, the Freedom of Information Law, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant to the matter is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the provision to which you referred, §501-c of the Executive Law, which states that files pertaining to youths maintained by the Division for Youth (or its successor) are confidential and may be disclosed only in specified circumstances. That provision states in relevant part that:

> "Records or files of youths kept by the division for youth shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by any person other than one authorized to receive such knowledge or to make such inspection or examination: (i) by the division pursuant to its regulations; (ii) or by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in

> such court; or (iii) by a federal court judge or magistrate, a justice of the supreme court, a judge of the county court or family court, or a grand jury. No person shall divulge the information thus obtained without authorization to do so by the division, or by such justice, judge or grand jury."

In consideration of the foregoing, it is suggested that you review the regulations of the Office of Children and Family Services dealing with disclosure of records acquired from the Division for Youth or that you seek an order from the proper court.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13603

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 27, 2002

Mr. Sal DeRuggiero
94-A-8693
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. DeRuggiero:

I have received your letter in which you sought assistance in obtaining a copy of the police report prepared by the City of Yonkers Police Department relating to your arrest. It appears that the City does not maintain or cannot locate the report, and that it is maintained by the Office of the Westchester County District Attorney, and perhaps by your attorney.

In this regard, I note that the Freedom of Information Law is applicable to agency records, and that §86(3) of that statute defines the term "agency" to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, while the office of a district attorney clearly constitutes an "agency", neither a court nor your private attorney would be subject to the Freedom of Information Law.

Second, in denying your request, the Deputy Counsel to the District Attorney wrote that:

> "I am required to deny your request at least in part because it requests a copy of 'my police report,' which is too vague for me to determine specifically what it is that you are requesting. In any event, any 'police report' to which you may once have been entitled, was produced to you or to your attorney at the time of trial (CPL § 240.20) and need not be provided again under the present circumstances (see CPL § 240.45; *Matter of Moore v. Santucci*, 151 AD2d 677, 679). Finally, you request must also be denied since you have not paid or offered to pay any required fees (Public Officers Law §89(3))."

With respect to the statement that your request was "too vague", 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 (i.e., names, dates, identification, indictment or docket numbers, etc.) to enable agency staff to locate and identify the records, and an offer to pay fees for photocopying.

In the decision cited in the response, Moore v. Santucci [151 AD2d 677 (1989)], it was held that if a records 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 continues to possess the record. 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.

Lastly, particularly if you were involved in a trial, it would seem that the report in question would be included among the records filed with the clerk of the court, and that you might request the court's case file, rather than a particular report. As indicated earlier, the courts are not subject to the Freedom of Information Law. However, other statutes grant broad access to court records (see e.g., Judiciary Law, §255). To seek court records, a request should be made to the clerk of the court

in which the proceeding was conducted, providing sufficient detail to identify the file and citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward D. Saslaw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13604

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 27, 2002

Mr. Tyrone Nowlin
99-A-5738
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. Nowlin:

I have received your letter in which you explained that you have attempted to obtain records from the Central Park Conservancy. You also wrote that you have not received responses to your requests for information from the "New York City Transit Authority and Manhattan & Bronx Surface Transit Operating Authority."

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."

A public authority is a kind of public corporation. Therefore, the authorities to which you referred are "agencies", subject to the Freedom of Information Law.

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]. It is my understanding that the Central Park Conservancy is independent of government. It appears that no government agency or official has control over the Conservancy or the authority to designate any person to its board of

directors. If that is so, I do not believe that the Central Park Conservancy is an "agency" or that it is required to comply with the Freedom of Information Law.

Second, as it applies to them, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

Lastly, with respect to your requests to the transit authorities for information regarding the times that certain subway trains arrived at various stations, 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 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.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 records exist that contain arrival times, they would appear to be available, for none of the grounds for denial would apply.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13605

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 27, 2002

Ms. Jean A. Black
Certified Public Accountant
24 West Avenue, Suite 5
Spencerport, NY 14559

Dear Ms. Black:

I have received your letter in which you sought guidance in "persuading" a certain "501(c)(3) corporation to provide [you] with a copy of their tax return."

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, pertains to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law is applicable to entities of state and local government in New York; it does not ordinarily apply to records maintained by not-for-profit or other private entities.

While I am not an expert on the subject, it is my understanding that IRS Form 990, a brief annual financial statement, must be completed and disclosed on request to the public by not-for-profit corporations, and that, in the alternative, Form 990 can be obtained from the IRS itself. Since the issue lies beyond the scope of the Freedom of Information Law, it is suggested that you seek guidance, or the form itself, from the IRS.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-13606

From: Robert Freeman
To: kahlberg@orleansny.com
Date: 8/28/02 3:29PM
Subject: Hi Kathy - -

Hi Kathy - -

There has been confusion regarding the fees that can be charged for copies of accident reports. As you may recall, the Freedom of Information Law provides that an agency can charge no more than 25 cents per photocopy, unless a different fee is prescribed "by statute." A "statute" is an act of the State Legislature, and there are statutes that authorize both the State Police and the Department of Motor Vehicles to charge substantially more than 25 cents. There is no statute, however, that authorizes entities of local government to charge a higher fee. Consequently, a local police department or county sheriff is limited to charging no more than 25 cents per photocopy.

For a more expansive explanation, you can go to the FOIL index to advisory opinions on our website, click on to "F", and scroll down to "Fees for Accident Reports". At least one of the opinions accessible online will deal expansively with the issue.

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-13607

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 28, 2002

Mr. Jesse Hammock
86-C-0361
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. Hammock:

I have received your letter in which you explained that you have not received a response to your Freedom of Information Law request form the Cayuga County District Attorney's 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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-13608

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 28, 2002

Ms. Sarah J. Nicholas
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Nicholas:

I have received your letter and the correspondence attached to it. You wrote that you requested "the detailed current list by subject matter of all records in possession of the City" of Long Beach, but that you were informed that no such list exists. Further, when you appealed, the initial determination was affirmed, and copies were sent to two city officials, but there is no indication that a copy of the determination was sent to this office.

You have sought an advisory opinion concerning the matter, and in this regard, I offer the following comments.

First, in general, the Freedom of Information Law pertains to existing records, and an agency, such as a city, 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 he 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 City. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

Second, the provision dealing with the right to appeal a denial of access and agencies' responsibilities in relation to appeals is §89(4)(a) of the Freedom of Information Law, which provides in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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."

Having reviewed our files regarding appeals, none was found relating to your appeal. That being so, I believe that the City of Long Beach failed to comply with law.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be forwarded to City officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Harold Porr, III
Noreen Costello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13609

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 28, 2002

Mr. Harvil St. Louis
98-A-6306
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. St. Louis:

I have received your letter in which you requested a "response and intervention" with respect to a letter you received from the Kings County District Attorney's Office. You wrote that the District Attorney's Office, in response to a request for records under the Freedom of Information Law, informed you that it would be "approximately 270 days" before you would be notified concerning rights of access to documents possessed by 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, 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.

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, in a decision concerning a request for records maintained by the office of a district attorney [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).

Based on the foregoing, insofar as the records sought have previously been disclosed to you or your attorney, I do not believe that the Office of the District Attorney is required to make a second disclosure, unless it can be demonstrated that neither you nor your attorney remain in possession of the records.

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

FOIL-AO - 13610

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 29, 2002

Ms. Lucille Held
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Held:

I have received your correspondence in which you sought an opinion concerning several requests made under the Freedom of Information Law to the Town/Village of Harrison. In some instances, you were informed that records did not exist; in others, records were withheld on the ground that disclosure would result in an "unwarranted invasion of personal privacy."

In this regard, based on a review of your requests and the responses to them, I offer the following comments.

It is noted at the outset that the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency, such as a town, is not required to create or prepare a record in response to a request. Therefore, if, for example, there is no record reflective of "the schedule for staffing for the desk in the police station indicating those sgts. answering the phone for April to August 2002", the Town would not be obliged to prepare a new record that contains the information of your interest.

In a related vein, however, I note that the Freedom of Information Law pertains to all agency records, and 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."

Therefore, insofar as the Town maintains records, irrespective of their physical form, that contain the information requested, I believe that they would be subject to rights of access conferred by the Freedom of Information Law.

It is suggested that, in the future, requests should not be as specific as your request quoted above. There may be no record characterized as a "schedule"; perhaps it is called a duty roster. There may not be a record containing the information sought for the specific period to which you referred. A schedule or similar record might not identify officers by rank. Rather than referring to specific items, it is recommended that you merely seek records or portions of records that identify those assigned to desk duty at the police department for a period covering certain dates. By making a request of that nature, the name or characterization of records kept by the Town would not be relevant, and the problem of mischaracterizing records would be eliminated.

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.

Assuming that records exist which include information indicating the identities of employees assigned to desk duty at given times, I believe that they would be available.

As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The initial ground for denial,§87(2)(a), pertains to records that "are specifically exempted from disclosure by statute." Section 50-a of the Civil Rights Law, exempts certain records from disclosure, but in my opinion, not those that you requested. Section 50-a requires that an agency keep confidential those personnel records pertaining to a police officer that are "used to *evaluate performance* toward continued employment or promotion..." In my view, there is nothing in records that you requested that involve an evaluation of performance. In a decision by the Court of Appeals, the state's highest court, sustaining 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 the kinds of records that you requested 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 Town to deny access.

Several judicial decisions, most notably, the case cited in Daily Gazette in the passage quoted above, indicate that the records sought must be disclosed. In Capital Newspapers v. Burns [67 NY2d 562 (1986)], the Court of Appeals unanimously affirmed a decision granting access to records indicating the days and dates of sick leave claimed by a named police officer. Those documents might be found in a police officer's personnel file, but they are not the kind of records that fall within §50-a of the Civil Rights Law.

While tangential to the matter, I point out that §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

Although §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, supra]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an

unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Based upon the foregoing, it is clear in my view that records reflective of assignments of public employees must be made available. Similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records in my view would be relevant to the performance of one's official duties. As indicated earlier, Capital Newspapers v. Burns, supra, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer, and in granting access, the Court of Appeals found that the public has both economic and safety reasons for knowing when public employees perform their duties and whether they carry out those duties when scheduled to do so. As such, attendance records, duty rosters and similar documents, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of payment of overtime must be disclosed, again, because the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties.

Items that may appear in the records of your interest that are irrelevant to the performance of one's duties, i.e., social security numbers, home addresses, deductions, alimony payments and the like, may in my opinion be deleted prior to disclosure of the remainder of the records.

With specific respect to cancelled checks, the front side of cancelled checks have been found to be public, it has been held that the back of the checks may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. The court found, in essence, that inspection of the back of a check could indicate how an individual chooses to spend his or her money, which is irrelevant to the performance of that person's duties (see Minerva v. Village of Valley Stream, Supreme Court, Nassau County, May 20, 1981).

With regard to disclosure of the names of police officers who have been "on disability", while I know of no decision that focuses directly on the issue, the mere indication that a public employee is or has been on disability is, in my view, no more intimate or personal than disclosure of days and dates of sick leave, which, again, were found to be accessible in Capital Newspapers. Insofar as those kinds of records indicate the nature of an illness or disability, those entries, which are akin to medical details, may in my opinion be deleted.

Lastly, in consideration of the preceding remarks concerning access to records, I direct you to a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals, the State's highest court, 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 foregoing, I believe that the need to enable the public to make informed choices and provide a mechanism for exposing waste or abuse can be balanced against the possible infringement upon the privacy of present or former public officers or employees in a manner consistent with the preceding commentary.

In an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, 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: Hon. Joan B. Walsh
Town Board
Joseph L. Latwin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13611

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 29, 2002

Mr. Jefferey B. LaTour
Hale Creek A.S.A.T.C.A.
279 Maloney Road
Box 950
Johnstown, NY 12095-0950

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. LaTour:

I have received your letter in which you explained your unsuccessful attempts to obtain a variety of records from several agencies.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 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.

Third, with respect to the availability of "aggressive behavior reports and inmate misbehavior reports", several grounds for denial may be pertinent.

Of potential relevance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

Also relevant is §87(2)(e), which states in part that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings...
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

It is also possible that some aspects of records could be withheld pursuant to §87(2)(f). That provision permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person."

The remaining ground for denial of apparent relevance would be §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Many of the records prepared in conjunction with an investigation would constitute inter-agency or intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. For instance, recommendations concerning the course of an investigation or opinions offered by employees interviewed would fall within the scope of the exception.

Fourth, regarding your request for the visitor records pertaining to several inmates, if a visitors log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the Correctional Center have the ability to locate portions of the log pertaining to particular individuals based upon the information that you provided, 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 a visitors log 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.

Fifth, with respect to your request directed to your facility for records regarding yourself and others "required to be kept pursuant to NYS Correction Law §500-f", that provision of law states that:

"Each keeper shall keep a daily record, to be provided at the expense of the county of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what and by whom committed, how and when discharged, trade or occupation, whether or 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."

I note that the provision quoted above pertains only to county jails.

Sixth, with regard to medical records pertaining to yourself maintained by your facility, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by

Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

However, §18 of the Public Health Law generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

Lastly, with respect to responses indicating that records of your interest do not exist or are not maintained by an agency, an applicant for the records may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1362

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 29, 2002

Mr. Freddie Harris
00-A-4677
Five Points Correctional Facility
P.O. Box 400
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. Harris:

I have received your letter in which you requested that this office send to you records from the Office of Chief Medical Examiner or "explain to [you] the results concerning 'computer data'" contained in certain records. You wrote that you were informed by the Medical Examiner that "the department had no documents" concerning the matter of your interest.

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, or to obtain records on behalf of an individual. However, I offer the following comments.

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 Office of the Chief Medical Examiner does not maintain the records sought, the Freedom of Information Law would not apply. If there is no record containing the information of your interest, there is nothing to be disclosed under the Freedom of Information Law and the agency would not be obliged to prepare a record on your behalf.

Also, 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, an agency's obligation under the Freedom of Information Law involves the disclosure of records; there is nothing in that law that requires agencies to explain or interpret the contents of records.

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-13613

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 29, 2002

Mr. Robin L. Foringer
99-B-0289
Groveland Correctional Facility
700 Sonyea Road
Sonyea, NY 14556

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Foringer:

I have received your letter in which you requested that this office assist you in obtaining from the Ontario County District Attorney's Office records indicating "the application date, interview date(s), hiring date and starting date of one James Ritts. Mr. Ritts is a public employee."

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 [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 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. Two of the grounds for denial are pertinent to an analysis of rights of access.

Of significance is §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Records containing the information of your interest would constitute "inter-agency materials". In my opinion, portions of records, if they exist, containing application, interview and hiring dates of a public employee would be "statistical or factual" information that are accessible under §87(2)(g)(i).

The other relevant exception to rights of access is §87(2)(b), which permits an agency to withhold records or portions thereof the disclosure of which 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 view, the items of your interest are relevant to the duties of a public employee and, therefore, should be made available.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1364

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 29, 2002

Mr. Frank J. Stubbolo
[redacted]

Dear Mr. Stubbolo:

I have received your letter in which you requested a variety of information concerning a complaint made against the Dormitory Authority relative a particular project at the SUNY College at Old Westbury. The letter was addressed to this office and the State Ethics Commission.

In this regard, it is emphasized that the Committee on Open Government and the State Ethics Commission are separate entities. This office, in brief, is authorized to provide advice and opinions pertaining to public access to government records, primarily under the state's Freedom of Information Law. The Committee on Open Government does not have possession or control of records generally, and it is not empowered to compel an agency to grant or deny access to records. In short, the Committee does not maintain any information pertaining to the complaint. The jurisdiction of the State Ethics Commission involves matters arising under the Ethics in Government Act.

In an effort to provide clarification in relation to your request and for your future reference, 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 order to satisfy a request. In the context of your request, I would conjecture that there is no record that identifies each person who might have had access to certain documents. If that is so, there would be no obligation to conduct an inquiry for the purpose of preparing a record that contains the information sought. Similarly, an agency would not be required to prepare an opinion offering its view of what certain behavior might be.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Since your request pertains to the State Ethics Commission, the initial ground for denial, §87(2)(a), is relevant. That provision authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute deals directly with records of the State Ethics Commission. Section 94 of the Executive Law deals with the powers and duties of the Commission, and subdivision (17), paragraph (a), states that:

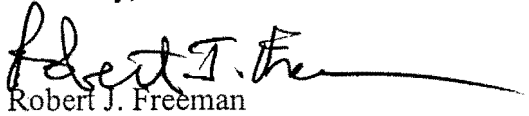
> "Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection are:
>
> (1) the information set forth in an annual statement of financial disclosure filed pursuant to section seventy-three-a of the public officers law except the categories of value or amount, which shall remain confidential, and any other item of information deleted pursuant to paragraph (h) of subdivision nine of this section:
>
> (2) notices of delinquency sent under subdivision eleven of this section;
>
> (3) notice of reasonable cause sent under paragraph (b) of subdivision twelve of this section; and
>
> (4) notices of civil assessments imposed under this section."

Based on the foregoing, the only records required to be disclosed by the Commission are those identified in (1) through (4) of paragraph (a).

With respect to your request for the "Complete Public Officers Law", I note that the Public Officers Law is a volume of statutes that can be reviewed in most public libraries. Additionally, all New York statutes are accessible via the New York State Assembly website. The address is <www.assembly.state.ny.us>.

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: Karl J. Sleight, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13615

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 29, 2002

Mr. Terry Mathis
92-B-1144
Auburn Correctional Facility
P.O. Box 618
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. Mathis:

I have received your letter in which you explained that the Department of Correctional Services denied your request for records. You asked whether you "have a right to know when" certain "public records" prepared by the Department of Correctional Services were made available to the Governor and the Legislature.

In this regard, it is noted that 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.

I hope that I have been of assistance.

Sincerely,

David Treacy

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13616

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 29, 2002

Mr. Douglas Coleman
97-A-3490
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. Coleman:

I have received your letter in which you complained that your facility has not responded to your Freedom of Information Law 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 requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1367

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 29, 2002

Mr. Thurman Ramsey
91-A-0775
Wende Correctional Facility
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. Ramsey:

I have received your letter in which you questioned the propriety of responses from your facility and the Division of Parole denying your request to obtain 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 mus 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.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 13618

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 29, 2002

Mr. Richard U. Heppler
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Heppler:

I have received your letter and the correspondence attached to it. You have questioned the propriety of the fee assessed by the State Liquor Authority for its list of liquor licensees in electronic format.

In this regard, pursuant to §87(1)(b)(iii) of the Freedom of Information Law, the basis for assessing fees for the reproduction of records, other than by photocopying, 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."

If the fee sought to be charged by the State Liquor Authority reflects the actual cost of reproduction, I believe that the fee would be consistent with law. Otherwise, the amount of the fee should, in my view, be altered accordingly.

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: J. Mark Anderson
Joanne Miranda

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13619

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 30, 2002

Mr. Irving Schachter
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Schachter:

I have received your letter of August 19 and the materials attached to it. You have sought an advisory opinion concerning a request for two "U-rating appeal" files pertaining to a named employee from the New York City Department of Education. Since I am unaware of the contents of those records, I cannot offer specific guidance. However, in the ensuing paragraphs, I will offer general comments regarding rights of access to the records in question.

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, from my perspective, two of the grounds for denial are pertinent to an analysis of rights of access.

It is assumed that the files consist largely of communications between or among school officers or employees, or perhaps between those persons and staff at the Board of Education. If that is so, pertinent is §87(2)(g), which authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In my view, if a rating regarding performance is final, it is a final agency determination that must be disclosed, unless a separate exception may properly be asserted. Further, I believe that those portions of the records in question consisting of statistical or factual information should be made available, again, with the exception of portions that may be withheld under a different ground for denial.

The other relevant exception to rights of access is §87(2)(b), which permits an agency to withhold records or portions thereof the disclosure of which 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, a final agency determination regarding a public employee's performance would, if disclosed constitute a permissible invasion of the employee's privacy, for the determination is clearly relevant to that person's duties. As indicated at the outset, however, I am unaware of the contents of the records sought. Insofar as they include intimate personal details relating to the subject of the records, or items irrelevant to the performance of his duties, I believe that deletions may appropriately be made. Similarly, to the extent that the records identify others, i.e., students, parents, or perhaps other employees, disclosure may result in an unwarranted invasion of those persons's privacy, in which case deletions could also be made.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1360

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 5, 2002

Mr. Kenneth Bartholomew
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bartholomew:

I have received your letter in which you sought an advisory opinion concerning the sufficiency of the subject matter list prepared by the Whitehall Central School District. You pointed out that the list does not include reference to "athletics, vehicles, legal actions" and the like.

In this regard, by way of background, the Freedom of Information Law generally 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 interest. 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James S. Watson

13621

From: Robert Freeman
To: [redacted]
Date: 9/5/02 12:03PM
Subject: Dear Ms. Kahl:

Dear Ms. Kahl:

I have received your inquiry, and I note at the outset that the fee to which you referred is applicable to entities of state and local government in New York and this state's FOI Law. I am unaware of the law in Illinois.

In New York, section 87(1)(b)(iii) of the FOI Law specifies that an agency may charge up to 25 cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing other records (i.e., audio or videotapes, computer tapes or disks), unless a different fee is prescribed by statute. The term "statute" has been construed by the courts to mean an act of the state legislature. Therefore, a unit of local government does not have the authority to raise fees through a local enactment.

I hope that the foregoing serves to clarify your understanding of the issue 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-13622

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

Mr. Rob Edwards
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Edwards:

As you are aware, I have received your letter of August 20 in which you sought my views concerning a request made under the Freedom of Information Law to the Chemung County Sheriff's Department for a variety of records.

The request includes "Annual Consolidated Financial Reports" for each fiscal year beginning in 1997, "complete and itemized expense account reports" relating to the Sheriff and two other employees of the Department, "reports, complaints or investigations of professional misconduct" pertaining to any Department employee for the same period, records relating to an inmate escape and an inmate suicide in the County Jail in 2001, reports pertaining to "contractual negotiations" involving Chemung County Sheriff's Association, reports of child abuse made to the Department by Planned Parenthood or the child protective services relating to several agencies beginning in 1997, similar reports concerning "elder abuse", and all records concerning the Sheriff's "recent heart attack."

Your request was denied on the basis of an opinion rendered by this office, which referred to a decision in which it was held that:

> "Petitioner's actual demand transcends a normal or routine request by a taxpayer. It violates individual privacy interests of...persons and would bring in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already heavily burdened bureaucracy" (Fisher & Fisher v. Davison, Supreme Court, New York County, NYLJ, October 6, 1988).

While I believe that much of the information likely may be withheld, is not in possession of the Sheriff's Department, or may not exist, I disagree with the response offered by County officials. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) provides in relevant part that an agency is not required to "prepare any record not possessed or maintained by such entity". Therefore, insofar as the records sought do not exist or do not include the information sought, the Freedom of Information Law would not apply. For instance, while I would conjecture that the County maintains records reflective of expenses incurred by or reimbursements to its employees, there may be no "complete and itemized expense account reports." Similarly, having spoken with Mr. Mark M. Schneider, the County's Director of Public Information and Records, it appears that the County does not maintain records that may be characterized as "Annual Consolidated Financial Reports". He added, however, that other records, such as the budget of the Sheriff's Department, exist and could be made available on request. Since your request also referred to reports regarding "contractual negotiations" relating to the Sheriff's Association, Mr. Schneider indicated that there are no reports of that nature. Again, however, the collective bargaining agreements between the County and public employee unions are accessible under the Freedom of Information Law and could be made available on request.

Second, despite the voluminous nature of your request, I do not believe that it is analogous to the request that was the subject of the decision cited by the County's Director of Public Information and Records. The request in that case involved many thousands of records and significant concerns relating to the privacy. Insofar as the records sought exist, a key issue, rather than volume, involves the extent to which your request "reasonably described" the records in accordance with §89(3). It has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the County, to extent that the records sought can be identified and located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if your descriptions of records do not enable staff to locate and identify them, your request, to that extent, would not meet that standard.

Third, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), is pertinent in relation to several elements of your request. That provision 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, §50-a provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. In a case dealing with 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 another case, the Court determined that the identities of officers who were reprimanded could not be disclosed based on §50-a of the Civil Rights and were exempt from disclosure under the Freedom of Information Law [Daily Gazette v. City of Schenectady, 93 NY2d 145 (1999)]. Therefore, insofar as item 3 of your request requests to persons employed as police or correction officers, I believe that the records could properly be withheld.

Item 7 relates to records relating to allegations of child abuse. Those kinds of records are confidential with respect to the public pursuant to §§422 and 422-a of the Social Services Law. With regard to item 8, records pertaining to persons receiving public assistance or care are confidential under §136 of the Social Services Law.

With respect to the remainder of your request, insofar as records exist and have been reasonably described, it is likely that some aspects of the records must be disclosed, but that others may be withheld. It appears that several exceptions may be relevant.

Communications between and among government officers and employees fall within §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, 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.

Also pertinent is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". 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].

If indeed there are records in the nature of expense statements, vouchers and similar records reflective of expenditures or reimbursements, since those records relate to the performance of one's official duties, I believe that they would be accessible in great measure. However, insofar as they include personal information that is unrelated to the performance of official duties, i.e., a home address, social security number, credit card number, etc., those portions may in my view be deleted to protect personal privacy. Further, in the case of a law enforcement official, other aspects of such records might, depending on the effects of disclosure, be withheld. For instance, §87(2)(e)(i) enables an agency to withhold records compiled for law enforcement purposes when disclosure would

interfere with an investigation or judicial proceeding; §87(2)(f) authorizes an agency to deny access to records to the extent that disclosure would "endanger the life or safety of any person", i.e., a witness or informant who could be identified via a disclosure.

I note, too, that §89(2)(b) of the Freedom of Information Law specifically refers to the ability to withhold medical information. While news releases regarding the Sheriff's medical condition would be accessible, other records that have not been disclosed to the public regarding his medical condition could be withheld, in my opinion, under the provision cited above.

Lastly, you referred in your request to 5 USC 552, which is the federal Freedom of Information Act. That statute applies only to records maintained by federal agencies. Further, while the federal Act includes provisions pertaining to fee waivers, the New York Freedom of Information Law does not include any similar provision. As such, the County may impose a fee for photocopying records accessible under the law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas F. O'Mara
Mark M. Schneider

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13623

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

E-Mail

TO: Stephen P. Watkins [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. Watkins:

As you are aware, I have received your letter in which you inquired with respect to rights of access to records prepared by an attorney for Suffolk County. The County denied access to a certain record "stating that it was the product of an Attorney and therefore exempt." You have contended, however, that "an Attorney, hired and paid by the County...is merely a paid employee of the County...and thus non exempt."

From my perspective, while a county attorney or assistant county attorney is indeed an employee of a county, the county, which is a public corporation, has the authority to assert certain privileges associated with the functions of attorneys in the same manner as other entities or persons.

As a general matter, the Freedom of Information Law pertains to all records of an agency, such as a county, 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 first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with an attorney-client relationship may be considered privileged under §4503 of the Civil Practice Law and Rules (CPLR). 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)].

Section 3101 of the CPLR pertains to disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe 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)].

In sum, assuming that the records of your interest consist of the work product of an attorney or were prepared in anticipation of litigation and that they have not been filed with a court or copies given to an adversary, it appears that they would be exempt from disclosure under the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

cc: Suffolk County Department of Law

FOIL-AO-13624

From: Robert Freeman
To: kathleen.murray@town.southold.ny.us
Date: 9/19/02 11:07AM
Subject: Good morning - -

Good morning - -

I have received your communication in which you questioned the propriety of transmitting notices of delinquency to owners of real property on postcards. You alluded to the possibility of "violating a taxpayer's privacy" and the fact that income tax returns are confidential.

In short, I do not believe that there is any law that would prohibit the Town from transmitting the notices by means of postcards.

In this regard, first, the fact that a person has failed to pay real property taxes is itself a matter of public record. Typically, information relating to the payment (or non-payment) of those taxes appears in assessment records that are accessible to the public; notices of tax sales due to a failure to pay property taxes are published in legal notices. Second, the confidentiality provisions to which you referred pertain to the records submitted by taxpayers to the IRS and the State Department of Taxation and Finance; they do not pertain to records maintained by municipalities or others (i.e., employers) or to the particular items in question. Third, and this is as an aside, I recall a decision involving a claim that the federal Privacy Act is violated when the IRS mails forms to taxpayers that include the taxpayers' social security numbers because the social security numbers could conceivably be seen by persons other than postmen (or women) and the taxpayers themselves. The claim was rejected.

In sum, I believe that the Town may transmit the information at issue on postcards.

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-13625

From: Robert Freeman
To: [redacted]
Date: 9/20/02 8:25AM
Subject: Dear Mr. Mack:

Dear Mr. Mack:

I have received your letter in which you raised questions regarding access to certain records.

First, with respect to Surrogate's Court records, as you may be aware, the Freedom of Information Law excludes the courts from its coverage. However, other statutes frequently require disclosure of court records. In this instance, I believe that the key provisions are found in Article 25 of the Surrogate's Court Procedure Act. Subdivision (8) of section 2501 states that "All books and records other than those sealed are open to inspection of any person at reasonable times." Section 2502 pertains to "Books to be kept by clerk" and section 2503 is entitled "What must be recorded."

The text of those provisions, as well as all other New York statutes, can be found on the Assembly's website at <www.assembly.state.ny.us>.

Second, I would conjecture that the FAA maintains or has the ability to obtain records identifying persons who were on particular flights. However, it is also likely in my view that information of that nature could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy." If you would like to discuss the issue with a representative of the FAA, it is suggested that you contact its FOIA officer at (202)267-9165 or via email at<9.awa_arc_foia@faa.gov>.

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

mack.d

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13636

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 20, 2002

Mr. Kevin J. Bluett
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bluett:

I have received your letter in which you questioned the propriety of a delay in the disclosure of records by the Village of Ilion.

In this regard, as you are aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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.

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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 Trustees
Gale M. Hatch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13627

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 20, 2002

Mr. Gerald Pauletti
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pauletti:

I have received your letter of August 19 and the materials attached to it. You have sought my views concerning a denial of your request by Community School District 27 relating to a retired teacher. In the request, you wrote as follows:

> "On what grounds, for how long, what was the result of the investigation, the name of the people involved, dates and any information involving the barring of teacher Toby Goldberg from M.S.#210Q (formerly JHS#210Q) and reassigned to the District #28 Q office."

The District indicated that the request "included inter/intra agency materials, opinions and other information that if disclosed would result in unwarranted invasion of personal privacy." You asked that I "look into this situation."

In this regard, it is emphasized that the Committee on Open Government is not an investigating entity; the primary function of this office involves offering advice and opinions concerning the Freedom of Information Law. That being so, I offer the following comments.

First, your request is, in my view, analogous to an interrogatory, for you essentially sought information by raising questions (i.e., "for how long"; "on what grounds", etc.). Here I point out that the Freedom of Information Law deals with requests for records, and that it does not require that agency officials answer questions as a means of supplying information. Similarly, that statute 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. In the future, it is suggested that you seek existing records rather than attempting to elicit information by raising questions.

Second, insofar as agency records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While I am unfamiliar with the contents of the records at issue, it appears that both of the provisions to which the District alluded would be pertinent to an analysis of rights of access.

The initial ground for denial to which reference was made, §87(2)(g), provides that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The other, §87(2)(b), provides that an agency may deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." If there was some sort of final determination concerning the status of a teacher, I believe that such a record would be accessible, for it would clearly be relevant to the performance of one's official duties. However, in consideration of the terms of your request, there may be other records that identify people, perhaps including students, other than the teacher. In those instances and likely others, depending on the contents of records, the exception concerning privacy might properly have been asserted. It is reiterated, however, that without greater knowledge of the contents of the records, I cannot offer unequivocal guidance.

Lastly, with respect 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mohamed Ahmed
Robin Greenfield
Susan Holtzman

FOIL-AO-13628

From: Robert Freeman
To: pasagiae@tlc.nyc.gov
Date: 9/23/02 8:41AM
Subject: Dear Ms. Pasagiannis:

Dear Ms. Pasagiannis:

I have received your inquiry regarding a request made to the Taxi and Limousine Commission for "identificaion of all base station owners, vehicle owners and/or drivers who have been assessed penalties or fines or been subject to suspension or revocation." You have sought guidance concerning the matter in relation to the FOIL and the Personal Privacy Protection Law.

From my perspective, there are several potential issues, and I would like to discuss them with you. I'll be out of the office this morning, but if you can email me your phone number, I can call you this afternoon.

For the moment, however, I note that the Personal Privacy Protection Law applies only to state agencies; it does not apply to NYC agencies, such as the Commission. Also, I would like to know if those identified are charged with violations pursuant to provisions of the Penal Law. If they are, when charges are dismissed in their favor, it appears that the records should be withheld under 160.50 or 160.55 of the Criminal Procedure Law. With respect to those who were convicted, who admitted to have engaged in a violation or who paid fines are accespted suspension or revocation, I believe that their identities would be a matter of public record [see Johnson Newspapers v. Stainkamp, 61 NY2d 958 (1984)]. Another possible issue involves the manner in which the Commission maintains its records and the extent to which the information sought can be located with reasonable effort, i.e., whether or the extent to which the request "reasonably describes" the records as required by section 89(3) of FOIL.

I hope that the foregoing will begin to be helpful and that we can talk about the issues this afternoon.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO-13629

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 24, 2002

Ms. Janet J. Leahing
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Leahing:

I have received your letter and the materials attached to it. You have sought a determination concerning the obligation of the Better Business Bureau Serving Metropolitan New York to disclose records pursuant to your requests for certain records.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, the New York Freedom of Information Law, is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally pertains to records of entities of state and local government. It does not apply to records of private organizations, such as the Better Business Bureau.

Since you referred to the Freedom of Information and Privacy Acts, respectively 5 USC §§552 and 552a, I note that they are federal statutes, and that they apply only to records maintained by federal agencies.

In short, I do not believe that the Better Business Bureau is required to honor requests made under either New York or federal freedom of information statutes.

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-1363

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 24, 2002

Mr. Monroe Yale Mann
Office of the Town Attorney
Town of Rye
10 Pearl Street
Port Chester, NY 10573

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mann:

I have received your letter and apologize for the delay in response. You wrote that the Town of Rye has received a request for "all records regarding assessments to properties owned by Senior Citizens which have any exemptions for veterans, combat veterans, alternate non-combat veterans, disabled, etc." You specified that the Town "maintains no separate lists other than the regular assessments of all properties of the Town." That being so, you have sought my views concerning your obligations in relation to the request.

In this regard, first and perhaps most importantly, the Freedom of Information Law pertains to existing records, and §89(3) states in relevant part that "Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity..." Therefore, if there are no separate lists or other records that pertain to or identify those property owners by means of the characteristics described in your letter, the Town, in my view, would not be required to prepare new records or lists that identify property owners with those characteristics. In short, an applicant is entitled to gain access, to the extent required by law, to existing records maintained by the Town; the Town is not required to create a new record in an effort to accommodate an applicant.

Second, insofar as the items sought are contained in the Town's assessment roll, I believe that they would be available through the disclosure of that record. When the assessment roll is made available, the applicant would have the ability to review it and extract information from it as he or she sees fit.

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.

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.

I note, too, 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.

Lastly, since you indicated that the request involved "all records" relating to certain assessments and exemptions, I believe that certain records used in determining assessments may be withheld. For instance, for senior citizens to apply for STAR exemptions, they must submit records that include personal financial details. Having discussed the issue with representatives of the Office of the Office of Real Property Services, we agree that income tax forms or other personal financial information submitted by senior citizens seeking STAR exemptions may be withheld form the public. Although the Freedom of Information Law is based upon a presumption of access, §87(2)(b) authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." The New York State Tax Law contains provisions that require that confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., §697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning taxpayers' income would constitute an improper or "unwarranted" invasion of personal privacy.

In short, I believe that an agency, such as the Town of Rye, has clear authority to withhold records submitted by residents insofar as they include intimate or sensitive details of their lives, including copies of tax forms given to assessors in conjunction with an application for a STAR exemption. Similarly, insofar as other records submitted by property owners, such as military discharge and separation papers, include intimate personal information (i.e., social security numbers, descriptions of disabilities, etc.), those details may in my view 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:tt

FOIL-AO-1363

From: Robert Freeman
To: [redacted]
Date: 9/26/02 8:15AM
Subject: Re: denial of access to public record

In short, the state's highest court has held that records prepared by consultants for agencies may be characterized as "intra-agency materials." Insofar as those materials consist of advice, opinion, recommendation and the like, they may be withheld. However, insofar as they consist of statistical or factual information, they must ordinarily be disclosed.

In many instances, a report or memo consists of a combination of advice or opinions and statistical or factual information. In those cases, the agency is obliged to disclose the statistical or factual portions.

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-13632

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 7, 2002

[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear [redacted]:

I have received your letters and the materials attached to them, as well as correspondence from your mother indicating that you have been transferred to a new facility. In brief, you complained that you have experienced "continual denials of information from the Troy Housing Authority." Based on a review of 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) states in part that an agency is not required to create a record in response to a request. In several aspects of your requests, you sought information rather than records. If no records exist reflective of the information sought, i.e, if there is no figure indicating the number of people named on a certain list, the Freedom of Information Law would not apply. Similarly, that law requires agencies to respond to requests for records, but it does not require agency staff to answer questions, i.e., "who was Housing Security Patrol Supervisor" on certain dates. In like manner, a request for "legislation/documentation indicating any additional powers bestowed upon the Troy Housing Authority" is not, in my opinion, a request for records. In essence, it is a request that legal research be performed involving 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.

Second, in a related vein, a likely 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 Authority, to extent that the records sought can be located with reasonable effort, I believe that the requests would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. For instance, you requested arrest reports by certain officers regarding narcotics. If the Authority's records are not filed or indexed in a manner that enables staff to locate those of your interest with reasonable effort, a request, in my view, would not meet the standard of reasonably describing the records sought.

Third, insofar as your requests relate to existing records that have been reasonably described, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of all of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the

following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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 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 your requests involve personnel records relating to police officers, it is likely that those records must be withheld under §50-a. The Court of Appeals, in reviewing the legislative history leading to its enactment, found that:

> "Given this history, the Appellate Division correctly determined that the legislative intent underlying the enactment of Civil Rights Law section 50-a was narrowly specific, 'to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action' (Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, 109 AD 2d 92, 96). In view of the FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50-a should not be construed to exempt intervenor's 'Lost Time Record' from disclosure by the Police Department in a non-litigation context under Public Officers section 87(2)(a)" [Capital Newspapers v. Burns, 67 NY 2d 562, 569 (1986)].

It was also determined that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568). In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. Additionally, as you may be aware, it was held that records indicating findings or admissions of misconduct by police officers are exempt from disclosure under §50-a of the Civil Rights Law [Daily Gazette v. City of Schenectady, 93 NY2d 145 (1999)].

If employees who are not subject to the protection accorded by §50-a are the subjects of certain of your requests, rights of access would be different. Although §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute an unwarranted invasion of personal privacy, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In several of the decisions cited above, final determinations reflective of findings or admissions of misconduct were determined to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of

misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Lastly, several aspects of your requests involve law enforcement manuals and procedures. As suggested earlier, instructions to staff that affect the public and agency policy are generally available under subparagraphs (ii) and (iii) of §87(2)(g), respectively. However, if they were compiled for a law enforcement purpose, and disclosure would reveal non-routine criminal investigative techniques or procedures, I believe that they may be withheld. 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 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Warren Brown
Gail Lundstrom

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13633

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 7, 2002

Mr. Robert S. Risman, Jr.
[redacted]

Dear Mr. Risman:

As you are aware, I have received your letter of September 17 in which you sought an advisory opinion concerning access to records relating to "any events ending Michael E. Stafford's appointment", as well as his employment with the Department of State.

Having discussed the matter with various staff at the Department, including Glen Bruening, the Department's General Counsel and Freedom of Information Appeals Officer, the Department has or will have disclosed to you all of its records that fall within the scope of your request. I note that Mr. Bruening indicated that portions of certain forms would be deleted, i.e., a social security number or home address, on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §§87(2)(b) and 89(2)(b); Personal Privacy Protection Law, §96(1)], but that the remainder will be made available. In my view, the deletion of those or similar personal items is fully consistent with law. With the disclosure of those records, you will have received all records in possession of the Department that you requested.

I point out, too, that fewer records are prepared with respect to the employment and termination of appointees than others. In most instances, employees are hired based on civil service exams; terminations may be for cause, in which case, quasi-judicial proceedings may be conducted in accordance with law or pursuant to collective bargaining agreements, resulting in the preparation of a variety of records. Those events did not occur in relation to Mr. Stafford's appointment to and departure from tbe Department. Consequently, the Department's records relating to him are minimal. In that vein, as you may know, 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 that it does not possess.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO - 3521
FOIL AO-13634

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 7, 2002

Mr. Richard 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 information presented in your correspondence.

Dear Mr. Quaglietta:

I have received your letter in which you expressed concern "about breaches of both the Freedom of Information Law and the Open Meetings Law" by certain officials of the Town of Kent.

You wrote that a motion to enter into executive session was made at a recent meeting that identified "[t]wo specific departmental, personnel issues" that would be discussed. Nevertheless, you indicated that "shouting" occurred during the executive session and that it became "apparent that the subject matter had nothing to do with the publicly indicated issues." One of the subjects discussed involved complaints made against officials of the Kent Recycling Commission; another involved consideration of a request made under the Freedom of Information Law. You have sought assistance in the matter.

In this regard, first, the Open Meetings Law prescribes a procedure that must be accomplished in public before an executive session may be held. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Based on the foregoing, 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.

In the context of the matter that you described, it appears that the motion for entry into executive session failed to make reference to the subjects that were actually discussed. That being so, it appears that the Board failed to comply with §105(1) of the Open Meetings Law.

Second, however, insofar as the Board discussed complaints pertaining to particular individuals, I believe that, had the procedure been followed correctly, there would have been a basis for discussion of that issue. Section §105(1)(f) 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..."

I note that it has been advised that a motion to enter into executive session pursuant to § 105(1)(f) should be based on the terms of that provision. 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.

Lastly, I do not believe that consideration of an appeal made following a denial of access under the Freedom of Information Law could, as you described the situation, have validly been considered during an executive session. In short, none of the grounds for entry into executive session would apparently have applied. I point out, too, that the Freedom of Information Law is applicable to all records of an agency, such as a town, and that §86(4) of that statute defines the term record expansively to include "any information....in any physical form whatsoever" maintained by or for an agency. Therefore, assuming that the Town maintained a list of the members of a certain commission, it would have constituted a "record" that fell within the coverage of the Freedom of Information Law. Further, in my view, there would have been no basis for a denial of access to such a record.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Kent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13635

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 7, 2002

Ms. Tamara O'Bradovich
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. O'Bradovich:

I have received your letter in which you complained that requests for any records maintained by the Village of Tuckahoe must be made in writing.

In this regard, first, the Freedom of Information Law includes all records maintained by or for an agency, such as a village, within its scope, even those that have routinely been made available to the public.

Second, §89(3) of the Freedom of Information Law indicates that an agency may require that a request for records be made in writing, reasonably describing the records sought. Therefore, in short, although an agency may accept requests made orally and provide access to records in response to oral requests, I do not believe that it is obliged to do so. Rather, an agency may choose, based on the provision referenced above, to require that requests for records be made in writing.

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-13635A

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 7, 2002

Mr. Kwane Dozier
99-A-3684
Hudson Correctional Facility
P.O. Box 576
Hudson, NY 12534

Dear Mr. Dozier:

I have received your letter, which is addressed to both the Committee on Open Government and the Office of the Westchester County District Attorney.

Having reviewed its contents, I note that the Committee on Open Government is authorized to provide advice and opinions concerning the New York Freedom of Information Law. The Committee does not maintain records generally, and it does not possess any of the records described in your letter of request. As a general matter, requests should be made to the "records access officer" at the agency that maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

I point out, too, that your request appears to based on the federal Freedom of Information Act, 5 USC 552. While the federal Act includes provisions concerning the waiver of fees, the equivalent statute applicable to entities of state and local government in New York does not contain any such provisions. 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 requester is an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13636

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. Kenneth L. Cline
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cline:

I have received your letters of August 21 and September 15, both of which pertain to requests made under the Freedom of Information Law to Allegany County. One series of requests involves records of accounts and account numbers associated with the functions of the County Sheriff; the other relates to a "justice study" prepared for the County. Having reviewed the materials attached to your letters, I offer the following comments.

First, some of the responses refer to "off-book" accounts maintained by the Sheriff. Assuming that such records exist, I believe that they would be subject to the Freedom of Information Law, irrespective of the location in which they may be maintained. In this regard, 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."

The Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Further, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Based upon the foregoing, assuming that the "off-book" account records are maintained in relation to the functions or duties of the Sheriff, by the County or elsewhere, I believe that they would constitute County records subject to the Freedom of Information Law.

Second, with respect to access to account numbers, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, it appears that §87(2)(i), which was recently amended, may be pertinent. In some instances, account numbers may be used as access codes, which could be used to gain unauthorized access to information, alter the content of records maintained electronically, or perhaps authorize the withdrawal of moneys from an account. That being so, the cited provision enables an agency to withhold records or portions thereof the disclosure of which "would jeopardize an agency's capacity to guarantee the security of information technology assets..." If indeed the account numbers may be used in the manner described, I believe that they may be withheld. On the other hand, if disclosure of those numbers

is unrelated to security or unauthorized access, it doubtful in my view, that they could justifiably be withheld.

Third, one of the issues appears to involve a requirement that you "specify exactly, the information you require..." In this regard, by way of background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant seek "identifiable" records. That standard often resulted in the kind of problem that you encountered, that you are unaware of the particular records that you want and therefore cannot identify them. Nonetheless, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Additionally, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state that an agency's designated records access officer has the duty of assuring that agency personnel "assist the requester in identifying requested records, if necessary" [21 NYCRR 1401.2(b)(2)]. Consequently, it is suggested that you confer with the records access officer in an effort to enable you to seek the records of your interest.

Lastly, I do not understand the difficulty concerning the "Justice Study" prepared by David Burin. While there may be no document with that title, Undersheriff Timberlake indicated that his office, upon payment of the requisite fee, "can provide you with copies of all the work that has gone into this study." That being so, it does not appear that there should be a problem or issue in gaining access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Margeson
William J. Timberlake
Brenda R. Hotchkiss

FOIL-AO-13637

From: Robert Freeman
To: Dave Mack
Date: 10/8/02 10:23AM
Subject: Re:

Certainly you can use FOIL to obtain minutes of meetings. However, there is no obligation that a board prepare a transcript of a meeting. The minutes typically consist of motions, proposals, resolutions, action taken and the vote of each member; they need not include reference to comments made. I note that meetings are often tape recorded by a clerk or other official. If that is so in this instance, the tape recording would constitute a "record" for purposes of the FOIL. Further, because the meeting was open to the public, there would be no basis for a denial of access.

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-1638

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 9, 2002

Ms. Jane Goldblatt
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Goldblatt:

I have received your letter and apologize for the delay in response. You indicated that you raised a variety of questions in the Northport-East Northport School District's application for public access to records, but that the response was unsatisfactory.

In this regard, it is emphasized that the title of the Freedom of the Information Law may be somewhat misleading. That statute does not require the disclosure of information *per se*, nor is it a vehicle that requires government officials to answer questions. Rather, it pertains to existing records maintained by or for a government agency, such as a school district. Further, §89(3) states in part that an agency is not required to create a record in response to a request.

In the future, instead of seeking information by raising questions, it is suggested that you seek records. For instance, rather than asking "how many students with disabilities...were in private placement", you might seek records indicating or that would enable you to ascertain the number of students with disabilities in private placements. In such a request, you might also specify that your request is not intended to include personally identifiable information relating to students (which would be exempt from public disclosure under federal law). If there is no figure or statistic indicating the number of such students, again, the District would not be required to prepare a total or a new record containing the information on your behalf. However, a disclosure of portions of existing records (with other portions deleted to protect the privacy of students) might enable you to determine the number such students in private placements.

There may be instances in which some of the information sought may not be accessible. If, for example, transportation costs are not broken down or budgeted in a manner that permits an analysis or conclusion regarding transportation of special education students, there would be no record, or portion of a record, containing the information sought. In that situation, District staff would not be required to attempt to calculate or prepare a new record to accommodate you.

Lastly, indicating that a response to a request will be given "in a few days" is not, in my opinion, adequate. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Christina A. McCulloch, District Clerk

FOIL-AO-13639

From: Robert Freeman
To: Dave Mack
Date: 10/10/02 8:07AM
Subject: Re:

In brief, who you are and why you may be seeking a record are irrelevant. The only instance in which the identity of the requester is significant involves a request by that person or his or her representative for records that would be available only to the requester (who could not invade his or her own privacy), but that could be denied if requested by others.

With respect to the duties of the records access officer, that person has the responsibility of coordinating an agency's response to requests. He or she may consult with an attorney or others, but is not required to do so.

Lastly, if there is a domestic incident that does not result in a charge or arrest, for example, it has been advised that the identities of those involved may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, but that a blotter entry or its equivalent (i.e., "disturbance at 210 Main St."), would be accessible. On the other hand, if there was an arrest and conviction, records regarding the event would generally be available; if there is an arrest that is still pending, the arrest or booking record would typically be available. As you know, if a charge is dismissed, the records are sealed.

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-1360

From: Robert Freeman
To: murray@DCandH.org
Date: 10/10/02 12:23PM
Subject: Dear Mr. Bodin:

Dear Mr. Bodin:

I believe that there several provisions of law that indicate that a tape or video recording of an open meeting constitutes a record that is the property of the town.

First, the Freedom of Information Law applies to all records of an agency, such as a town, and section 86(4) defines the term "record" to mean any information in any physical form whatsoever kept, held, filed, produced or reproduced by, with or for an agency. Second, section 30 of the Town Law states that the town clerk is the custodian of all town records, and section 64(3) gives the town board "the management, custody and control of all town....property". Third, section 57.25(1) of the Arts and Cultural Affairs Law (part of the "Local Government Records Law") states that it is "the responsibility of every local officer to....retain and have custody of...records for so long as the records are needed for the conduct of the business of the office..."

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-1360/11

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 10, 2002

Ms. Madonna 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 Ms. Kless:

I have received your letters and related correspondence. You have sought assistance in acquiring a subject matter list from the Town of Hamburg and encouraging the Town to respond to requests in a timely manner.

In this regard, first, the Freedom of Information Law pertains to existing records, and an agency, such as a town, 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 concern. Section 87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not , in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. It is suggested that you ask to review the retention schedule applicable to the Town; the schedule is likely maintained by the Town Clerk. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

Section 89(4)(b) also requires that agencies send copies of appeals and their determinations to this office. Having searched our files regarding appeals, I do not believe that we have received any material from the Town.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Clerk
Vincent Sorrentino, Town Attorney
Richard Boehm, Deputy Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 3480
FOIL AO-13642

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 10, 2002

Mr. Joseph Leeson
01-B-0597
Wyoming Correctional Facility
P.O. Box 501, Dunbar Road
Attica, NY 14011-0501

Dear Mr. Leeson:

I have received your letter in which you appealed to this office under the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. It does not maintain custody or control of records generally, and it is not empowered to determine appeals or compel an entity to grant or deny access to records.

I note, too, that the Freedom of Information Law is applicable to agencies and that §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Further, §86(1) defines "judiciary" to mean:

> " the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts are not subject to the Freedom of Information Law. Similarly, the records of a private attorney fall beyond the coverage of that law.

This is not to suggest that court records are not often public, for other provisions of law may provide rights of access to them (see e.g., Judiciary Law, §255). When seeking court records, it is

suggested that a request be made to the clerk of the court, citing an applicable provision of law as the basis for the request.

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-13643

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 10, 2002

Mr. Ronald Gagnon
[redacted]

Dear Mr. Gagnon:

I have received your "Freedom of Information/ Privacy Act" requests directed to this office and the "New York Department of Justice." In the request, you have sought any information referenced by your name and social security number that relates to any investigations carried out by any agency in this state.

In this regard, please be advised that there is no agency in New York known as the Department of Justice. Further, the primary function of the Committee on Open Government involves providing advice and opinions concerning rights of access under the Freedom of Information Law. The Committee does not maintain records generally, it does not acquire records on behalf of individuals, and it has no authority to compel an agency to grant or deny access to records.

I note, too, that the statutes to which you referred are the federal Freedom of Information and Privacy Acts, which apply only to federal agencies. The provision that generally deals with access to government records in New York is the New York Freedom of Information Law.

Lastly, I do not believe that there is any database or other vehicle that would enable a person or agency to locate all records referenced by your name and social security number relating to investigations that might have occurred anywhere in the state. Section 89(3) of the Freedom of Information Law requires that an applicable must reasonably describe the records sought. Therefore, a request should contain sufficient detail to enable staff of an agency to locate and identify the records of your interest. Additionally, requests should be directed to the records access officer at the agency that you believe would maintain records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

I hope that the foregoing serves to 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-1364

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

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 facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Fournier:

I have received your letter and the correspondence attached to it. In short, you indicated that you have unsuccessfully attempted to obtain information from an entity known as Comlinks. It is my understanding that Comlinks has been retained by Franklin County to carry out various functions on behalf of the County in implementing a loan program for low income participants. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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 is applicable to entities of state and local government; it does not ordinarily apply to private, non-governmental organizations.

Second, however, that law is expansive in its coverage, for §86(4) defines "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 breadth of the definition of "record", the Freedom of Information Law includes not only records in the physical possession of an agency, but those maintained *for* the agency as well. Having discussed the matter with Rob Brooks of the Governor's Office of Small Cities, it is my understanding that Comlinks carries out certain functions and maintains records for Franklin County. Any such records, in my view, are County records, even though they are in possession of a private entity.

Assuming the accuracy of my understanding of the matter, I do not believe that Comlinks is directly responsible for compliance with the Freedom of Information Law. Rather, it is suggested that a request for records maintained by Comlinks for the County be made to the County's "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records [see 21 NYCRR §1401.2]. When in receipt of such a request, I believe that the records access officer would be obliged either to direct Comlinks to disclose records in a manner consistent with the Freedom of Information Law or acquire the records for review and a determination of rights of access.

Third, it 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. If no records exist reflective of the information sought, the Freedom of Information Law would not apply. Similarly, that law requires agencies to respond to requests for records, but it does not require agency staff to answer questions or, as you requested, provide "explanations" of certain provisions of law. In like manner, a request for laws that might apply in a certain situation is not, in my opinion, a request for records. In essence, it is a request that legal research be performed involving an interpretation of law requiring a judgement. Any number or provisions of law might be applicable, and a disclosure of some of the, 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 87 of the Public Officers 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.

Lastly, insofar as agency records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent in my opinion is §87(2)(b), which authorizes an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In this regard, it has been held that the identities of persons participating in a federal grant or loan program based

on an income qualification, i.e., based on income below a certain level, may be withheld to protect their privacy [Tri-State Publishing Company v. City of Port Jervis, Supreme Court, Orange County, March 4, 1992]. On the other hand, names of members of a corporate board or of others acting in business or professional capacity generally should be disclosed, for there is nothing personal or intimate about information of that nature.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Nancy Reich
Rob Brooks
Franklin County Attorney

FOIL-AO-13645

From: Robert Freeman
To: Bob and Jenny Petrucci
Date: 10/11/02 8:06AM
Subject: Re: Medium Choice

If a particular record has been routinely made available to others via email, I believe that the County would be required to email the same record to you. However, as a general matter, it is my view that an agency is not required to transmit records sought under the Freedom of Information Law by means of email. While it may choose to do so, I do not believe that it is compelled to do so.

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-13646

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 15, 2002

Mr. Charles O'Shea
Chairman
Nassau County Board of Assessors
240 Old Country Road
Mineola, NY 11501-4245

The staff of the Committee on Open 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'Shea:

I appreciate having received a copy of your determination of an appeal made by Stephanie S. Abrutyn, Newsday's attorney, following a partial denial of access to records sought by Newsday reporter Michael Rothfeld. In the determination, you sustained a denial of access to certain records used in the preparation of assessments, including a "final inventory used by CLT for the preliminary assessments", "new assessments", "estimated market value under the new assessment" and those indicating "type, category, style or market value of a property." In each instance, the records were withheld because they are "not in the possession of or under the control of the Department of Assessment" and are "exempt under the Public Officers Law section 87g [sic] as pre-decisional, non-final data."

Based on decisions rendered by the Court of Appeals, the state's highest, I believe that the records in question must be made available in great measure if not in their entirety. In this regard, I offer the following comments.

First, it is my understanding that the County contracts with CLT (Cole Layer Trumble) to serve as a consultant and carry out various functions on its behalf in relation to the process of assessing real property. While the records sought may not be in the physical custody of the Department, based on the nature of the relationship between the Department and CLT, it appears that they are Department records that fall within the framework of the Freedom of Information Law. That statute pertains to agency records, such as those of a county department, and §86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever

> including, but not limited to, reports, statements, examinations; memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of 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, for example, 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 significant is a decision rendered by the Court of Appeals in which it was found that materials maintained 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. 417 (1995)].

Insofar as records maintained by CLT are "kept, held, filed, produced or reproduced...*for* an agency", such as the Department, i.e., for the purpose of providing services that would otherwise be carried out by that entity, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform CLT into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it maintains are maintained for an agency, and that those records fall within the coverage of that statute.

In other circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency, as Mr. Rothfeld did in this instance. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation described in the correspondence, insofar as CLT maintains records for the Department, to comply with the Freedom of Information Law and the implementing regulations, the records access officer must either direct CLT to disclose the records in a manner consistent with law, or

acquire the records from CLT in order that he can review the records for the purpose of determining rights of access.

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.

Although the provision cited by the Records Access Officer as a basis for denial, §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, i.e., CLT, 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.

With respect to the contention that the records are "predecisional" or "non-final", I note that in Gould v. New York City Police Department, 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)..."
[87 NY2d 267, 276 (1996)].

In short, that the records are "predecisional" 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.

In sum, based on the direction offered by the state's highest court, I believe that records prepared by CLT for the Department constitute Department records that fall within the coverage of the Freedom of Information Law, even though the records are not in the physical possession of the Department. Moreover, insofar as the records consist of "statistical or factual tabulations or data", they must be disclosed, even though they may be predecisional or "non-final." I note, too, that it has been held that inventory data is accessible under the Freedom of Information Law, unless it is sought for commercial or fund-raising purposes [see COMPS, Inc. v. Town of Huntington 269 AD2d 446 (2000)]. Since the request was made by a Newsday reporter for news gathering purposes, I do not believe that the exception to rights of access is applicable or pertinent.

If you would like to discuss the matter, please feel free to contact me. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stephanie S. Abrutyn
Michael Rothfeld
William K. Long

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1364/7

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 15, 2002

Ms. Lauren Storms
Project Coordinator
Long Island Pine Barrens Society
P.O. Box 429
Manorville, NY 11949-9801

The staff of the Committee on 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. Storms:

I have received your letter and the correspondence attached to it. In brief, you expressed frustration in relation to your efforts to obtain records from the Town of Riverhead. The records sought involve:

> "[T[he acreage, address, tax map number, price paid and to whom for all land purchases and purchases of development rights since June 30, 2001 to present by the Town of Riverhead. Please differentiate between what was a land purchase and what was a purchase of development rights."

Although the request was delivered on August 1, as of the date of your letter to this office, you had received no response either to the request or the ensuing appeal.

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government that deal with the procedural implementation of the Freedom of Information Law (21 NYCRR Part 1401), each agency, such as a town, 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. In most towns, the clerk is records access officer, and it has been advised that requests ordinarily should be made to that person. If, however, a request is made to a person other than the records access officer, I believe that he or she must either respond directly in a manner consistent with 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..."

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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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, a potentially significant issue involves whether your request "reasonably described" the records sought as required by §89(3) of the 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)].

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 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, and I believe that a request would reasonably describe the records insofar as the records can be located with reasonable effort. On the other hand, if particular records cannot be located except by means of a review of what may be hundreds or thousands of records individually, the request would in my opinion not reasonably describe the records. In that event, the records access officer could explain that the records are not kept in a manner that would permit their retrieval in conjunction with the terms of the request and indicate how the records are kept.

I would conjecture that there have been relatively few purchases of land by the Town during the past year and that records regarding those purchases would not be difficult to locate. If that is so, the request, in my view, would have met the requirement that you "reasonably describe" the records sought.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Robert Kozakiewicz
Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13648

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 15, 2002

Mr. Robert Hamilton
01-R-5561
Marcy Correctional Facility
Box 3600
Marcy, NY 13403

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hamilton:

I have received your letter in which you complained that your facility has not responded to requests for your "disciplinary actions" and "monthly evaluations." Consequently, you have asked this office to take "actions of reprimand."

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.

Section 87(2)(g) may be pertinent to analysis regarding the availability of "disciplinary actions" pertaining to you. That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Lastly, regarding your request for your "monthly evaluations", if staff at a facility prepared evaluations concerning your performance or conduct, they would likely consist of opinions that may be withheld under §87(2)(g). If they are mental health evaluations, relevant is §87(2)(a), which 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 Mohawk 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.

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-1364

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 15, 2002

Mr. David Bathurst
Niagara Falls Fire Department Officers Association
Local 3359
182 80th Street
Niagara Falls, NY 14304

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bathurst:

I have received your letter concerning delays in responding to requests for records by the City of Niagara Falls. You wrote that the City "has apparently adopted a 120 day time frame for all requests.

In my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records within 120 days or some other particular period following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a month or perhaps longer 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 a lengthy time. In a municipality the size of Niagara Falls, I would conjecture that only the most unusual requests would involve as long as 120 days to effectively respond. 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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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.

As inferred earlier, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is

> reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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, 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:jm

cc: City Council
City Clerk
Corporation Counsel

FOIL-AO-13650

From: Robert Freeman
To: Bob and Jenny Petrucci
Date: 10/16/02 5:07PM
Subject: Re: One time FOIL request

Since the law pertains to existing records, technically, an agency can neither grant nor deny access to records that have not yet been prepared. Consequently, it has consistently been advised that an agency is not required to honor a request that is prospective in nature.

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-13651

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Ann B. Olson
The Country House Inn
1457 Peekskill Hollow Road
Carmel, NY 10512

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Olson:

As you are aware, I have received your letters concerning your frustration in attempting to obtain records from the Town of Kent. I note that the staff of the Committee prepares approximately eight-hundred written advisory opinions annually, and in fairness, they are prepared in the chronological order in which requests for advice or opinions are received.

With regard to delays in responding to requests for records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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."

Further, as you indicated, the Freedom of Information Law requires that an agency send copies of appeals and the determinations that follow to this office, for the last sentence of §89(4)(a) states that:

> "In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

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. Records relating to "town finances" are generally available, for none of the grounds for denial would be applicable or pertinent. Moreover, §29(4) of the Town Law states that the town supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

In addition, subdivision (1) of §119 of the Town Law states in part that:

> "When a claim has been audited by the town board of the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours."

In short, a variety of records concerning town finances are clearly public and, in my view, should be readily accessible.

Lastly, you indicated that the Supervisor "refuses to allow anyone to speak" at Town Board meetings. In this regard, although the Supervisor presides at meetings, §63 of the Town Law provides that the Town Board is empowered to adopt rules and procedures concerning the conduct of its meetings. I note, too, that the Open Meetings Law confers the right to attend meetings upon the public, but that there is no law that generally gives the public the right to speak or otherwise participate at meetings. Therefore, the Board is not required to permit the public to speak at meetings. Many public bodies, however, have chosen to authorize the public to speak, and in those instances, it has been recommended that they do so by means of reasonable rules that treat members of the public equally.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Edith Schanil

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13652

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Wayne R. Ruben
Market Intelligence Unit
Szerlip and Company
288 Main Street
Millburn, NJ 07041

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ruben:

I have received your note and the correspondence attached to it. You have sought direction relating to a denial of your request for a "list of service contractors who engage in commerce with the Town of Hempstead." The Town denied the request on the basis of §89(2)(b)(iii). That provision authorizes an agency to withhold a list of names and addresses if the list would be used for commercial or fund-raising purposes on the ground that disclosure in such a circumstance would constitute "an unwarranted invasion of personal privacy."

In consideration of the nature of the list that you requested, I do not believe that the provision upon which the Town relied in denying access is applicable or pertinent. On the contrary, if such a list exists, I believe that it must be disclosed.

Based on judicial decisions, §87(2)(b) and §89(2)(b), both which pertain to unwarranted invasions of personal privacy, are intended to apply to records that identify natural persons, not entities or persons acting in business capacities. In a decision rendered by the Court of Appeals, the state's highest court, 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 or persons acting in a business capacity, I do not believe that any of the grounds for denial would be applicable.

In an effort to enhance compliance with an understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the office of the Town Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Merik R. Aaron

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3529
FOIL-AO-13654

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Lynne E. Eckardt
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Eckardt:

I have received your letter in which you raised a variety of questions relating to access to records and meetings of the Architectural Review Board (hereafter "the Board") created by the Town of Southeast in August of 2000.

In consideration of the issues that you raised, I offer the following comments.

First, you indicated that in response to a request made under the Freedom of Information Law, you were informed that no minutes of meetings of the Board "had ever ben turned in to the Town Clerk."

Here I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require the governing body of a municipality, i.e., the Town Board, 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. In most towns, the clerk is the records access officer, for the clerk is also the legal custodian of town records, irrespective of where the records are kept [see Town Law, §30(1)].

Second and in a related vein, the Freedom of Information Law pertains to all government agency records, and §86(4) defines the term "record" broadly to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Therefore, insofar as the Board has produced, acquired or maintained records, I believe that they are Town records, again, irrespective of where the records may be located. That records have not been "turned over" to the Clerk is irrelevant; the records access officer, in my view, has the duty to direct the person in possession of requested records to disclose them in a manner consistent with law or obtain them in order to determine the extent to which they must be disclosed.

Third, it appears that the Board is a creation of law and constitutes a public body required to comply with the Open Meetings Law. Section 102(2) of that statute defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Judicial decisions indicate generally that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

In the decisions cited earlier, none of the entities was designated by law to carry out a particular duty and all had purely advisory functions. I would conjecture that more analogous to the matter is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511-512).

In most instances, architectural review boards and similar bodies do not make final decisions relating to construction in a municipality. However, they typically perform a necessary function in the process of reaching a decision. If that is so in this case, I believe that the Board is a public body required to comply with the Open Meetings Law.

The same conclusion can likely be reached by viewing the definition of "public body" in terms of its components. The Board is an entity consisting of more than two members; it is apparently required in my view to conduct its business subject to quorum requirements (see General

Construction Law, §41); and, based upon the preceding commentary, it conducts public business and performs a governmental function for a public corporation, i.e., a town.

It is also noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of the Law.

Next, §104 of the Open Meetings Law pertains to notice of meetings and requires that every meeting be preceded by notice given to the news media and posted. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Lastly, assuming that the Board is a public body, it is and has been required to prepare minutes of its meetings. Section 106 of the Open Meetings Law provides direction concerning the contents of minutes and the time within which they must be prepared and disclosed. Specifically, that provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, minutes must be prepared and made available within two weeks of meetings.

It is noted that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

In an effort to enhance their understanding of an ability to comply with open government statutes, copies of this opinion will be forward to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Architectural Review Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO-13655

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Brian R. Copeland
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Copeland:

I have received your letter and the correspondence attached to it. In your cover letter and other items, you expressed interest in obtaining "a list of teachers that should not be hired" that appears to be maintained by the New York City Department of Education. In other items, it appears that you are seeking only information pertaining to yourself. I will attempt to offer guidance with respect to both situations.

First, the statutes cited in the correspondence are the federal Freedom of Information and Privacy Acts, which apply only to records maintained by federal agencies. The statute that generally governs rights of access to government records in New York is the New York 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. From my perspective, two of the grounds for denial are pertinent to an analysis of rights of access.

Section 87(2)(g) deals with internal governmental communications and 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 officials are informed that they "should" not hire certain persons, i.e., if a recommendation has been made concerning hiring those persons, I believe that a list suggesting that those persons should not be hired could be withheld. However, insofar as the records at issue pertain to you and consist of factual information, I believe that those factual items pertaining to you would be accessible.

The other provision of significance, §87(2)(b), authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." In my view, you could not invade your own privacy when seeking records about yourself. That being so, again, factual information about you would appear to be accessible; opinions or recommendations could be withheld under §87(2)(g).

With respect to records pertaining to others, I do not know enough about the records to offer clear guidance. Nevertheless, I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sheldon d. Hychman
Susan Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1356

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Sam J. Radov
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Radov:

I have received your letter of September 3 and the correspondence attached to it.

You have sought guidance concerning your ability to gain access to records relating to a change in the income affidavit prepared by the cooperative in which you reside. The change was apparently made based on a legal opinion prepared by staff at the New York City Department of Housing Preservation and Development (HPD), and you are interested in obtaining records indicating " the specific reasons presented to support" the change.

In this regard, as a general matter, the Freedom is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, two of the grounds for denial are pertinent to an analysis of rights of access.

First, the correspondence indicates that the change was made "based upon on HPD legal opinion." That being so, relevant is the first ground for denial of access, §87(2)(a), concerning records that are "specifically exempted from disclosure by state or federal statute. One such statute, §4503 of the Civil Practice Law and Rules (CPLR), indicates that attorney-client communications are privileged and, therefore, exempt from disclosure in accordance with §87(2)(a) [see Williams & Connolly v. Axelrod, 527 NYS 2d 113,139 AD 2d 806 (1988), Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979]. Assuming that the legal opinion rendered by an HPD attorney has not been disclosed by the client, the agency decision-maker, I believe that it would remain privileged.

Also pertinent, as you suggested, 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.

With respect to the intent of §87(2)(g), the state's highest court has found 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, Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985).

In one of the decisions quoted above, McAulay, the request was similar to yours, and the Court upheld the agency's denial of access to opinions that might have been used to enable the head of an agency to reach a decision on a certain court of action. However, if a particular opinion has been "endorsed" by the decision maker, "adopting the reason as his own" (Miller v. Hewlett-Woodmere Union Free School District #14, Supreme Court, Nassau County, NYLJ, May 16, 1990), or "expressly adopted" [New York 1 News v. Office of the Borough President of Staten Island, 647 NYS2d 270 (1995), affirmed 231 AD2d 524 (1996)], the opinion would become a "final agency policy or determination" that would in my view, be accessible under §87(2)(g). Absent such acknowledgement that an opinion has been "endorsed" or "adopted", it appears that it may be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, NYC HPD

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13657

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Charles Roda
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Roda:

I have received your letter in which you sought assistance in gaining access to "the research gathered on the Irish Famine that is used for the curriculum written by the State Department of Education, and the financial annual reports/executives/board members/functions of the Public Authorities Control Board."

In this regard, first, enclosed are copies of §§50 and 51 of the Public Authorities Law, which describe the Public Authorities Control Board and its powers, functions and duties. While it does not appear those provisions require the Board to prepare an annual report, its determinations would appear in minutes of meetings accessible to the public.

With respect to the "research gathered" to develop the curriculum relating to the Irish Famine, a potentially significant issue involves whether a request "reasonably describes" the records sought as required by §89(3) of the 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)].

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 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, and I believe that a request would reasonably describe the records insofar as the records can be located with reasonable effort. On the other hand, if particular records cannot be located except by means of a review of what may be hundreds or thousands of records individually, the request would in my opinion not reasonably describe the records.

Further, research might involve information or knowledge acquired over the course of years by various persons from books, magazines, journals, library materials and any number of other sources. It may be difficult if not impossible to locate and identify such records, and in that instance. Consequently, a request for "research" may not reasonably describe the records as required by §89(3). On the other hand, if a bibliography or digest of source materials has been compiled, a record of that nature likely could be found with reasonable effort and would, in my view, be accessible under the Freedom of Information Law. Such a record might be used to locate materials in possession of or used by the State Education Department.

Internal departmental records might also have been prepared in the development of the curriculum. With respect to those and other records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Pertinent concerning rights of access to communications between and among government employees is §87(2)(g). Although that provision potentially serves as a basis for denial of access, it may also require disclosure. 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. Concurrently, those 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: Nellie Perez, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3531
FOIL-AO-13658

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Harold Scudder
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scudder:

I have received your letter and the correspondence attached to it. In brief, the matter involves your inability to gain access to a variety of records from the Town of Bombay relating to the assessment of real property. In a request made to the Town Clerk on August 7, you sought the following:

> "1. The reason for the BAR decision on my property.
>
> 2. Where and when I can file a petition for judicial review of my assessment.
>
> 3. A copy of all minutes of the BAR held in May of this year for all complainants, whether written or tape recorded.
>
> 4. The recorded vote of each member per decision for all complainants."

As of the date of your letter to this office, it appears that you had received no response. In this regard, I offer the following comments.

First, while I am not an expert concerning the assessment review process, I believe that you may seek review of your assessment in small claims court, the justice court in the Town. To obtain additional information pertaining to the process it is suggested that you contact the Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210-2714, or contact that office by phone at (518) 474-5446.

Second, pursuant to regulations promulgated by the Committee on Open Government that deal with the implementation of the Freedom of Information Law (21 NYCRR Part 1401), the Town Board is required to designate one or more persons as " records access officer." The records access officer has the duty coordinating the Town's response to requests. In most towns, the clerk is the records access officer. I note, too, that the clerk is also the legal custodian of all town records [see Town Law, §30(1)].

Third, if a record exists indicating the reason or reasons for the assessment of your property, I believe that such a record would be accessible under §87(2)(g)(iii) of the Freedom of Information Law. That provision requires that final agency determinations be disclosed.

Next, the Open Meetings Law is pertinent to the matter, for a board of assessment review is a "public body" required to comply with that statute [see Open Meetings Law, §102(2)]. While meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

Moreover, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Further, since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

In my opinion, because an assessment board of review is a "public body" and an "agency", it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of the votes of its members in conjunction with §87(3)(a) of the Freedom of Information Law.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

In an effort to enhance their understanding of compliance with 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
Hon. Tammy Tuper
Board of Assessment Review

FOIL-AO-13659

From: Robert Freeman
To: Melissa Freeman
Date: 10/17/02 3:23PM
Subject: Re:

The bills historically have been public. If you want to be somewhat astonished, take a look at section 51 of the General Municipal Law, which has been on the books for a century. It seems to me that the name and address that appears on the bill is and has always been public. Think about the assessment roll. Everyone knows that it's public, even though it identifies the owners of real property, the locations and the assessed value. It's accessible because the taxpayer's need to know that government is treating him/her fairly outweighs the minimal invasion of privacy that occurs via disclosure.

The only instance in which you would withhold the list would involve a request for a commercial or fund-raising purpose.

Call me if you need to discuss.

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-1366

From: Robert Freeman
To: [redacted]
Date: 10/17/02 4:53PM
Subject: I have received your letter relating to the Shenendehowa School District.

I have received your letter relating to the Shenendehowa School District.

Please be advised that the functions of this office relate to public access to government information. Consequently, we do not have the jurisdiction or the expertise to answer most of your questions.

With respect to your FOIL request, that statute requires that an agency respond to a request within five business days by granting access, denying access in writing, or acknowledging receipt of the request in writing if more than five business days may be needed to reply. If the agency acknowledges the receipt of the request, it must provide an approximate date indicating when it will be able to grant or deny the request. If that date is reasonable in view of the volume of the request, the need to search for records, etc., the agency would be complying with law. If no response is given within five business days, the request may be considered to have been denied, and the applicant may appeal. The appeal is made to the governing body of the agency (the Board of Education) or the person designated by the governing body to determine appeals.

I note that there is a decision of the Appellate Division indicating that the grades given to students in a certain class are accessible, following the deletion of personally identifiable details pertaining to students. In that case, because the list was alphabetical, the court ordered the school district to "scramble" the list so as to ensure that no student would be identified [see Kryston v. Board of Education, East Ramapo School District, 77 AD2d 896 (1980)].

A copy of this response will be sent to the District's FOIL officer.
I hope that I have been of assistance.

cc: Laraine Longhurst

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-13661

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Irving Schachter
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Schachter:

I have received your letter in which you sought my opinion concerning "three categories of records" that you requested from the New York City Department of Education. The records sought include:

> "1 - the final investigative report or memorandum from the Office of Special Investigations relating to the allegations against Rhona Cunningham described in the article
>
> 2 - the Office of Special Investigations' complete file(s) relating to the allegations against Rhona Cunningham described in the article
>
> 3 - the April 30, 2002 letter from John Lee to Rhona Cunningham relating to the allegations against Rhona Cunningham described in the article."

You also attached an article indicating that allegations had been "substantiated" and that the teacher "remains on the schools payroll while the case is pending" and that she has been reassigned.

In this regard, as you are aware, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, several grounds for denial are likely pertinent to the matter.

First, since the allegations appear to be based largely on complaints made by students, §87(2)(a) is relevant. That provision authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute is the federal Family

exempted from disclosure by state or federal statute." One such statute is the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g), which forbids an educational agency or institution from disclosing information that is personally identifiable to a student without the consent of a parent of the student. Therefore, insofar as disclosure of any portion of the record sought would make a student's identity easily traceable (see 34 CFR 99.3), the Department, in my view, could not disclose, absent consent to do so from a parent.

Second, although the teacher in question has been transferred from her teaching position, her status is unclear. If, for example, she has been transferred or suspended from teaching duties pending the determination of charges, but those charges have not yet been finally determined, it is likely that most if not all of the records sought could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b); Herald Company v. School District of the City of Syracuse, 430 NYS2d 460 (1980)]. Further, charges that had not yet been proven could be withheld as "intra-agency material", a category to be discussed in the ensuing paragraphs.

Section 87(2)(g) pertains to those materials and enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

One of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers

> Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is "predecisional" or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed, unless a different ground for denial, i.e., §87(2)(b), may be asserted.

Lastly, I am unaware of the nature of the investigation, the allegations or the stage to which it has proceeded. However, if, during an investigation, it is found that there may have been violations of the Penal Law, records from that point might be characterized as having been compiled for law enforcement purposes. In that instance, §87(2)(e) authorizes an agency to withhold such records to the extent that 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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joel I. Klein
Susan Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13603

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

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 of September 17 in which you sought assistance concerning requests for records made to the Hyde Park School District that had not, as of the date of your letter to this office, been answered by the District. In short, you requested the District's "salary list" on a computer disk.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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.

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. That provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record described above must be disclosed for the following reasons.

Pertinent is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would constitute "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30,

1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

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, with regard to the ability to acquire the record in an electronic storage medium, I point out that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held 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).

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: Superintendent
Mr. Debonis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13663

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 18, 2002

Mr. Nicholas Leone
[redacted]

Dear Mr. Leone:

I have received your letter and the correspondence attached to it. You have criticized the Office of Court Administration relative to your requests for information concerning the statewide registry of orders of protection and warrants, as well as information pertaining to you that is contained in the registry.

Based on a review of the materials and a discussion with staff of the Office of Court Administration, it appears that information sought regarding the registry has been made available, and that the contents of the registry pertaining to you, other than those portions indicating the date of birth and social security number of a person other than yourself, have been disclosed. That being so, I believe that the Office of Court Administration has met its obligations under the Freedom of Information Law.

As suggested in the correspondence, 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 or prepare a new record in response to a request for information. Similarly, although agency staff may and often do respond to questions raised by the public, there is no obligation imposed upon an agency by the Freedom of Information Law to do so. While that statute provides rights of access to records, it contains no provisions concerning the correction or amendment of records. Further, since the registry consists solely of court records, I believe that any effort to correct or amend records that you consider to be inaccurate would involve an application to the appropriate court, not the Office of Court Administration.

In short, the Office of Court Administration has, in my view, acted in a manner consistent with law, and I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Shawn Kerby
Theresa Breen
Elaine Best

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13664

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 18, 2002

Mr. Michael Coleman
02-R-1824
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601-0168

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Coleman:

I have received your letters and the attached materials in which you requested an advisory opinion regarding the propriety of a response to a Freedom of Information Law request you received from the Office of Court Administration (OCA). In consideration of your request for "registration statements" of an attorney and records indicating the attorney's "compliance with the mandatory Continuing Legal Education Requirements", the OCA sent you a variety of information pertaining to the attorney. Nevertheless, you complained that the Office of Court Administration was"unresponsive" to your request.

First, I note that this office has previously been informed by the OCA that a record characterized as an "attorney registration statement" is not a public record, but that a form known as an "AR 1" is made available to the public. That form includes the name of an attorney currently registered and in good standing, that person's business address, the Department of the Appellate Division to which he or she was admitted, and the year of admission. It appears that the OCA has provided you with an "AR1", as well as a history of registration payments and a statement indicating that the attorney is currently registered to practice. The OCA also indicated that "[Y]our request regarding CLE has been forwarded to that Department for processing."

Second, it appears that the basis for withholding the registration statement is §90(10) of the Judiciary Law, which states that:

> "Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct

> or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Based on the foregoing, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

If you still have not received a response regarding CLE information, in my view, you may request this information from the records appeals officer at the OCA.

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-13665

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 18, 2002

Mr. Bernard Fuller
01-R-5189
Ulster Correctional Facility
P.O. Box 800
Napanoch, NY 12458

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fuller:

I have received your letter and the attached materials in which you complained that the Office of Court Administration (OCA) denied your request for a "notification from the court" involving the sealing of charges that had been brought against you. You asked this office to contact OCA on your behalf.

In response to your Freedom of Information Law request, Ms. Shawn Kerby, Assistant Deputy Counsel, wrote in part that the Office had "no record responsive to your request because sealing notifications are transmitted electronically to the Division of Criminal Justice Services ('DCJS'). This Office can inform you only that the matter has been sealed."

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, I note that the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute provides in part that an agency need not create a record in response to a request. If OCA does not maintain the records sought, the Freedom of Information Law would not apply, and it would not be obliged to prepare or acquire a record containing the information of your interest.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm
cc: Shawn Kerby

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1346

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 21, 2002

Mr. John J. Culkin
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Culkin:

I have received your letter and the materials attached to it. In brief, you requested "contracts and/or retainers [sic] agreements between the State (State Insurance Fund) and the Law Firm of Hodgson Russ" concerning a grievance in which you are involved, as well as records "showing expenses paid, legal fees, investigatory fees or any and all billings" relating to the proceeding. The State Insurance Fund denied access to records on several grounds, most notably those relating to the attorney-client privilege and related exemptions from disclosure.

In this regard, first, I note that it has been held in a context unrelated to the Freedom of Information Law that records indicating monies paid and received by an attorney or law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS2d 10 (1975)].

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 first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it

is prepared or imparted pursuant to an attorney-client relationship [see e.d., 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 an attorney or firm retained by an agency may engage in a privileged relationship with a client, an agency and its staff, and that records prepared in conjunction with such an attorney-client relationship may be considered privileged under §4503 of the CPLR. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the attorney-client privilege is appropriately asserted and read in conjunction with §87(2)(a) of the Freedom of Information 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 the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant 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.)...
>
> "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 being communicated and, consequently, 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.)"

In short, in Knapp, it was found that those portions of billing statements indicating "the general nature of legal services performed", as well as certain others, did not fall within the attorney client privilege and were available.

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 initial contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications.
>
> "In this regard, the Court recognizes that not all communications between attorney and client are privileged. Matter of Priest v. Hennessy, supra, 51 N.Y.2d 68, 69, 409 N.E.2d 983, 431, N.Y.S.2d 511. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (Ibid.). Indeed, '[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given', but rather "[i]s a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged' Matter of Priest v. Hennessy, supra, 51 N.Y.2d at 69, 409 N.E.2d 983, 431 N.Y.S.2d 511.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel

> and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

In my view, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney-client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered ordinarily" would beyond the coverage of the privilege.

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 sum, 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 my view, the same analysis and result would be apt in the context of your requests.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeffrey R. Ritter
Kenneth J. Ross

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13667

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 21, 2002

E-Mail

TO: William S. Hecht <wsh6@cornelle.edu>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hecht:

As you are aware, I have received your letter of September 20. You referred to a newspaper article concerning an application to expand a salt mine and questioned how a company can "ask for" or be granted "confidentiality."

In this regard, there is one instance in the Freedom of Information Law in which a commercial entity may ask that records be kept confidential.

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. One of the grounds for denial deals with what is frequently characterized as "proprietary" information. Specifically, section 87(2)(d) permits an agency to deny access to records or portions of records that:

> "...are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtaining from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

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 agency, 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 agency 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 agency believes that the record should be disclosed, the entity would have the burden of proof.

With respect to the scope of the exception, 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 an 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).

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13668

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 21, 2002

Mr. Martus Granirer
President
West Branch Conservation Association
100 South Mountain Road
New City, NY 10956

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Granirer:

I have received your letter relating to a response to an appeal rendered by Rockland County in which it was indicated portions of the County's geographic information system (GIS) data had been withheld "for homeland security reasons and thus falls under the public safety exception of the FOIL law." You have asked whether the County sent a copy of its determination of your appeal to this office and whether there may be a basis for denial of access in a manner consistent with that offered by the County.

In this regard, first, the County did indeed transmit a copy of the determination of your appeal.

Second, in my view, there is no distinction in terms of rights of access between information maintained electronically, as in the case of GIS data, and information maintained on paper or some other medium. The contents of records and the effects of disclosure are the key factors in analyzing and determining rights of access. As you are aware, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several exceptions may be pertinent in the context of "homeland security" and in relation to your inquiry.

Perhaps of greatest significance 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." Although an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more of the grounds for denial [see §89(4)(b)], in the case of the assertion of that provision, the standard developed by the courts is somewhat less stringent. In citing §87(2)(f), it has been found that:

> "This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner's assertion that respondents are required to prove that a danger to a person's life or safety will occur if the information is made public (see, *Matter of Nalo v. Sullivan*, 125 AD2d 311, 312, *lv* denied 69 NY2d 612). Rather, there need only be a *possibility* that such information would endanger the lives or safety of individuals...."[emphasis mine; Stronza v. Hoke, 148 AD2d 900,901 (1989)].

The principle enunciated in Stronza has appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Divsion of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991), Fournier v. Fisk, 83 AD2d 979 (1981) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994], and it was determined in American Broadcasting Companies, Inc. v. Siebert that when disclosure would "expose applicants and their families to danger to life or safety", §87(2)(f) may properly be asserted [442 NYS2d 855, 859 (1981)]. Also notable is the holding by the Appellate Division in Flowers v. Sullivan [149 AD2d 287, 545 NYS2d 289 (1989)] in which it was held that "the information sought to be disclosed, namely, specifications and other data relating to the electrical and security transmission systems of Sing Sing Correctional Facility, falls within one of the exceptions" (id., 295). In citing §87(2)(f), the Court stated that:

> "It seems clear that disclosure of details regarding the electrical, security and transmission systems of Sing Sing Correctional Facility might impair the effectiveness of these systems and compromise the safe and successful operation of the prison. These risks are magnified when we consider the fact that disclosure is sought by inmates. Suppression of the documentation sought by the petitioners, to the extent that it exists, was, therefore, consonant with the statutory exemption which shelters from disclosure information which could endanger the life or safety of another" (id.).

In short, although §87(2)(f) refers to disclosure that *would* endanger life or safety, the courts have clearly indicated that *"would"* means *"could."*

Another exception relevant in preventing harmful effects of disclosure in a law enforcement context 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."

Based on the foregoing, it is clear that an agency may withhold records when disclosure would interfere with an investigation or, under subparagraph (iv), reveal techniques or procedures which could enable potential lawbreakers to evade detection or effective law enforcement.

In short, while I am unaware of the nature of the geographic information that was withheld, it is not inconceivable that there may have been appropriate grounds for denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Terry D. Grosselfinger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13669

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 21, 2002

Mr. Albert R. McEvoy
Private Investigator
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 information presented in your correspondence.

Dear Mr. McEvoy:

I have received your letter and the materials attached to it. In brief, you have sought my opinion concerning the treatment of a request made under the Freedom of Information Law to the City of White Plains.

You wrote that you were conducting "a health care employment background check and that [you] had a release from the subject being investigated." Your request involved any record indicating that the subject "had a criminal conviction record with the White Plains Police Department." You were informed that you would "have to come in person to obtain it", but when you did so, you were told that you could not have the information at that time, but that you would "hear from them in few days." Soon after, you received a call from the records division at the Police Department, who told you that the Department "does not provide records for private purposes, only for other police agencies." That phone call "was the last [you] heard on the matter, officially."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all records of an agency, such as the City of White Plains, and §86(4) defines the term "record" to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Therefore, insofar as the City maintains records involving the subject of your interest, they would be 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. If your description of its response is accurate, that the Police Department "does not provide records for private purposes", I believe that, as a matter of law, it would be acting in a manner inconsistent with the Freedom of Information Law. The courts have long held that the status or interest of a person seeking records is irrelevant [see Burke v. Yudelson, 368 NYS2d 777, aff'd 51 AD2d 673, 378 NYS2d 165 (1976) and M. Farbman & Sons v. New York Heal and Hosps. Corp., 62 NY2d 75 (1984)]; the only means of denying access to records involves the proper assertion of one or more grounds for denial appearing in section 87(2).

When the source of criminal history information is the Division of Criminal Justice Services, the information has been found to be beyond the coverage of the Freedom of Information Law. In that situation, the records, based on judicial decisions, are specifically exempted from disclosure by statute and may be withheld under §87(2)(a) (see e.g., Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989). However, if the City maintains records of convictions separate from those received by the Division of Criminal Justice Services, those records must be disclosed. The Court of Appeals, the state's highest court, determined that records reflective of finding or admissions of violations of law are accessible under the Freedom of Information Law [see Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 61 NY2d 958 (1984)]. Consequently, insofar as such records exist and are maintained by the City, I believe that they would be available to any person, irrespective of the purpose of a request.

Lastly, as indicated in previous correspondence, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. I note, too, that the regulations promulgated by the Committee on Open Government specify that a denial of access must be in writing, and that the written denial must inform the applicant of the right to appeal the denial [see 21 NYCRR Part 1401; Barrett v. Morgenthau, 144 AD2d 1040, 74 NY2d 907 (1990)]. Further, under section 89(3), if a response to a request indicates that an agency does not maintain a requested record or cannot locate the record, an applicant may request a certification in writing in which the agency attests that it does not possess the record or that the record could not be found after diligent search.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Edward Dunphy
Chief Bradley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13670

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 21, 2002

Mr. David Zaire
83-A-2242
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 facts presented in your correspondence.

Dear Mr. Zaire:

I have received your letter and attached material in which you requested that this office review "the propriety of each redaction" contained in a record you received from your facility. The record apparently originated from the Inspector General's Office. You wrote that " the Department's Counsel upheld the redactions on the premise that (1) release of the redacted information would 'endanger another' and (2) the document/investigation report is 'not a final determination of the (Inspector General's Office)."

Since I am unfamiliar with the content of the information redacted from the record, I cannot offer specific guidance on this matter. However, 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. Several grounds for denial may be pertinent with respect to a report prepared by the Inspector General.

First, of potential relevance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Insofar as the records identify persons other than yourself, that provision might serve as a ground for denial.

I note that several court decisions have dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an

unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. In addition, to the extent that charges are dismissed or allegations are found to without merit, I believe that they may be withheld. I note, too, that any such records relating to a correction officer, regardless of the outcome, would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

Second, in view of the duties of the Inspector General, also potentially relevant is §87(2)(e), which states in part that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings...
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

A third ground for denial of apparent relevance would be §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Many of the records prepared in conjunction with an investigation would constitute inter-agency or intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. For instance, recommendations concerning the course of an investigation or opinions offered by employees interviewed would fall within the scope of the exception.

Lastly, §87(2)(f) permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person."

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13671

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 21, 2002

Ms. Lauren Meacham
[redacted]

The staff of the Committee on 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. Meacham:

I have received your letter of September 20 and the correspondence attached to it. You have sought an advisory opinion concerning the propriety of a response to your request under the Freedom of Information Law by the Village of Voorheesville.

By way of background, in a request made in August, you requested several categories of records, one of which involved the "first page of each resume or the first page of each application, with the personal identifying information deleted, for any person who applied for the position of Village Clerk in 2002." That portion of your request was denied on the basis of §87(2)(b) of the Freedom of Information Law. In addition, you were asked to pay for copies determined to be available by check or money order; it was specified that you cannot "submit cash."

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) provides all records are available, except "records or portions thereof" that fall within the grounds for denial of access that follow. The phrase quoted in the preceding sentence indicates that situations may arise in which a single record includes both accessible and deniable information, and that an agency is obliged to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

Second, it is clear that the names and addresses of applicants for appointment to public employment need not be disclosed [see Freedom of Information Law, §89(7)], and that portions of a resume or an application for employment may be withheld under §§87(2))(b) and 89(2) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." The latter

provision contains a series of examples of unwarranted invasions of personal privacy, the first of which makes specific reference to the disclosure of employment histories; another refers to information of a personal nature in some circumstances. However, in a manner similar to §87(2), that provision specifies that disclosure "shall not be construed to constitute an unwarranted invasion of personal privacy....when identifying details are deleted" [§89(2)(c)(i)]. Therefore, in my view, the records in question should be disclosed following the deletion of personally identifying details. I note that in some instances, the deletion of a name and address alone may not be sufficient to ensure that a person's identity will not become known. In those situations, I believe that an agency may delete any details which, if disclosed, would permit the identity of the subject of the record to become known. I note that in a somewhat analogous request by a faculty member of a branch of the City University of New York for resumes of those promoted to full professor during a given period in order that he could compare his credentials to those of others, the court determined that the records must be disclosed following the deletion of personally identifying details [Harris v. City University of New York, Baruch College, 114 AD2d 805 (1985)].

Lastly, there is nothing in the Freedom of Information Law that pertains specifically to the means by which fees for copies should be paid. In the only decision of which I am aware, it was found that the County Board of Elections "failed to provide a reasonable and rationale basis to justify their policy of requiring payment of fees for copying of records in the form of only bank checks or money orders", and it was ordered that the agency be required to accept payment in United States currency as well [Reese v. Mahoney, Supreme Court, Erie County, June 28, 1984]. Based on the decision reached in Reese, it appears that the Village is required to accept United States currency as legal tender for payment for photocopies prepared in response to a request under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Derris V. Tidd, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-13672

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Jim Torczyner
MCGILL
School of Social Work
3506 University Street, Room 113
Montreal, QC, Canada H3A 2A7

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Torczyner:

I have received your letter and the materials attached to it concerning your ability to gain access to the "standards, manuals, and procedures" used by the Town Assessor in the Town of Willsboro. He indicated that those materials consist of thousands of pages, that they are not accessible to the public, and that a computerized version of those records is, in your words, "inaccessible as it required specialized software which is unavailable to the public." You asked that I "order" the Town to make the records available to the public.

In this regard, the Committee on Open Government is authorized to offer advice and opinions relating to public access to government information, primarily under the state's Freedom of Information and Open Meetings Laws. The Committee is not empowered to "order" an agency to make records available or otherwise compel an agency to comply with law.

Nevertheless, in an effort to learn more of the matter and provide assistance, I contacted the Office of Real Property Services (ORPS), the state agency that oversees the assessment of real property. I was informed that the records in question do in fact consist of thousands of pages and that they are published in seven volumes, each of which is available for purchase at a price of seventy-five dollars. However, I was also informed that the materials are available at no cost via ORPS' website; the address is <www.orps.state.ny.us>. The materials consist of standards adopted by the International Association of Assessing Officers (IAAO) and reflect what were characterized as "international norms" used in the assessment process.

With respect to rights of access under the Freedom of Information Law, that statute pertains to all records maintained by or for an agency, such as a town, for §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, any standards, manuals or written procedures maintained by or for the Town or its assessor constitute "records" that fall within the framework of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In consideration of the information provided by ORPS, that the records at issue were prepared outside of government, none of the grounds for denial could in my view be properly asserted to withhold the records of your interest. In other circumstances, those in which an agency develops standards, policies, procedures or similar records, I believe that they would be equally available. Pertinent in those instances is §87(2)(g). While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. Specifically, §87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The kinds of records that you requested have been viewed as an agency's "secret law" and are intended to be accessible to the public. In a letter addressed to me on July 21, 1977 by Assemblyman Mark Siegel, the primary sponsor of the amended Freedom of Information Law in 1977 and the author of the provision, he wrote that:

> The basic intent of [section 87(2)(g)] is twofold. First, it is the intent that any so-called 'secret law' of an agency be made available. Stated differently, records or portions thereof containing any statistical or factual information, policy, or determinations upon which an agency relies is accessible. Secondly, it is the intent that written communications, such as memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency might not be made available if they are advisory in nature and contain no factual information upon which an agency relies in carrying out its duties."

In my view, the records of your interest reflect the policy of the Town Assessor in carrying out his duties and should be accessible to the public.

I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and requests should ordinarily be made to that person. A town clerk is the legal custodian of all town records and is typically designated as records access officer.

Lastly, when discussing the matter with a representative of ORPS, I indicated that you were informed by the assessor that the records at issue could not be obtained without special software. As stated earlier, she told me that they are available on line through the ORPS website and that certain applications, not the records of your interest, can only be accessed through the use of software that is generally unavailable to the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Town Clerk
Bob Rowe, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13623

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Antonio Marinaccio
01-A-1886
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Marinaccio:

I have received your letter in which you requested guidance in obtaining "information concerning a court appointed attorney (Section 18B) from the County of Nassau, New York. This information that [you] would like to obtain would be a list of person(s) (dating back a few years) the attorney [who] was assigned (by Nassau County Court) to represent under Section 18B status and the amount of payment he received for representing such individuals."

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."

In turn, §86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the Freedom of Information Law applies, in general, to records of entities of state and local government in New York. It does not apply to courts or 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.

With regard to your ability to obtain the record of your interest, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If such a list exists, I believe that it would be available, except to the extent that it identifies persons against whom charges were dismissed (see Criminal Procedure Law, §160.50). However, I note that the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, if an agency does not maintain the records sought, the Freedom of Information Law would not apply.

Lastly, in response to your request for a blank Freedom of Information Law request 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 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.

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-13674

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Ms. Pam Piazza
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Piazza:

I have received your letter and the materials attached to it. In brief, you wrote that the Police Chief of the Lakewood/Busti Police Department has adopted a policy of charging $2.50 per photocopy and $25.00 for copies of video recordings. When you questioned the fees, the Chief, according to your letter, indicated that the Department routinely charges those amounts and informed you that both the County Attorney and the District Attorney told him that he is permitted to do so.

Based on the legislative history of the Freedom of Information Law, its language, and judicial interpretations, the "policy" adopted by the Chief is inconsistent with law. In short, 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, or the actual cost of reproducing other records (i.e., videotapes), no such fees may be assessed. In this instance, I know of no statute that would authorize the Chief or any local government agency to do so.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute',

> thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987); Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS2d 214, 226 AD2d 339 (1996)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
>
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

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 Chief of Police.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Bentley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13675

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Mark I. Cushman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cushman:

I have received your letter concerning delays by the Village of Ilion in responding to your request made under the Freedom of Information Law. According to your letter, among four categories of records sought, three involve matters that had been addressed recently by the Board of Trustees and other Village officials.

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, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the state's highest court, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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 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.

Among the records sought are audits and other materials prepared by an auditing firm of the Village. Here I point out that section 87(2)(g)(iv) specifies that "external audits", audits prepared by an entity other than the Village, are accessible. Another category involves requests made under the Freedom of Information Law by a particular person during a specified period. From my perspective, with the exception of portions of certain kinds of requests, those records are accessible under the law. In my view, the only instances in which requests for records may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a village board, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, Nay 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Gale Hatch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13676

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 23, 2002

Mr. Robert Wagner
00-A-5100
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403-3600

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Wagner:

I have received your letter and material in which you requested an opinion regarding the propriety of a response to your request for records from the Office of the Special Narcotics Prosecutor for the City of New York.

You wrote that your appeal to the Appeals Officer "generated a response affirming the denial and citing that they were unable to locate" the records of your interest.

In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

If you consider it worthwhile, you may consider requesting such a certification.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

FOIL-AO-13677

From: Robert Freeman
To: [redacted]
Date: 11/4/02 4:19PM
Subject: Dear Mr. Shields:

Dear Mr. Shields:

I have received your message, and as it has been communicated, you asked whether a city budget is "foilable" and whether the city can charge 25 cents per page for photocopies of its contents.

In this regard, first, as a general matter, FOIL is based on a presumption of access and states that all government agency records are accessible, except to the extent that exceptions listed in the law may properly be asserted. In the case of an agency's budget, none of the grounds for denial, in my view, would apply, and that kind of record must be disclosed.

Second, while an agency cannot charge for the inspection of accessible records, the law provides that it may charge up to twenty-five cents per photocopy up to nine by fourteen inches when a duplicate of a record is requested.

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-13628

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 4, 2002

Mr. Aaron Pino
99-A-6894
Franklin Correctional Facility
62 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. Pino:

I have received your letter in which you requested assistance in obtaining your "security-assessment-summary report" from 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. Since I am unfamiliar with the contents of the record of your interest, I cannot conjecture as to its availability. However, 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 enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I point out that a decision rendered in 1989 might have dealt with 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)].

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-13629

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 4, 2002

Mr. Alan Newton
85-A-3855
Box 1991
Route 36, Sonyea Road
Sonyea, NY 14556

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Newton:

I have received your letter in which you questioned your ability to obtain "a copy of the victim's hospital record" and a "testifying eyewitness' grand jury testimony" from the office of a district attorney.

In this regard, first, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, with respect to the records of your interest, 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 any 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.

Lastly, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

> "Grand jury proceeding 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, disclosed 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 I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

From: Robert Freeman
To: [redacted]
Date: 11/5/02 3:32PM
Subject: Dear Mr. Engle:

Dear Mr. Engle:

I have received your letter in which you asked whether "DBA certificates [are] only searchable by the county clerk." Since I am not an expert on the subject, I attempted to conduct research on your behalf. Based on my findings, pursuant to section 130(1)(b) of the General Business Law, I believe that a DBA certificate pertaining to a corporation must also be filed with the Secretary of State.

You also asked whether building permits are accessible to the public and how long they must be kept. In this regard, the Freedom of Information Law is based on a presumption of access, stating that all government records are available, unless an exception to rights of access appearing in section 87(2) of that law may properly be asserted. In my view, none of the grounds for denial of access would be applicable to building permits.

With regard to the retention of those records, under Article 57-A of the Arts and Cultural Affairs Law, the Commissioner of Education through the State Archives prepares schedules indicating minimum retention periods for various classes of records. Some must be kept permanently; others may be discarded instantly; and still others may have to be kept for particular periods of years based on their significance. I am unaware of the retention period pertaining to building permits, but I believe that that information can be acquired by contacting the State Archives. The phone number is (518)474-6926.

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-13681

From: Robert Freeman
To: [redacted]
Date: 11/5/02 11:50AM
Subject: Dear Ms. Amrhein:

Dear Ms. Amrhein:

I have received your inquiry, which involves a variety of records of historical interest.

In this regard, as you are likely aware, the State Health Department has developed rules regarding the disclosure of genealogical records (birth, death and marriage). If you are unfamiliar with them, I believe that they can be acquired via the Department's website, which is <www.health.state.ny.us>.

With respect to coroner's records, section 677 of the County Law states that autopsy reports and related records prepared by a coroner or medical examiner are available as of right only to a district attorney or the next of kin. However, there is nothing in that law that prohibits disclosure of those records. Therefore, a government agency that maintains those records may choose to disclose them. It is suggested that you specify that you are an historian and that requests for such records are for purposes of research and scholarship, and that the events to which the records are, at this juncture only of historical significance.

With regard to "poorhouse" and similar materials, section 136 of the Social Services Law provides that records pertaining to applicants for or recipients of public assistance are confidential. That provision, however, was enacted in 1940 and likely would not apply to the kinds of records at issue. If that is so, I believe that the Freedom of Information Law would likely apply. Although that law states that a government agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy", if the persons identified in the records died decades ago, that exception, in my view, would not apply. Again, the records at this point would be of purely historical significance, and that factor should be stressed.

If you would like to discuss the matter further, please feel to contact me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-13682

From: Robert Freeman
To: kathleen.murray@town.southold.ny.us
Date: 11/5/02 10:47AM
Subject: Dear Ms. Murray:

Dear Ms. Murray:

As you are aware, I have received your inquiry, and I hope that you will accept my apologies for the delay in response.

The matter involves access to records indicating the names of employees of the Southold Police Department who are members of the US Marshal Service, as well as their dates of service. In my view, insofar as such information exists in the form of a record or records, it must be disclosed.

There are numerous decisions relating to the privacy of public employees and, in general, the courts have determined that those items pertaining to public employees that relate to or are relevant to the performance of their official duties are accessible. In those instances, disclosure would constitute a permissible rather than an unwarranted invasion personal privacy.

Somewhat tangential is a provision in FOIL specifying that agency must maintain a record identifying every employee by name, public office address (not home address), title and salary. That kind of record has long been public, and in my opinion, an indication that an officer is a sworn US marshal relates to his or her governmental duties and would not rise to the level of an unwarranted invasion of privacy. Further, decisions rendered by the Court of Appeals indicate that attendance records pertaining to public employees are public. Therefore, I believe that dates of service would be accessible as well.

I am mindful that section 50-a of the Civil Rights Law prohibits disclosure of certain personnel records pertaining to police officers. However, the prohibition extends only to those personnel records that are "used to evaluate performance toward continued employment or promotion." The items at issue would not appear to fall within that kind of characterization.

In short, I believe that the items in question, if they exist, should be disclosed. If you would like to discuss the matter, please feel free to contact me.

I hope that I have been of assistance.

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-13683

From: Robert Freeman
To: jdiefenderfer@dc-northeast.org
Date: 11/5/02 4:40PM
Subject: Dear Mr. Diefenderfer:

Dear Mr. Diefenderfer:

I have received your note in which you indicated that you are an archivist and that you received student records from a private nursing school that cover a period from 1932 to 1956. You wrote that the school was located in Philadelphia but that the archives where you work is in New York. You have asked whether the "privacy laws" of New York or Pennsylvania apply.

In this regard, I offer the following comments.

First, if the nursing school still exists, the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC 1232g, enacted in 1974) might apply. In brief, FERPA is applicable to student records maintained by any educational institution in the US that receives federal funding or participates in a federal loan program, and it prohibits such institutions from disclosing personally identifiable information pertaining to students without the consent of a parent of a student under the age of eighteen or the student if he or she has attained that age. If you have received the records, I would conjecture that FERPA does not apply; if it did, and if the school complied with that statute, the records would not likely have been disclosed.

Second, assuming that FERPA does not apply, I know of no privacy law in NY that would pertain to or restrict your ability to disclose records. I note that the Freedom of Information Law, which includes provisions dealing with the protection of privacy, applies only to records maintained by or for government agencies; it does not apply to private institutions.

Third, if you are located in New York, since Pennsylvania cannot ordinarily apply its laws beyond its borders, I do not believe that the law of that state would, at this juncture, be pertinent.

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 - 13684

Some on 13680

From: Robert Freeman
To: [redacted]
Date: 11/5/02 3:32PM
Subject: Dear Mr. Engle:

Dear Mr. Engle:

I have received your letter in which you asked whether "DBA certificates [are] only searchable by the county clerk." Since I am not an expert on the subject, I attempted to conduct research on your behalf. Based on my findings, pursuant to section 130(1)(b) of the General Business Law, I believe that a DBA certificate pertaining to a corporation must also be filed with the Secretary of State.

You also asked whether building permits are accessible to the public and how long they must be kept. In this regard, the Freedom of Information Law is based on a presumption of access, stating that all government records are available, unless an exception to rights of access appearing in section 87(2) of that law may properly be asserted. In my view, none of the grounds for denial of access would be applicable to building permits.

With regard to the retention of those records, under Article 57-A of the Arts and Cultural Affairs Law, the Commissioner of Education through the State Archives prepares schedules indicating minimum retention periods for various classes of records. Some must be kept permanently; others may be discarded instantly; and still others may have to be kept for particular periods of years based on their significance. I am unaware of the retention period pertaining to building permits, but I believe that that information can be acquired by contacting the State Archives. The phone number is (518)474-6926.

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

NO

13684

AO

FOIL-AO-13685

From: Robert Freeman
To: [redacted]
Date: 11/5/02 4:26PM
Subject: Dear Ms. Schiavone:

Dear Ms. Schiavone:

I have received your inquiry concerning a situation in which a response to your request to the Village of Tuckahoe for records apparently failed to include documents that you believe exist. You have asked how you may "approach this issue."

In this regard, first, it is suggested that you contact the person who responded and express your belief that your request included items that were not made available, and that you might provide an indication of the nature of those documents.

Second, if an agency responds to a request and indicates that it does not maintain a certain record, under section 89(3) of the Freedom of Information Law, upon your request, the agency "shall certify that it does have possession of such record or that such record cannot be found after diligent search."

Third, if you believe that the agency has denied access to certain records, it is required to inform you of the denial and of your right to appeal the denial pursuant to section 89(4)(a) of the Freedom of Information Law. Under that provision, an appeal would be made to the Board of Trustees or a person designated by the Board to determine appeals.

I hope that I have been of assistance.

cc: Records Access Officer

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-13686

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 5, 2002

Mr. Arthur Green
76-A-3097
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. Green:

I have received your letter in which you questioned the propriety of a response from the New York City Police Department which indicated that your Freedom of Information Law request was being denied due to its breadth and because you "did not describe a specific document." You also indicated that you have not received a response form the records appeals officer.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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 New York City Police Department, to the extent that 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.

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-13687

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 5, 2002

Mr. Frank DiChiara
79-A-1771
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. DiChiara:

I have received your letter in which you wrote that you received partial responses to your Freedom of Information Law requests to the Kings County District Attorney's office and the New York City Police Department after waiting "over a year for the documents."

You asked whether an agency is required to provide you with a "certified statement that they have done a diligent search of the complete files." You also asked whether you should have to "wait a long period of time for an answer on certification" considering that you waited "over a year for the documents in [your] case."

In this regard, with respect to an 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)].

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 cannot be found after diligent search."

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

FOIL AC-13688

From: Robert Freeman
To: [redacted]
Date: 11/6/02 8:02AM
Subject: Re: Dear Ms. Schiavone:

Dear Ms. Schiavone:

Having read your remarks, it is reiterated that you request the certification to which I alluded yesterday, and that you refer specifically to the documentation that you believe to be "missing."

In addition, if you feel that it is appropriate to do so, you might point out that there are provisions in the Freedom of Information Law [section 89(8)] and the Penal Law [section 240.65] that deal with what I have come to call "bad faith" responses to requests. Those provisions deal with situations in which, following a request for a record, an agency official denies its existence, knowing that it does exist, or destroys a record to prevent its disclosure. Specifically, the Penal Law provision 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 [the Freedom of Information Law], he willfully conceals or destroys any such record. Unlawful prevention of public access to records is a violation."

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-13689

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 6, 2002

Mr. Jonathan Odom
92-T-0387
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. Odom:

I have received your letter in which you explained that the Department of Correctional Services has refused to identify the employees who provided information regarding your use of law library services. Mr. Anthony J. Annucci, Deputy Commissioner and Counselor of the Department of Correctional Services denied your request because it was "for information and therefore, beyond the scope of the Freedom of Information Law."

In this regard, I offer the following comments.

First, in terms of rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With certain exceptions, the Freedom of Information Law 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..."

If indeed the Department of Correctional Services does not maintain a record which identifies those employees who provided information relating to your use of library services, there is nothing to be disclosed under the Freedom of Information Law, and the agency would not be obliged to prepare a record containing the information.

I hope that the foregoing serves to enhance your understanding of the law.

Sincerely,

David Treacy
Assistant Director

DT:tt

FOIL-AO-13690

From: Robert Freeman
To: [redacted]
Date: 11/7/02 11:12AM
Subject: Dear Chairman Erck:

Dear Chairman Erck:

I have received your inquiry concerning public access to a list of names and addresses of persons having pistol permits in Niagara County. In this regard, section 400.00 of the Penal Law is entitled "Licenses to carry, possess, repair and dispose of firearms", and subdivision (5) states in relevant part that: "The name and address of any person to whom an application for any license has been granted shall be a public record." That being so, I believe that a list of names and addresses of those to whom pistol permits have been issued must ordinarily be made available to the public.

The only exception to the foregoing relates to a provision in the Freedom of Information Law, section 89(2)(b)(iii), which states that an agency may deny access to a list of names and addresses if the list would be "used for commercial or fund-raising purposes" on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." Therefore, if, for example, a list of pistol license holders is sought for purposes of commercial solicitation or fund-raising, I believe that it may be withheld. In other circumstances, however, the list, in my opinion, would be accessible.

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-13691

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 7, 2002

Ms. Caroline Reichenberg
Town Clerk
Town of Dover
126 East Duncan Hill Road
Dover Plains, NY 12522

The staff of the Committee on 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. Reichenberg:

I have received your letter of October 1 and the materials attached to it. Please accept my apologies for the delay in response. You have asked whether the Town must honor a voluminous request for records.

The request encompasses "eight subdivision plans, SEQR documents, public hearing minutes, comments from Town Engineers, Attorneys and other retained professionals." You indicated that the records sought cover a range of thirteen years.

In this regard, first, 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 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 hundres 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, insofar as the request has met the requirement of reasonably describing the records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, items such as subdivision plans, "SEQR documents", and minutes of meetings and hearings are clearly accessible, for none of the grounds for denial would apply. However, the other kinds of records to which you referred, those prepared by Town officers or employees, its consultants or attorneys might justifiably be withheld in whole or in part, depending on their contents.

With respect to internal communications, those between or among officers or employees of the Town, §87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other

material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

Insofar as the records sought involve requests for or the rendition of legal advice by an attorney employed or retained by the Town, I believe that they would fall within the scope of the attorney-client privilege. In that instance, the records would be exempt from disclosure by statute [see Civil Practice Law and Rules, §4503; Freedom of Information Law, §87(2)(a)].

Lastly, when a record is available in its entirely under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, 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. Further, if the applicant for the records in this instance is seeking copies, it has been held that an agency may seek payment in advance of making copies when a request is voluminous (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-13692

From: Robert Freeman
To: as1301@nyu.edu
Date: 11/8/02 8:11AM
Subject: Dear Ms. Singh:

Dear Ms. Singh:

I have received your note concerning a failure by a state agency to respond to an appeal following a denial of a FOIL request. In this regard, section 89(4)(a) of FOIL specifies that a determination must be rendered within 10 business days of the receipt of an appeal. It has been held that an agency's failure to render a determination within that time constitutes a denial of the appeal. In that instance, the applicant for the records may be deemed to have exhausted his or her administrative remedies and may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)].

One of the functions of this office involves the preparation of advisory opinions. While they are not binding, it is our hope that they are educational and persuasive, and they they may negate the need to litigate. If you can provide additional detail regarding the matter, I would be pleased to attempt to assist, either via phone or by means of a written opinion, or both.

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-1363

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 8, 2002

Ms. Rosalyn Ayers
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Ayers:

I have received your letter in which you sought assistance in obtaining immunization records. You indicated that you entered the New York City public school system in 1952.

In this regard, first, I note that the Freedom of Information Law is applicable to all records maintained by or for an agency of state or local government in New York. Therefore, if, for example, the records of your interest are maintained by the New York City Department of Education or the City Department of Health, those entities would fall within the coverage of that law. I point out, however, that the Freedom of Information Law pertains to existing records. If the records of your interest have been destroyed, that law would not apply and your rights of access would have been eliminated.

Second, assuming that the records continue to exist, a request should be made to the "records access officer" at the agency or agencies that you believe would maintain the records of your interest. The records access officer has the duty of coordinating the agency's response to requests for records. While I am unaware of the identity of the records access officer at the Department of Health, the address of that agency is 125 Worth Street, New York, NY 10013. The records access officer at the Department of Education is Susan Holtzman, and her address is Office of Legal Services, 52 Chambers St., Room 309, New York, NY 10007. When seeking records, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, a request should include detail sufficient to enable the staff of an agency to locate and identify the records.

Third, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. If the records exist, I believe that they would be available to you when you offer reasonable proof of your identity. That is necessary, for the records in question pertain only

to you and would, if disclosed to the general public, constitute "an unwarranted invasion of personal privacy" [see §§87(2)(b) and 89(2)(b)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13694

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 8, 2002

E-MAIL

TO: Evan Lowenstein <Elowenstein@RACF.org>

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lowenstein:

I have received your letter in which you asked whether a municipality may properly deny a request for access to a tape recording of a meeting of a municipal board.

From my perspective, the denial of such request is not only inconsistent with law, it is illogical. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when a municipal board maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law, irrespective of the reason for which the recording was prepared.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, case law indicates that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

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 municipal board and perhaps the staff of a municipality 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 municipality that captures words knowingly expressed in public pursuant to board members' statutory duties is, in my opinion, unsupportable and clearly inconsistent with law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13695

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. Christopher Holmes
01-R-0941
Mt. McGregor Correctional Facility
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 facts presented in your correspondence.

Dear Mr. Holmes:

I have received your letter in which you requested assistance from this office in acquiring information regarding "items (inventoried) removed" from a residence and records related to a police officer's "dismissal from duty." You wrote that you requested records from "NYS Trooper Barracks of Middletown, New York", and have not received a response.

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, 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 they duty of coordinating an agency's response to requests, and a request should ordinarily be directed to that person. Under the circumstances, it is suggested that you submit your request to the records access officer at the New York State Police, Lt. Laurie Wagner, State Campus, Building 22, Albany, NY 12226.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 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.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, in reviewing the legislative history leading to its enactment, found that:

> "Given this history, the Appellate Division correctly determined that the legislative intent underlying the enactment of Civil Rights Law section 50-a was narrowly specific, 'to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action' (Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, 109 AD 2d 92, 96). In view of the FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50-a should not be construed to exempt intervenor's 'Lost Time Record' from disclosure by the Police Department in a non-litigation context

under Public Officers section 87(2)(a)" [Capital Newspapers v. Burns, 67 NY 2d 562, 569 (1986)].

It was also determined that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568). In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

It is emphasized that the bar to disclosure imposed by §50-a deals with personnel records that "*are used to evaluate performance toward continued employment or promotion.*" If the officer in question has left the department, there is no issue involving continued employment or promotion; he is no longer an employee or a police officer. That being so, in my opinion, the rationale for the confidentiality accorded by §50-a is no longer present, and that statute no longer is applicable or pertinent [see Village of Brockport v.Calandra, 745, NYS 2d 662(2002)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13696

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 8, 2002

Mr. James Rizzo
95-A-3842
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. Rizzo:

I have received your letter in which you raised a variety of issues related to the Freedom of Information Law.

First, please note that most of the issues have previously been addressed by this office in letters written to you earlier this year. In the event that you have misplaced those letters, I have enclosed copies for your review.

Second, one of the issues pertains to the absence of any expressed reason for withholding records. In this regard, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the Freedom of Information Law. Section 1401.2 (b)(3) states that an agency's records access officer is responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor." Based on the foregoing, the reasons for a denial of access must be stated in writing. This is not to suggest that any such reasons must be explained in an exhaustive manner or provided for each record. Later in the process of seeking records, if an appeal is denied, §89(4)(a) provides that the reason must be "fully explain[ed] in writing." Please see the enclosed letter of July 16 for further discussion of the issue.

Lastly, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was previously made available to you or your attorney, i.e., in conjunction with a criminal proceeding, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and

currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13697

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 12, 2002

Mr. Thomas Dallio
88-T-2364
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13021

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Dallio:

I have received your letter in which you asked how your facility can be "properly required to disclose videotapes through FOIL." You wrote that the tapes are recycled after fourteen days and "facility staff are automatically denying all FOIL requests for video-recordings because by the time an appeal is responded to it'll be past 14 days of the date of the video-recording."

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, 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I do not believe that an agency can destroy or dispose of a record that has been requested pursuant to the Freedom of Information Law. The record must, in my view, be preserved during the pendency of any request or appeal.

With respect to the videotapes, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, two of the grounds for denial are pertinent to an analysis of rights of access. The extent to which they may properly be asserted is, in my opinion, dependent on the nature of the depictions on the videotapes.

Relevant are §87(2)(b), which authorizes an agency to withhold records when disclosure would constitute " an unwarranted invasion of personal privacy", and §87(2)(f), which enables an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person."

In a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

> "...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution. Moreover, respondents' regulations require disclosure to news media of an inmate's 'name *** city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7 NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in

> a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff under §87(2)(f).

Further, in a case involving videotapes of events occurring at a correctional facility, in the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. However, other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy and endanger life and safety [see 174 AD2d 212 (1992)].

In sum, based on the language of the Freedom of Information Law and its judicial interpretation, I believe that the Department is required to review each videotape falling within the scope of your request to attempt to ascertain the extent to which their contents fall within the grounds for denial appearing in the statute.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13698

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 14, 2002

Mr. Harold Stauffer
00-R-4014
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. Stauffer:

I have received your letter in which you wrote that the Suffolk County Police Department and District Attorney's Office have not responded to your requests for records. You requested that this office take "some form of action" on your behalf.

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, 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Records Access Officer, Suffolk County Police Department
Records Access Officer, Office of the Suffolk County District Attorney

FOIL-AO-13699

From: Robert Freeman
To: adamsn@southerncayuga.org
Date: 11/15/02 8:56AM
Subject: Dear Ms. Adams:

Dear Ms. Adams:

Thank you for your kind words regarding my presentation.

You have asked whether attachments referenced in an agenda of a meeting of the Board of Education should be copied and placed with the minutes in the "official minute book." From my perspective, unless the attachment is adopted in some way by the Board, i.e., if an attachment is a lengthy proposed policy that is approved at a meeting by the Board, I believe that common practice is to specify in the minutes that the policy was approved and "incorporate it by reference". By so doing, the policy would not have to repeated, word for word, in the minutes, and it would not have to placed in the minute book.

In other situations, the practice may be different. For example, if an attachment is a memo indicating why you deserve a raise, and the Board later acts to give you the raise, the minutes would merely refer to its action giving you a raise; the attachment would not have to be referenced in the minutes or included in the minute book. It would likely be filed with other internal Board documents.

I hope that this has been helpful. If you have additional questions, please feel free to call.

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-13200

From: Robert Freeman
To: [redacted]
Date: 11/15/02 9:01AM
Subject: Dear Mr. McAllister:

Dear Mr. McAllister:

I have received your inquiry concerning voting rights in union activities.

I cannot offer guidance. The laws that this office oversees, the Freedom of Information Law and the Open Meetings Law, pertain only to governmental entities. A public employee union, although associated with government, is not itself government, and those laws would not apply.

It is suggest that you carefully review the by-laws of the organization, and you might want to contact the Public Employment Relations Board (PERB) in Albany.

I regret that I cannot be of greater 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-13701

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Ms. Sharon L. Brin
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

, S

ur letter in which you raised two issues concerning the policy of the East t relative to the Freedom of Information Law.

to a change in policy that now limits the ability of the public to make hours of ten a.m. to three p.m. If that is so, I believe that the policy is inconsistent with law.

In this regard, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division. Among the issues was the validity of a similar limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of

> the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Second, you wrote that the District has established a fee for photocopies of twenty-five cents per page. While an agency cannot charge for the inspection of accessible records, §87(1)(b)(iii) specifies that an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Lawrence A. Edson, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13702

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Mitchell Hagler
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hagler:

I have received your letter in which you sought an opinion concerning the "appropriateness" of a response to your request for records by the Southampton Union Free School District. In short, following the receipt of the request, the District Clerk enclosed "the district's official form for requesting an appointment to inspect a school district record."

In this regard, first, the Freedom of Information Law provides direction concerning the time and manner in which an agency, such as a school district, 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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 (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. As such, neither the Law nor the regulations refer to, require or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

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, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial

appearing in §87(2)(a) through (i) of the Law. From my perspective, the kinds of records sought should be disclosed, for none of the grounds for denial would appear to apply.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, 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: Dr. Linda. J. Bruno
Elizabeth A. Raynor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13703

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Ms. Francine Jakob
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Jakob:

I have received your correspondence. Please accept my apologies for the delay in response.

You have sought guidance concerning the apparent failure of the Town of Tuscarora to respond 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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, 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
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13204

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Ms. Margaret Grindrod
Clarence Senior Citizens, Inc.
4600 Thompson Road
Clarence, NY 14031

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Grindrod:

I have received your letter in which you asked that I "verify" our conversation concerning the status of Clarence Senior Citizens, Inc.

You expressed the understanding that the Senior Center "is considered under the control of the Town of Clarence due to the fact that the Town appoints all of the members of the Senior Center's Board of Directors", that "all records collected and kept at the Senior Center are, by extension, being kept for the Town", and that requests for records pertaining to the Senior Center "must therefore be directed to the Town Clerk's office..." It is also your understanding that employees of the Senior Center "are considered Town employees", but that "should the Town relinquish control over the Senior Center's Board of Directors, this relationship will be severed and the Senior Center will no longer by subject to the Freedom of Information Law and/or the Open Meetings Law."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, an agency typically is an entity of state or local government; not-for-profit and other corporate entities are generally not subject to the Freedom of Information Law.

There are judicial decisions, however, that indicate that a not-for-profit entity may be an agency, despite its corporate status, if there is substantial governmental control over its operations. For instance, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, notwithstanding their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

More pertinent to the situation at issue in my view is Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)]. In that decision, the state's highest court, 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).

In this instance, the entire board of directors of Clarence Senior Citizens, Inc. is designated by the government of the Town of Clarence. Due to the Town's clear and substantial control, I believe that the Senior Center is an agency of the Town and, therefore, is subject to the Freedom of Information Law.

In note, too, 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."

Due to the breadth of the definition and in consideration of the Town's control over the Senior Center, I believe that the records of the Senior Center would constitute agency records that fall within the coverage of the Freedom of Information Law.

If at some point the Town relinquishes control over the Senior Center and the Center becomes essentially independent of government control, in my opinion, it would not be subject to open government statutes, such as the Freedom of Information Law or the Open Meetings Law.

Second, I do not believe that it was advised that requests for records pertaining to the Senior Center "must...be directed to the Town Clerk." For purposes of clarification, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate rules and regulations to implement the procedural aspects of the law, and the Committee has done so (see 21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a municipality to adopt rules

applicable to all agencies within the municipality in a manner consistent with the Committee's regulations.

One aspect of those regulations is a requirement that the governing body, i.e., the Town Board, designate one or more persons as "records access officer." The records access officer has the duty of "coordinating" the Town's response to requests for records. If the Town Clerk is the sole records access officer, again, her duty is to "coordinate." In that role, the Clerk would have the authority to enable you or others at the Senior Center to respond directly to routine requests. On the other hand, she could direct that all requests be transmitted to her.

Lastly, while I believe that employees of the Senior Center must be accountable in a manner analogous to Town employees, I have neither the expertise nor the authority to conclude that they are Town employees.

I hope 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

FOIL-AO-13705

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Ms. Margaret Caraberis, MPH
[redacted]

The staff of the Committee on 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. Caraberis:

I have received your letter concerning a delay in response to a request made under the Freedom of Information Law to a school district.

You wrote that you and others "have been trying to obtain [y]our school district's Ten-Year Enrollment Projections for several weeks", but that you were informed that "you may not see them until the Board of Education approves them..."

From my perspective, the data in question are accessible under the Freedom of Information Law as soon as they are maintained by or for the District, irrespective of the approval of the data by the Board. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all records of an agency, such as a school district, for §86(4) of that 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, as soon as the projections come into the possession of or are kept for the District, they constitute agency 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. Pertinent in this instance is §87(2)(g)(i), which specifies that "statistical or factual tabulations or data" found within internal government records must be disclosed.

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.

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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13706

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Michael Esslie
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Esslie:

I have received your letter in which you questioned the propriety of fees assessed by the Town of Cairo for reproducing certain records.

As I understand the billing statement attached to your letter, the Town charged twenty-five cents each for photocopies of nine by twelve inches. However, for copies of maps, the Town charged $27.00 to reproduce them, plus $0.34 per mile, apparently to transport them to a location where they could be copied, and $8.50 an hour for the "time for map reproduction."

In this regard, §87(1)(b)(iii) of the Freedom of Information Law contains essentially two standards under which agency may impose fees for copying records. First, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches; and second, for copies of all other records, an agency may charge based on the "actual cost" of reproduction. Those standards apply, unless a different fee is prescribed by statute, and no other statute would be pertinent in this instance.

It appears that the maps that you requested are larger than nine by fourteen inches and could not be reproduced, as a single sheet, by means of the Town's photocopying equipment. In order to reproduce the maps, it appears that a Town employee drove to a location where they could be copied and paid $27.00 to have them copied. If that is so, the "actual cost" in my view would include the cost of mileage and whatever was paid to a copying service to have the maps reproduced. Assuming that the §8.50 per hour for time involved the time of a town employee, a fee of that nature would in my view be contrary to law. The regulations promulgated by the Committee on Open Government specify that employee time or other personnel costs cannot be imposed [21 NYCRR §1401.8).

In similar situations, it has been suggested that an agency official inform the applicant for oversized records of the fee in advance of having copies made. In the alternative, an applicant may choose to photograph the record with his or her own camera at no charge, or photocopies of the map

could be made and cut and pasted together. In that instance, I believe that the Town could charge twenty-five cents for each photocopy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Planning Board
Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13707

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Brooks Lee
[redacted]

The staff of the Committee 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. Lee:

I have received your letter and the materials attached to it. Based on our conversation, you are seeking an advisory opinion concerning a denial of access to "[a]ll documentation as to why Jill Lee was terminated from BOCES." Jill Lee is your former spouse, and as I understand the situation, was a school principal at the time of her termination. It is unclear whether she was tenured. The request was denied on the ground that "disclosure would constitute an unwarranted invasion of personal privacy."

While some aspects of the documentation likely could properly have been withheld, it is also likely that others should have been disclosed. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Two of the grounds for denial to which you alluded are relevant to an analysis of the matter; neither, however, could in my view serve to justify a denial of access.

Perhaps of greatest significance is the provision to which the agency alluded, §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 terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is 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. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access.:

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

Another decision also required the disclosure of a settlement agreement between a teacher and a school district following the initiation of disciplinary proceedings under §3020-a of the Education Law, which pertains to charges against tenured persons, (Buffalo Evening News v. Board of Education of the Hamburg School District and Marilyn Will, Supreme Court, Erie County, June 12, 1987). Further, that decision relied heavily upon an opinion rendered by this office.

It has been held in variety of circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In another decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

> "...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

The court also referred to contentions involving privacy as follows:

> "Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his

> privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

> "This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (*Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

In LaRocca v. Board of Education of Jericho Union Free School District [220 AD 2d 424, 632 NYS 2d 576 (1995)], charges were initiated under §3020-a of the Education Law, but were later "disposed of by negotiation and settled by an Agreement" (id., 577) and withdrawn. The court rejected claims that the record could be characterized as an employment history that could be withheld as an unwarranted invasion of privacy, and found that a confidentiality agreement was invalid. Specifically, it was stated that:

> "Having examined the settlement agreement, we find that the entire document does not constitute an 'employment history' as defined by FOIL (*see, Matter of Hanig v. State of New York Dept. of Motor*

> *Vehicles, supra*) and it is therefore presumptively available for public inspection (*see,* Public Officers Law § 87[2]; *Matter of Farbman & Sons v. New York City Health and Hosps. Corp., supra,* 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437). Moreover, as a matter of public policy, the Board of Education cannot bargain away the public's right of access to public records (*see, Board of Educ., Great Neck Union Free School Dist. v. Areman,* 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943)" (id., 578, 579).

In sum, there may be details within the documentation that pertains to your former spouse and others that may be of an intimate nature or which are largely irrelevant to the performance of her official duties. I believe that those aspects of the records could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. Similarly, charges that were not sustained or that were withdrawn could, in my view, also be withheld for the same reason. Internal communications between or among District employees reflective of opinions or recommendations could, as suggested earlier, be withheld under §87(2)(g). However, for reasons previously discussed, any determination reflective of a finding of misconduct or agreement concerning termination between your former spouse and the agency should, in my opinion, be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Allen D. Buyck

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13708

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Joseph Berry
00-A-6515
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Berry:

I have received your letter in which you requested that this office "instruct [you] on what steps" you should take if the Inspector General denies your appeal for "complaints" you have filed and "investigation reports."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In my view, complaints you have filed would be available to you. None of the grounds for denial would be applicable, for you are the author of those records.

However, several grounds for denial may be pertinent with respect to a report or investigative materials prepared by the Inspector General. Of potential relevance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found

that, in general, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. In addition, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

In view of the duties of the Inspector General, also potentially relevant is §87(2)(e), which states in part that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a 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 Hawkins v. Kurlander [98 AD 2d 14 (1938)], the Appellate Division referred to and "adopted" the view of federal courts under the federal Freedom of Information Act. The Court cited Pape v. United States (599 F.2d 1383, 1387), which held that a major purpose of the "law enforcement" exception "is to encourage private citizens to furnish controversial information to government agencies by assuring confidentiality under certain circumstances" (Hawkins, supra, at

16). Similarly, the Appellate Division in Gannett v. James cited §87(2)(e)(i) and (iii) in upholding a denial of complaints made to law enforcement agencies, stating that:

> "the confidentiality afforded to those wishing it in reporting abuses is an important element in encouraging reports of possible misconduct which might not otherwise be made. Thus, these complaints are exempt from disclosure which might interfere with law enforcement investigations and identify a confidential source or disclose confidential information" [86 AD 2d 744, 745 (1982)].

The remaining ground for denial of apparent relevance would be §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Many of the records prepared in conjunction with an investigation would constitute inter-agency or intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. For instance, recommendations concerning the course of an investigation or opinions offered by employees interviewed would fall within the scope of the exception.

If your complaints pertain to correction officers, §50-a of the Civil Rights Law may also be pertinent. That provision exempts from public disclosure those personnel records relating to correction officers that are "used to evaluate performance toward continued employment or promotion."

Lastly, if an appeal is denied, or if an agency fails to determine the appeal within ten business days as required be law, the applicant would have exhausted his or her administrative remedies. At that point, the applicant could seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

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-13709

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. DeAndre Williams
99-A-0052
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. Williams:

I have received your letter in which you explained your difficulty in obtaining a variety of records from the Mt. Vernon Police Department and the Westchester County District Attorney's Office.

First, 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)].

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 rendered 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, 89 NY2d 267, 276-277 (1996)].

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, with respect to your request for "911 reports", 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.

Fourth, regarding your request for "blotter entry sheets", although there is no legal definition of the phrase "police blotter", based on custom, it has been held that a police blotter is typically a log or diary in which events recorded by or to a police department are recorded. Assuming that the blotter includes no names or investigative information, but merely consists of a summary of events or occurrences, such a record has been found to accessible under the Freedom of Information Law [see Sheehan v. City of Binghamton, 59 AD2d 808(1977).

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 Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13710

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Robert Ellingsworth Lee
02-R-1503
Frawnklin Correctional Facility
P.O. Box 10/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 facts presented in your correspondence.

Dear Mr. Lee:

I have received your letter in which you requested that this office assist you in obtaining a copy of the pre-sentence report in your case.

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.

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

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13211

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 15, 2002

Mr. Roderick Scafe
97-A-6094
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. Scafe:

I have received your letter in which you explained your difficulty in obtaining a response to your request for records from the New York City Sanitation Department.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Records Access Officer, Department of Sanitation

FOIL-AO-13712

From: Robert Freeman
To: HSherwani@ci.mount-vernon.ny.us
Date: 11/20/02 2:21PM
Subject: Dear Ms. Sherwani:

Dear Ms. Sherwani:

I have received your inquiry, and in this regard, section 89(7) of the FOIL states in part that "Nothing in this article shall require the disclosure of...the name or home address of a beneficiary of a public employees' retirement system..." Therefore, the City is not required to disclose the identity of the beneficiary of a present or former City employee. I note, however, that nothing in the law would preclude the City from disclosing.

I hope that I have been of assistance. Should any questions arise, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-1373

From: Robert Freeman
To: [redacted]
Date: 11/20/02 4:57PM
Subject: Dear Ms. Fritz:

Dear Ms. Fritz:

Your inquiry has been forwarded to the Department of State and the Committee on Open Government. The Committee is authorized to provide advice and opinions concerning public access to government records, primarily under the state's Freedom of Information Law.

It is noted at the outset that assessment rolls that include the names of owners of real property, the address of the property and the assessed valuation of the proper have long been accessible under provisions of the Real Property Tax Law that preceded the enactment of the Freedom of Information Law.

Because reporters from both Newsday and the New York Times contacted me regarding the County's website, I went to the site to review the nature of information that would be accessible via the internet. The contents of the assessment roll, as well as a photograph of the property and a basic outline of the structure were available online. What is seen in the photograph could be seen by anyone from the street, and the outline is so minimal that I do not believe that its disclosure would be the cause of jeopardy or endangerment. Further, the information made available would not identify the resident of a parcel as a police officer or any other kind of employment.

Since the transmission of your message, I believe that the County has removed the diagrams of the structures and the names of owners from the website. Whether or not that has occurred, there is nothing in the law that would prohibit the County from placing the information in question on its website. If the action described has not been taken, it is suggested that you contact your county legislator.

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-1374

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 20, 2002

Mr. Keith A. Werner
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Werner:

I have received your letter and the attached materials in which you requested that this office make "an appropriate inquiry with the N.Y.C. Clerk" regarding your request for a "street list." You also asked for an advisory opinion pertaining to your request to the Department of Motor Vehicles for "motor vehicle driver's license applications, and motor vehicle registration abstracts" relating to particular individuals.

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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 your request to the Department of Motor Vehicles, pertinent is §87(2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute. In many instances, the Driver's Privacy Protection Act, 18 USC §2721 *et seq.* prohibits the disclosure of personal information maintained by the Department that is derived from license records. In the context of your request, I believe that the Act would exempt the requested records from disclosure.

Third, with respect to your request for a "street list for East 63rd Street, Manhattan, from 1st Avenue through 3rd Avenue", your letter and the attached materials indicate that the records you refer to as a street list include street numbers with corresponding parcel identification numbers and names of owners of such residences on a particular street. It is my understanding that this type of information is also available from real property assessment rolls, which are accessible to the public.

However, it is noted that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create a record in response to a request for information. If, for instance, the New York City Clerk does not maintain a list indicating the owners of property on a specified portion of 63rd Street, the Clerk would not be obligated to create such a list.

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 - 13715

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 21, 2002

Mr. Charles Bixby
[redacted]

Dear Mr. Bixby:

It is my understanding that you have requested an advisory opinion concerning whether a municipality may properly deny a request for access to a tape recording of a meeting of a municipal board.

From my perspective, the denial of such request is not only inconsistent with law, it is illogical. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when a municipal board maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law, irrespective of the reason for which the recording was prepared.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, case law indicates that a

tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

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 municipal board and perhaps the staff of a municipality 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 municipality that captures words knowingly expressed in public pursuant to board members' statutory duties is, in my opinion, unsupportable and clearly inconsistent 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

FOIL-AO-13716

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 25, 2002

Mr. Sidney G. Sloves
[redacted]

Dear Mr. Sloves:

I have received your note concerning a request made under the Freedom of Information Law to the Yonkers Industrial Development Agency. As in the case of previous correspondence, the issue involves the time within an agency must respond to a request.

To reiterate, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dennis E. A. Lynch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13717

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 25, 2002

Mr. Terry Grosselfinger
County of Rockland
Office of the County Executive
Allison-Paris County Office Building
New City, NY 10956

Dear Mr. Grosselfinger:

I appreciate having received your determination of an appeal relating to a request by the CSEA under the Freedom of Information Law. The request involved "a report of the Joint Commission on Accreditation of Hospital Organizations" (JCAHO), and based on the advice of the County Attorney and this office, you sustained the denial of access.

In this regard, Michael Ortiz, an attorney for CSEA contacted me, and I indicated that I recalled a federal statute that specified that JCAHO reports are confidential. When he asked for additional detail concerning the basis for claiming confidentiality, I contacted the JCAHO to seek guidance. Enclosed is a copy of a response sent to me by JCAHO's Director of State Relations. In brief, he indicated that "[t]he confidentiality of a JCAHO report...depends on state law and the purpose for which the report was received", and that hospitals in New York "have consented to have JCAHO send the official accreditation report directly to the NYS Department of Health." He noted that JCAHO and the State Department of Health have signed a memorandum of understanding stating that "all JCAHO reports received by the department will be subject to public disclosure, i.e. should they be requested, they will be released to the requestor pursuant to FOIL."

Reference was also made to the situation in which JCAHO records may be confidential, and it was stated that: "[i]f the state licensing agency obtained a JCAHO survey report during its role in conducting a validation survey on behalf of the federal Centers for Medicare and Medicaid Services (CMS), the JCAHO report cannot be redisclosed except by CMS, an only then as part of an official action against the organization."

Based on my conversation with Mr. Ortiz, the record sought is unrelated to the kind of report that is deemed confidential. If that is so, it appears that it should be accessible.

I hope that the foregoing serves to clarify the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Ortiz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13718

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Augustine Papay, Jr.
Private Investigator
Inter-Pro Investigations
P.O. Box 528
Port Jervis, NY 12771

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Papay:

I have received your letter in which you contended that the Suffolk County Clerk failed to comply with the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) of 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 records maintained by or for the courts 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 the court records, the other statutes may deal with access to court

records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

Second, as you are likely aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law.

Lastly, even if the Freedom of Information Law were to apply, a likely significant issue would involve whether or the extent to which your request would have "reasonably described" the records as required by §89(3). 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 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 Clerk, to the extent that the records sought are subject to the Freedom of Information Law and can be located with reasonable effort, I believe that a request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of a request, to that extent, the requests would not in my opinion meet the standard reasonably describing the records.

I hope that I have been of assistance and that the foregoing serves to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: John M. Kennedy, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13719

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Armond Cannella
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cannella:

I have received your letter in which you questioned whether, under §87(1)(b)(iii) of the Freedom of Information Law, "copies mean[s] in any form, i.e., computer printout, or just for photocopies."

In this regard, as you are aware, the provision cited above states that a government agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches, or the "actual cost" of reproducing any other record, unless a different fee is prescribed by statute. In my view, when information is stored on a computer and is printed out on paper, no photocopying is done, and, therefore, the fee should not be twenty-five cents per sheet. Rather, in that situation, I believe that the actual cost of reproduction would involve the cost of paper and computer time. The fee in that instance, particularly if the material printed out is substantial, would likely be less than if twenty-five cents is charged per sheet.

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

OMI. AO- 3449
FOIL-AO-13720

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

E-MAIL

TO: Kevin Bluett[redacted]

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bluett:

As you are aware, I have received your letter concerning the contents and accuracy of minutes of meetings of the Board of Trustees of the Village of Ilion. You indicated that you are seeking the minutes in an effort to ascertain the amount of wages earned by a Village official.

In this regard, I offer the following comments.

First, §106 of the Open Meetings Law deals specifically with 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 meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session. ..."

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, including a motion

to amend minutes, proposals, resolutions, action taken and the vote of each member. I note, too, that §4-402 (b) of the Village Law states that the clerk shall "act as clerk of the board of trustees and of each board of village officer and shall keep a record of their proceedings."

In my opinion, inherent in the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate. If, for instance, a member of the Village Board was not present, the minutes could not validly indicate that he or she introduced a motion or voted. If there is concern regarding the accuracy of minutes or a desire to have a verbatim account of statements made at a meeting, it has been suggested that a public body direct that a meeting be tape recorded.

Second, if the matter involves payments made to or wages earned by a particular Village officer or employee, I believe that the Freedom of Information Law would require the Village to disclose records insofar as the records include reference to gross wages.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Although tangential to the matter, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Based on the foregoing, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

It has been contended that W-2 forms are specifically exempted from disclosure by statute on the basis of 26 USC 6103 (the Internal Revenue Code) and §697(e) of the Tax Law. In my

opinion, those statutes are not applicable in this instance. In an effort to obtain expert advice on the matter, I contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue. I was informed that the statutes requiring confidentiality pertain to records received and maintained by the Internal Revenue Service; those statutes do not pertain to records kept by an individual taxpayer [see e.g., Stokwitz v. Naval Investigation Service, 831 F.2d 893 (1987)], nor are they applicable to records maintained by an employer, such as a village. In short, the attorney for the Internal Revenue Service said that the statutes in question require confidentiality only with respect to records that it receives from the taxpayer.

In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. Further, in a recent decision, the same conclusion was reached judicially, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1372

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 25, 2002

Mr. Nathaniel Jay
[redacted]

The staff of the Committee on Open 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 in which you explained difficulty in obtaining records from the "Union Square Job Center." You wrote that you have not received a response to your request for records "that provide [your] name and/or home address, thus verifying [your] public assistance participation."

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."

Since I am unfamiliar with the "Union Square Job Center", I cannot conjecture as to whether it is subject to the Freedom of Information Law.

With respect to records maintained by a social services agency, §87(2)(a) of the Freedom of Information Laws pertains to records that "are specifically exempted from disclosure by state or federal statute." Several statutes within the Social Services Law prohibit public disclosure of records identifiable to either applicants for or recipients of public assistance (see e.g., Social Services Law, §§136 and 372). In my view, because the records in question are exempted from disclosure to the public, the Freedom of Information Law does not govern rights of access to them; rather, any rights of access would be conferred by the Social Services Law and applicable regulations.

With respect to access by the subject of case files, state regulations, 18 NYCRR §357.3, provide in relevant part that:

> "(c) Disclosure to applicant, recipient, or persons acting in his behalf.
> (1) The case record shall be available for examination at any reasonable time by the applicant or recipient or his authorized representative upon reasonable notice to the local district. The only exceptions to access are:
>
> > (i) those materials to which access is governed by separate statutes, such as child welfare, foster care, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Services;
> >
> > (ii) those materials being maintained separate from public assistance files for purposes of criminal prosecution and referral to the district attorney's office; and
> >
> > (iii) the county attorney or welfare attorney's files.
>
> (2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

Based on the foregoing, if you are the subject of a case file, you may have rights of access under the regulations cited above. Consequently, you may consider contacting the appropriate Department of Social Services to request the records of your interest.

I hope that I have been of assistance

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13722

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Vincent Berrios
01-A-6439
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. Berrios:

I have received your letter in which you sought assistance in obtaining information pertaining to you 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 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."

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.

Under the Freedom of Information Law, a request for records should be directed to the "records access officer" at the agency which maintains the records. The records access officer has the duty of coordinating an agency's response to requests. The Law also requires that you "reasonably describe" the records of your interest. It is suggested that you provide sufficient detail to enable an agency to locate the records of your interest.

Lastly, since you referred to the pre-sentence report, 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

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13723

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Paul J. Witkowski
01-B-1866
Camp Gabriels Correctional Facility
Box 100
Gabriels, NY 12939

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Witkowski:

I have received your letter in which you sought guidance in obtaining a "case summary of any and all Violation of Probation cases" presided over by a particular judge during a two year period. It is your understanding that the Genesee County Probation Department compiles information from court records for "statistical purposes."

Since I am unfamiliar with the content of the records maintained by the Probation Department, I cannot offer specific guidance. However, 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 include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

If the records in which you are interested are maintained by a court and can be characterized as court records, the Freedom of Information Law in my opinion would not apply. If, however, the Freedom of Information Law is applicable, I note that 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.

Of potential relevance is §87(2)(g), which enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

If indeed an agency has prepared statistics reflective of the information sought, it appears that they would be accessible. However, it is emphasized that the Freedom of Information Law pertains to existing records, and that an agency is not required to create a record in response to a request [see §89(3)].

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- 13724

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Ronald DeFeo
75-A-4053
Greenhaven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-4000

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. DeFeo:

I have received your letter in which you requested assistance in obtaining witness statements made about you to an Assistant District Attorney in relation to your criminal case. You wrote that the Suffolk County District Attorney's Office has not responded to your requests for the statements.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

With respect to the availability of witness statements, of potential relevance to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found, however, that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintain records that had previously been disclosed, the agency would be required to respond to a request for the same records.

Assuming that the records sought involving interviews of witnesses have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

Lastly, §87(2)(g) authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13725

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Mr. Kennedy Cobb
00-A-6555
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cobb:

I have received your letter in which you requested assistance form this office in obtaining records from your facility.

You wrote that you "have been requesting a copy of the envelope [sic] that was produced" at your Tier 3 hearing, the envelope you used to "send a negative letter to your sister." You wrote that you also requested a copy of the "envelope that the sender used to return this negative letter" to 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.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 copy of an envelope that you used to send a letter would be available to you, for none of the grounds for denial would be applicable. With respect to the envelope used by the sender, in my opinion, several 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". From my perspective, a residence address could be withheld pursuant to that provision. In addition, §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, the Freedom of Information Law pertains to existing records. Therefore, if, for example, an envelope has been discarded, the Freedom of Information Law would not apply.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13726

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

[redacted]
00-A-1660
Groveland Correctional Facility
7000 Sonyea Road
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. Richards:

I have received your letter in which you requested assistance in obtaining your medical records from Bellevue Hospital and your psychological evaluation records from Kings County 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.

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."

As such, the Freedom of Information Law clearly applies to a public hospital, such as Bellevue. More importantly, §18 of the Public Health Law, deals specifically with access to patient records. In brief, that statute authorizes disclosure of medical records to "qualified persons", and that phrase is defined to mean:

> "any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law,

> 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."

Based on the foregoing, in my view, medical records pertaining to yourself would be available to you. 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.

With respect to your ability to obtain your psychological evaluation record from Kings County Hospital, the first ground for denial under the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which 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. Specifically, §33.16 of the Mental Hygiene Law provides rights of access to clinical mental health records, with certain exceptions, to "qualified persons," and paragraph 7 of subdivision (a) of that section defines that phrase to include "any properly identified patient or client." It appears that you are a "qualified person" and that you may assert rights of access under that statute.

I note that the right of a qualified person to obtain records pertaining to himself or herself is not absolute, for subdivision (c)(1) of §33.16 provides that such records may be withheld insofar 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,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1372

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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 26, 2002

Ms. Terri S. Blank, Esq.
3755 Henry Hudson Parkway
Bronx, NY 10463

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Blank:

I have received your letter in which you sought an advisory opinion concerning your request for records of the Office of the Bronx Borough President.

You requested from that agency "the names of any and all former employees who had been terminated or voluntarily left the employment of the agency but who remained on agency payroll through the use of accrued leave balances during the period January 1, 2000 through February 20, 2002." Having been Counsel at the agency, you added that "[t]hese records are readily available and in the direct custody and possession of the agency." Although some of the information sought was disclosed in a "generic" manner, the names of the employees were withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." You also indicated that you were asked to "specify how the names of the individuals would be used as a precondition to the release of public records..."

In this regard, I offer the following comments.

First, I do not believe that you could be compelled, as a condition precedent to disclosure, to indicate the purpose of your request or the intended use of the records. As as a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public

> right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, 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 this instance, your request did not involve addresses and, consequently, I do not believe that §89(2)(b)(iii) would be pertinent or that you could be compelled to indicate your intended use of the records as a condition precedent to disclosure.

Second, as you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant with respect to rights of access is the provision to which reference was made earlier, §87(2)(b) concerning unwarranted invasions of personal privacy. Although that standard is flexible and subject to a variety of interpretations, the courts have provided direction through their review of challenges to agencies' denials of access. In brief, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, it has been held that, as a general rule, records that are relevant to their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy

[see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In the context of the records at issue, records of payments to public employees have been found to be available in a variety of contexts. That payments may be related to the accrual of leave, is in my opinion, irrelevant. For example, in one of the few instances in which the Freedom of Information Law requires that a record be kept by an agency, §87(3)(b) specifies that each agency "shall maintain....a record setting forth name, public office address, title and salary of every officer or employee of the agency." Records of that nature have long been found to be accessible by the courts [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment 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.

Similarly, based upon the direction provided by the Freedom of Information Law and the courts, I believe that other records reflective of payments made to public employees are available. For instance, insofar as W-2 forms of public employees indicate gross wages, they must be disclosed. In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

In a case involving a request for copies of checks payable to a municipal attorney, although the front side of cancelled checks were found to be public, it was held that the back of the checks may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. The court found, in essence, that inspection of the back of a check could indicate how an

individual chooses to spend his or her money, which is irrelevant to the performance of that person's duties(see Minerva v. Village of Valley Stream, Supreme Court, Nassau County, May 20, 1981).

In conjunction with the preceding remarks concerning access to records, I direct you to a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals, the State's highest court, 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 foregoing, I believe that the need to enable the public to make informed choices and provide a mechanism for exposing waste, favortism or abuse can be balanced against the possible infringement upon the privacy of present or former public officers or employees in a manner consistent with the preceding commentary. I believe, too, that the judicial construction of the Freedom of Information Law clearly indicates that the names of those who are the subject of the records sought must be disclosed. As suggested above, disclosure, based on those decisions, would constitute a permissible rather than an unwarranted invasion of personal privacy

Lastly, a search has been conducted to determine whether the Office of the Borough President transmitted copies of your appeal and the determination that followed to this office as required by §89(4)(a) of the Freedom of Information Law. Since no such records were located, it appears that the Office failed to comply with that provision.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Ellie Jurado

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13728

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Ms. Betsy Combier
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Combier:

I have received your letter and the materials attached to it. In brief, you have sought an opinion concerning rights of access to records pertaining to you that are maintained by various officials of the New York City Department of Education.

Having discussed the matter with a representative of the Department's Office of Counsel, I was informed that the records in question consist largely of those that you sent to Department officials and that you have been granted access to all of the records that could be found that fall within the scope of your request. If that is so, the Department, based on the judicial interpretation of the Freedom of Information Law, would not be required to produce the records, copies of which are in your possession, a second time [see e.g., Moore v. Santucci, 151 AD2d 677 (1989)].

Since you requested a waiver of fees, I note, too, that the state's Freedom of Information Law does not include provisions regarding fee waivers. While provisions of that nature are found in the federal Freedom of Information Act (5 USC §552), due to the absence of analogous language in the state counterpart, it has been found that an agency subject to the New York statute may assess its established fee for copies, even when the applicant for records is indigent [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13729

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Harold Porr III
City Manager
City of Long Beach
Kennedy Plaza
Long Beach, NY 11561

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Porr:

I appreciate having received your determination of an appeal rendered under the Freedom of Information Law relating to a request by Mr. Jay Gusler.

You sustained an initial denial of access to a retainer agreement between the City of Long Beach and the law firm of Rains & Pogrebin based on the belief that the City "has a proprietary interest in the contents of the agreement which would be severely undermined jeopardizing future agreements and negotiations with outside counsel firms if retainers were permitted to be publicly circulated." You added that since the applicant is "an adversary in proceedings" with that firm, you "believe that there are additional grounds upon which to deny your application."

From my perspective, the retainer agreement is clearly accessible under the Freedom of Information Law. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

Second, in my opinion, bills, vouchers, contracts, receipts and similar records reflective of payments made or expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable in most instances. With specific respect to payments to attorneys, I point out that, while the communications between an attorney and client are often privileged, it has been established in case law unrelated to the Freedom of Information Law that records indicating the monies paid and received by an attorney or

a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)].

In the first case pertaining to records of payments by a municipality to an attorney sought under the Freedom of Information Law, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter involved an applicant who sought billing statements for legal services provided to the Board 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, citing a decision rendered by the state's highest court, it was 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..." (emphasis added).

Also pertinent is Orange County Publications, Inc. v. County of Orange [637 NYS 2d 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, and also cited Priest v. Hennessey, supra.

In the decisions cited above, there was no issue regarding the retainer agreements between government agencies and law firms, for they are clearly not privileged and accessible by law; rather

the controversy involved more detailed billing records, records that have not been sought by Mr. Gusler.

With respect to a claim that the City has a "proprietary interest" in the terms of the agreement, I do not believe that any of the grounds for denial of access appearing in §87(2) would recognize or authorize such a claim. While §87(2)(d) is often cited as means of withholding what might be characterized as "proprietary information", that provision pertains to records which if disclosed would "cause substantial injury to the competitive position" of a "commercial enterprise." The City of Long Beach could not, in my opinion, be considered a commercial enterprise, and that provision would be inapplicable.

Moreover, I believe that disclosure works to the benefit of the City and its taxpayers. When an agreement relating to the purchase of goods or services is about to expire, disclosure of the terms of the existing agreement provide an opportunity to potential bidders or those who may contract with the City to offer a better deal. Disclosure is central to the bidding and contracting process, and the release of contracts and agreements under the Freedom of Information Law similar to that sought in this instance has saved taxpayers across the state immense amounts of money.

Lastly, the intended use of the agreement and the fact that the applicant may be in litigation with Rains & Pogrebin is, according to the state's highest court, irrelevant. When records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. As the Court of Appeals has held:

> "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. In short, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the intended use of the records and the status of the applicant are, in my view, irrelevant.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that you will reconsider your determination.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jay Gusler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13730

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

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 sought advice on "how to compel the Department of Probation to honor the court's decision and order to release [your] presentence report." You wrote that the Supreme Court, Queens County, "gave a decision and order to release the presentence report pursuant to CPL section 390.50(2)", but you have not received the record from the Department of Probation.

As you may be aware, relevant under the circumstances is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law.

If you have not yet received a report that the court ordered to be made available, it is suggested that you contact the records access officer at the Department of Probation to ascertain the status of your request.

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-1373

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Stephen Koonz
Capital District Psychiatric Center
75 New Scotland Avenue
Albany, NY 12208

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Koonz:

I have received your letter in which you sought an opinion concerning an incident that occurred at your place of employment, the Capital District Psychiatric Center.

By way of background, you indicated that you serve a variety of patients in the performance of your duties, and that it is not "uncommon for a particular patient...to be annoyed or angry with [you] regarding an unfavorable decision." One aspect of treatment at the Center involves vocational rehabilitative services, and you wrote that patients may be placed in a work setting in order to develop job-related skills, but that those persons are not employees of the Center. The problem arose when you filled out a form for direct deposit of your paycheck; the form included your name, home address, unlisted home phone number and your social security number. After your return from a vacation, you found the form on the floor of your office with a note attached to it indicating that you must fill in your bank account number, and the note was signed by an inpatient on the unit where you work. You wrote that you had no knowledge that patients were receiving rehabilitative vocational services in the Center's personnel office. Since those personal items about you had been effectively disclosed to one or perhaps more patients, you brought the matter to the attention of your supervisor, who apparently agreed with your contention that patients should not have the ability to see or gain access to personal information pertaining to you or other employees. The Director of Treatment Services, however, suggested that there was no reason to change the Center's practices. As of the date of your letter to this office, no action had been taken concerning your complaint. You wrote that it is not your intention to initiate any sort of proceeding concerning the disclosure, but that you "just want to go home and sleep well and ensure your family is safe."

From my perspective, the Center should not have disclosed the personal items pertaining to you to a patient or patients. Two statutes, the Freedom of Information Law and the Personal Privacy Protection Law (respectively Articles 6 and 6-A of the Public Officers Law), are 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 government 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.

Based on judicial interpretations, disclosure of a public employee's home address, home phone number or 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 Center is part of a state agency subject to the Personal Privacy Protection Law, I believe that it is 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.

I note that §96(1)(b) of the Personal Privacy Protection Law may permit the disclosure of personal information to an agency's staff, but that the authority to do so is limited. 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..."

In sum, if the patients are not employees of the Center, I believe that the Personal Privacy Protection Law prohibits the disclosure of an employee's home address, home telephone and social security numbers to patients or other members of the public without the consent of the employee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John V. Tauriello
Sherry Gold

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13732

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Larry Brown
93-B-1945
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. Brown:

I have received your letter in which you questioned the availability of records related to your conditional release. You wrote that you would like to obtain from the Division of Parole information contained within investigative reports, and documents that serve "as the basis for final determination and decisions by the Division of Parole."

Since I am unfamiliar with the contents of the records of your interest, I cannot conjecture as to their availability. However, I offer the following comments.

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". Insofar as the records identify persons other than yourself, i.e., witnesses, victims, etc., that exception might 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 Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13233

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Phillip Sayles
00-A-4256
Box 20, 121 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 facts presented in your correspondence.

Dear Mr. Sayles:

I have received your letter in which you sought advice in obtaining a bus manifest from the "Adirondack Trailway/Greyhound Bus Station" and court records pertaining to your case.

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 Freedom of Information Law is clearly not applicable to Adirondack Trailways or Greyhound, for they are private rather than governmental entities.

The courts and court records are also 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.

There are no provisions in the New York Freedom of Information Law concerning the waiver of fees. Further, it has been held that an agency may charge its established fees, even when records are requested by an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

Lastly, as requested, enclosed please find our pamphlet "Your Right to Know."

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13734

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

Mr. Willie Clark
98-B-2151
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. Clark:

I have received your letter in which you sought assistance in obtaining records from the Lockport Town Court.

In this regard, the provisions upon which you relied in seeking the records are not applicable. The federal Freedom of Information Act (5USC §552) applies 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 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 Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13735

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 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, 2002

E-MAIL

TO: William Hecht<wsh6@cornell.edu

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hecht:

I have received your letter in which you questioned the propriety of a requirement imposed by the City of Syracuse that you and others "sign a release form before they would release basic maps of the Skaneateles watershed", as well as a "document stating that we would not release the maps or place them on the internet."

In this regard, from my perspective, a person seeking records under the Freedom of Information Law from an agency, such as a city, cannot be compelled, as a condition precedent to disclosure, to indicate the purpose of a request or the intended use of the records, or to promise or agree that that the records will not be released or placed on the internet. 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. In short, once records are made available under the Freedom of Information Law, I believe that the recipient may do with the records as he or she sees fit.

I note that in a decision rendered last year, the Life Insurance Council of New York attempted to bolster a denial of access to certain records maintained by the State Department of Insurance that had long been available to the public because the recipient of the records placed the records on the internet. The court rejected the argument and determined that the records remained accessible and that there was no justifiable reason for prohibiting their placement on the internet [Belth v. New York State Department of Insurance, 733 NYS2d 833 (2001)]. In a related vein, a decision published within the past week rejected a claim that the placement of statements of charges and determinations involving misconduct on the part of physicians on the internet was "violative of lawful procedure, arbitrary and capricious, and an abuse of discretion" (Anonymous v. Bureau of Professional Medical Conduct, Supreme Court, New York County, NYLJ, November 21, 2002).

In short, I do not believe that you can be compelled to agree not to release records accessible under the Freedom of Information Law or to place those records on the internet as a condition precedent to disclosure.

I hope that I have been of assistance.

RJF:jm

cc: Corporation Counsel, City of Syracuse

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13736

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 2, 2002

Mr. Michael Veitch
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Veitch:

I have received your letter in which you sought assistance concerning a request for records of the Town of Woodstock. You indicated that the records sought "date back prior to 1929," and the Supervisor denied access based on §87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, since the records are old and likely rarely used, a key issue may involve 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, 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 Town, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. Further, in the context of the request, a real question might involve, very simply, where Town officials might begin to look for records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within Town, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding a function, since its initiation in a single file or location, it may be a simple task to locate the records. If, however, records are not maintained by subject, but rather are kept chronologically, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

Second, insofar as a request meets the standard of reasonably describing the records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision cited by the Supervisor pertains to communications between or among agencies, i.e., between the Town and the Commission, and internal agency communications, i.e., memoranda between or among Town officers and employees. Specifically, §87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Jeremy Wilber

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13237

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 2, 2002

Mr. Robin L Foringer
99-B-0289
Groveland Correctional Facility
7000 Sonyea Road
Sonyea, NY 14556

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Foringer:

I have received your letter in which you sought assistance in obtaining records relating to your conviction regarding a sex offense from the Ontario County Clerk.

You wrote that you were denied access to records based on Civil Rights Law §50-b and contend that as the "person charged with the commission of a sex offense," you are entitled to the records.

From my perspective, the Freedom of Information Law does not apply, and §50-b of the Civil Rights Law would prohibit disclosure of records which identify a victim of a sex offense even though you previously may have been the person charged.

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 an agency is not forbidden from disclosing records subject to §50-b to a person charged, I do not believe that §50-b creates a right of access on behalf of such person. Further, subdivision (3) states in relevant part that "The court having jurisdiction over the alleged sex offense may order any restrictions upon disclosure authorized in subdivision two of this section..."

The state's highest court has held that the exception in §50-b authorizing disclosure to persons "charged" with a sex offense did not apply to those seeking post-conviction relief. Consequently, agencies and courts were prohibited from disclosing records that had been sought by a convicted sex offender insofar as the records identified victims of sex offenses [Fappiano v. New York City Police Department, 724 NYS2d, 685, 95 NY2d 738 (2001)].

In consideration of the foregoing, in my opinion, §50-b would prohibit the county clerk from providing you with records that identify the victim of a sex offense.

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-13738

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 2, 2002

Mr. Felipe Concepcion
91-A-7219
P.O. Box 700
Wallkill, NY 12589

Dear Mr. Concepcion:

I have received your letter in which you sought assistance in obtaining records from the U.S. Department of Justice.

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 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, the New York Freedom of Information Law is not applicable to records maintained by the U.S. Department of Justice.

While the Department of Justice is an agency for purposes of the federal Freedom of Information Act (5 USC §552), it falls beyond the definition of "agency" as that term is defined by the state statute. Consequently, this office has neither the expertise nor the authority to provide assistance in this matter.

I regret that I cannot be of further assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13739

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 2, 2002

Mr. Wilfredo F. Roldos
82-B-1870
Washington Correctional Facility
72 Lock 11 Lane, 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. Roldos:

I have received your letter in which you explained your difficulty in obtaining a copy of a telephone contract between your facility and MCI. You wrote that the "facility Inmate Liason [sic] Committee's Response to [your] request" informed you that the contract was not "in their files."

In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

It is suggested that a request be made to the Department's records access officer at its central offices in Albany.

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-13740

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 2, 2002

Mr. Timothy S. Fitzsimmons
01-B-1804
Groveland Correctional Facility
7000 Sonyea Road
Sonyea, NY 14556

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fitzsimmons:

I have received your letter in which you asked for assistance in obtaining a variety of records from your 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 the correspondence, 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, 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.

In the event you were represented by a public defender, it is noted that §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.

Lastly, since you mentioned your attempts to obtain a copy of your pre-sentence report, in my opinion, §390.50 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.

I hope that the foregoing serves to enhance your understanding of the law.

Sincerely,

David Treacy
Assistant Director

DT:im

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13741

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 2, 2002

Mr. Timothy S. Fitzsimmons
01-B-1804
Groveland Correctional Facility
7000 Sonyea Road
Sonyea, NY 14556

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fitzsimmons:

I have received your letter in which you sought assistance in obtaining records from the New York State Child Abuse and Maltreatment Center. You would like to obtain records related to a "child abuse or sexual abuse report of an alleged victim." You wrote that you were the subject of the "investigation.".

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.

Although the Freedom of Information Law generally deals with rights of access to agency records, relevant in this instance is §87 (2)(a) of that statute, which provides that an agency may deny access to records or portions thereof that "are specifically exempted from disclosure by state or federal statute...". Section 422 of the Social Services Law is a statute which pertains specifically to the statewide central register utilized by an agency having responsibility regarding such matters. Subdivision (4)(A) of section 422 states that reports as well as information concerning those reports are confidential, and may be disclosed only under specified circumstances listed in that statute. One of those circumstances involves disclosures to " any person who is the subject of the report or other persons named in the report" [§422 (A)(d)]. In addition, subdivision (7) of section 422 states:

> "At any time, a subject of a report and other persons named in the report may receive, upon request, a copy of all information contained in the central register; provided, however, that the commissioner is authorized to prohibit the release of data that would identify the person who made the report or who cooperated in a subsequent

> investigation or the agency, institution, organization, program or other entity where such person is employed or with which he is associated, which he reasonably finds will be detrimental to the safety or interests of such person."

As I understand the foregoing, although a report may generally be available to a subject of a report, those portions that would, if disclosed, identify the source of the report may be withheld to protect that person's privacy and safety.

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 - 1372

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 2, 2002

Mr. Caliek Dupree
95-A-5275
Green Haven Correctional Facility
P.O. Box 4000
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. Dupree:

I have received your letter in which you asked about your ability to obtain records related to the disciplining and disbarment of an attorney.

In this regard, I offer the following comments.

First, it is emphasized 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 excludes the courts from its coverage.

Second, with respect to the discipline of attorneys, §90(10) of the Judiciary Law states that:

> "Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being show, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Therefore, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable. If indeed your request involved records available under §90(10) of the Judiciary Law, it is suggested that you renew the request, citing and highlighting appropriate aspects of that statute.

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

OMC-AO-3551
FOIL-AO-1374

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 2, 2002

E-MAIL

TO: William J. Schimpf<mayor@warwick.net>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schimpf:

As you are aware, I have received your inquiry concerning minutes of meetings of a village board of trustees.

In this regard, §106 of the Open Meetings Law pertains specifically to minutes of meetings and provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Certainly if a clerk or board wants to include more information than is required by law, he or she may do so.

If a more detailed or perhaps verbatim account of a meeting is desired, I note that the courts have held that anyone may record an open meeting, so long as the use of the recording device is unobtrusive and non-disruptive.

Second, although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. In an opinion of the State Comptroller, it was found that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609). While it may be "advisable" for a board to review and approve minutes, there is no obligation to do so.

Lastly, you questioned whether the "official minutes are the sole property of one individual." In my view, minutes of meetings, like all village records, are the property of the village and subject to the control of the board of trustees [see Village Law, §4-412(1)]. While that is so, §4-402 of the Village Law states that the clerk "shall...have custody of the corporate seal, books, records and papers of the village..." From my perspective, the foregoing indicates that the minutes are the property of the village, not the clerk, but that the clerk has custody of those and all other village records. I note, too, that all village records, regardless of where or by whom they are kept or held, are subject to rights of access conferred by the Freedom of Information Law

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

RJF:tt

cc: Board of Trustees, Village of Maybrook
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1324

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 2, 2002

Mr. Benjamin Grimes
00-A-1447
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582

Dear Mr. Grimes:

I have received your letter in which you asked that this office "ascertain that the materials being requested [from the City of Troy Police Department] be appropriately expedited."

In this regard, it is not the function of this office to do so. In short, the Committee on Open Government is authorized to provide advice and opinions concerning rights of access to government records; it is not empowered to enforce the law or compel an agency to grant or deny access to records.

Having reviewed your request, I note that it has been held that if a record sought was previously made available to a 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" [Moore v. Santucci, 151 AD2d 677, 678 (1989)].

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the records of your interest.

Further, it has been held that an agency may charge its established fees for copying, even though a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that the foregoing serves to clarify your understanding of the role of this office and the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, City of Troy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO- 1320

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 2, 2002

Ms. Mary Fresina
[redacted]

Ms. Mary Ann Mengucci
[redacted]

Ms. Andrea Mitchell
[redacted]

The staff of the Committee on 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. Fresina, Ms. Mengucci and Ms. Mitchell:

As you are aware, I have received your correspondence and the materials attached to it. You have sought assistance in obtaining records identifying "non-instructional employees receiving Medicare Reimbursement" from the Canastota Central School District. The Superintendent denied your request on the ground that disclosure would result in an "Unwarranted Invasion of Personal Property" [sic].

In this regard, I offer the following comments.

First, the Freedom of Information Law, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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". Other provisions pertaining to the protection of personal privacy are found in the provision cited by the Superintendent, §89(2).

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 109 AD 2d 292 (1985) aff'd 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

It is noted that in Matter of Wool, the applicant requested a list of employees of a town "whose salaries were subject to deduction for union membership dues payable to Civil Service Employees Association...". In determining the issue, the Court held that:

> "...the Legislature has established a scale to be used by a governmental body subject to the 'Freedom of Information Law' and to be utilized as well by the Court in reviewing the granting or denial of access to records of each governmental body. At one extreme lies records which are 'relevant or essential to the ordinary work of the agency or municipality' and in such event, regardless of their personal nature or contents, must be disclosed in toto. At the other extremity are those records which are not 'relevant or essential' - which contain personal matters wherein the right of the public to know must be delicately balanced against the right of the individual to privacy and confidentiality.

> "The facts before this Court clearly are weighted in favor of individual rights. Membership or non-membership of a municipal employee in the CSEA is hardly necessary or essential to the ordinary work of a municipality. 'Public employees have the right to form, join and participate in, or to refrain from forming, joining or participating in any employee organization of their choosing.' Membership in the CSEA has no relevance to an employee's on-the-job performance or to the functioning of his or her employer."

Consequently, it was held that portions of records indicating membership in a union could be withheld as an unwarranted invasion of personal privacy. Based on the Wool decision, it might be contended that whether a public employee is reimbursed for Medicare or covered by health insurance has no relevance to the performance of that person's official duties, and that, therefore, such information may be withheld.

From my perspective, such a conclusion would be overly restrictive. In the context of your inquiry, the taxpayers are reimbursing particular persons and, in my view, records of that nature must always be disclosed. Insofar as those or related records include information concerning the nature of an illness or medical condition, that information, is in my view, nobody's business and may be withheld, for disclosure would indeed constitute an unwarranted invasion of personal privacy. A record indicating payment or reimbursement is in my opinion readily distinguishable from that involving an intimate detail of one's life.

In a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals, the state's highest court, asserted that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the foregoing, it might appropriately be contended that the need to enable the public to make informed choices and provide a mechanism for exposing waste or abuse must be balanced against the possible infringement upon the privacy of a present or former public officer or employee.

The magnitude of an invasion of privacy may be conjectural and must in many instances be determined subjectively. In the context of your request, it is my view that a disclosure merely indicating that a present or former public officer or employee receives a benefit at public expense would not represent or reveal an intimate detail of one's life.

Consequently, I believe that the names of those receiving reimbursement must be disclosed to comply with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Harry T. Kilfoile, Jr.
Christina Arno

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1324/6

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 2, 2002

[redacted]
00-A-3176
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 [redacted]

I have received your letter in which you asked about the availability of a psychologist's report written during your stay in a "mental ward [run by the] New York City Department of Corrections." You also questioned the availability of your DNA records.

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 New York City Department of Correctional Services 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.

With regard to records of DNA testing, by way of background, Executive Law §995-c(3) states that, subsequent to conviction and sentencing for certain felonies, a designated offender "shall be required to provide a sample of blood for DNA testing to determine identification characteristics specific to such person and to be included in a state DNA identification index pursuant to this article." Accordingly, Executive Law, §995-d, provides:

> "1. All records, findings, reports, and results of DNA testing performed on any person shall be confidential and may not be disclosed or redisclosed without the consent of the subject of such DNA testing. Such records, finding, reports and results shall not be released to insurance companies, employers, or potential employers, health providers, employment screening or personnel companies, agencies, or services, private investigation services, and may not be disclosed in response to a subpoena or other compulsory legal process or warrant, or upon request or order of any agency, authority, division, office, corporation, partnership, or any other private or public entity or person, except that nothing contained herein shall prohibit disclosure in response to a subpoena issued on behalf of the subject of such DNA record or on behalf of a party in a civil proceeding where the subject of such DNA record has put such record in issue.
>
> "2. Notwithstanding the provisions of subdivision one of this section, records, findings, reports, and results of DNA testing, other than a DNA record maintained in the state DNA identification index, may be disclosed in a criminal proceeding to the court, the prosecution, and the defense pursuant to a written request on a form prescribed by the commissioner of the division of criminal justice services. Notwithstanding the provisions of subdivision one of this section, a DNA record maintained in the state DNA identification index may be disclosed pursuant to section nine hundred ninety-five-c of this article."

Based on the foregoing, it appears that the records of your interest may be disclosed only to the extent authorized in subdivision (2) of §995-d.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13247

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 3, 2002

Mr. Robert A. Feuerstein
Counsel
New York State Racing and Wagering Board
1 Penn Plaza, 7th Floor
New York, NY 10119

Dear Mr. Feuerstein:

I appreciate having received your determination of an appeal made pursuant to the Freedom of Information Law by Mr. Glenn Coin of the *Post Standard*. The appeal was submitted following a denial of access to:

> "• All daily inspection reports made by commission employees regarding the operation of the Turning Stone Casino, as required under Section 4(b) of the Nation-State Compact between the Oneida Indian Nation of New York and the State of New York, for the calendar year 2002 and
>
> "• All patron complaints respecting the gaming operations of Turning Stone Casino submitted to the board as required under Section 4(b) of the Nation-State Compact between the Oneida Indian Nation of New York and the State of New York, for the calendar year 2002."

You sustained the denial, citing a provision within the Nation-State Compact between the Oneida Indian Nation and the State of New York (hereafter "the Compact"), and §87(2)(a) of the Freedom of Information Law as the basis for your determination

While I am not suggesting that the records must be made available in their entirety, I disagree with the rationale offered for the denial of access. The denial refers to Section 4(b) of the Compact, which provides that:

> "Copies of daily inspection reports made by Commission employees and copies of any patron complaints respecting the gaming operations shall be submitted to the Board on a daily basis. In the course of any investigation by the Board of matters within its jurisdiction, the Board may request, and the Nation or its operator shall provide to the

> Board, business and accounting records of its gaming operations necessary to the conduct of the investigation. Records provided to the State by the Nation or its operator pursuant to this obligation shall be deemed confidential and proprietary financial information belonging to the Nation and shall not be subject to public disclosure by the State without the express written consent of the Nation. Such records shall remain the property of the Nation and shall be returned to the Nation at the conclusion of the investigation, unless the records constitute evidence in a criminal proceeding" [emphasis yours].

Based on the language of the section of the Compact quoted above, both you and the records access officer concluded that the records sought are exempt from disclosure. In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." The term "statute", according to judicial decisions, is an enactment of Congress or the State Legislature. A "compact", according to Black's Law Dictionary (Revised Fourth Edition), is "An agreement; a contract." Assuming that the those terms are construed in a manner consistent with their generally accepted meanings, a compact is not a statute, and a compact, therefore, would not exempt records from disclosure by statute. If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)].

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).

There is nothing in the Freedom of Information Law that authorizes a person or agency to claim, promise or engage in an agreement conferring confidentiality. 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'."

Similarly, 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. In Washington Post v. Insurance Department, supra, the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court of Appeals reversed a finding that the documents were not "records" subject to the Freedom of Information Law, 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" (id., 564). Moreover, it was determined that:

> "Respondent's long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'records' 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 (see *Matter of John P. v Whalen*, 54 NY2d 89, 96; *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571-572, *supra*; *Church of Scientology v State of New York*, 61 AD2d 942, 942-943, affd 46 NY2d 906; *Matter of Belth v Insurance Dept.*, 95 Misc 2d 18, 19-20). Nor is it relevant that the documents originated outside the government...Such a factor is not mentioned or implied in the statutory definition of records or in the statement of purpose..."

The Court also concluded that "just as promises of confidentiality by the Department do not affect the status of documents as records, neither do they affect the applicability of any exemption" (id., 567).

In a different context, in Geneva Printing Co. and Donald C. Hadley v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

In 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."

In short, based on the precedents described above, I do not believe that the language of the Compact conferring confidentiality is, as you suggest, "equivalent" to a statute that exempts records from disclosure or that consent by the Nation can serve as a valid condition precedent to disclosure. It is reiterated, however, that my opinion is not intended to suggest that the Board must disclose the records in their entirety; on the contrary, it is likely that several of the grounds for denial appearing in §87(2) of the Freedom of Information Law provide the Board with the authority to withhold records or portions of records.

The first aspect of the request relates to inspection reports made by "commission employees." If those persons are employees of the State, i.e., employees of the Racing and Wagering Board, the reports would fall within the scope of §87(2)(g). That provision enables an agency, such as the Board, to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

With respect to complaints, it has consistently been advised that portions of records identifiable to complainants may be withheld pursuant to §§87(2)(b) and 89(2) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, when complaints are made concerning employees, it has been advised and held that their identities need not be disclosed unless and until there is an agency determination reflective of a finding of misconduct. Following the deletion of personally identifying details, the substance or nature of the complaints would be accessible.

Lastly, although I am unaware of the specific nature of the records, also pertinent may be §87(2)(d), which authorizes the Board to withhold records that:

> "...are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

The 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 the 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 an 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 sum, the extent to which §87(2)(d) could properly be asserted is, in my view, dependent on consideration of the effects of disclosure vis a vis competitors of Turning Stone, as well as the impact on the State's "economic development efforts."

I hope that you consider the foregoing to be constructive and ask that you review your determination to withhold the records sought in their entirety.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Glenn Coin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3556
FOIL-AO-13748

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 3, 2002

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 and the materials attached to it. You have raised a variety of issues relating to the implementation of the Open Meetings Law by the Board of Education of the Herricks Union Free School District. Based on a review of the materials, I offer the following comments.

First, a focus of your concern relates to a "retreat" conducted by the Board. The initial portion of that gathering involved "Building and Strengthening our Relationship" and "The Importance of Teamwork and Communication"; the later session involved "Board Goals and Objectives for 2002-03." From my perspective, the initial portion might not have been subject to the Open Meetings Law; the latter, however, which was held open to the public, would have fallen within the coverage of that statute.

By way of background, the Open Meetings Law applies to meetings of public bodies, and a board of education clearly constitutes a public body required to comply with that statute. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, Second Department, which includes Westchester County and whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. However, if there is no intent that a majority of public body will gather for purpose of conducting public business, but rather for the purpose of gaining education, training, to develop or improve team building or communication skills, or to consider interpersonal relations, I do not believe that the Open Meetings Law would be applicable.

In that event, if the gathering is to be held solely for those purposes rather than conducting public business, and if the members in fact do not conduct or intend to conduct public business collectively as a body, the activities occurring during that event would not in my view constitute a meeting of a public body subject to the Open Meetings Law. On the other hand, a gathering held for the purpose of discussing goals and objectives would, in my view, clearly involve the conduct of public business and would constitute a "meeting" that must be held in a manner consistent with the Open Meetings Law.

If the initial portion of the retreat was not subject to the Open Meetings Law, I do not believe that the Board would have been required to have given notice. When a meeting subject to that statute is scheduled, notice must be given in accordance with §104 of the Open Meetings Law, which states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.

> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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 specific 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.

As you are aware, many public bodies prepare agendas as a matter of practice or policy and include them with notices of meetings, but there is no legal obligation to do so. Further, unless an entity has established a policy or rule to the contrary, there is no requirement that public body adhere to its agenda.

Second, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

In consideration of the foregoing, it has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the

> same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. I understand that the intent was to be considerate to the public, and by indicating that an executive session is likely to be held (rather than *scheduled*), the public would implicitly be informed that there may be no overriding reason for arriving at the beginning of a meeting.

Third, with respect to the reasons for entry into executive session expressed by the Board, I note that although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division has confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

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 School District."

Similarly, with respect to "contract negotiations", the only ground for entry into executive session that mentions that term is §105(1)(e). That provision permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, §105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union.

In terms of a motion to enter into an executive session held pursuant to §105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter into executive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle, supra].

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the teachers' union."

Lastly, with respect to delays in responding to requests for records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13219

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 3, 2002

Mr. Elliott Shapiro
[redacted]

Dear Mr. Shapiro:

I have received your letter in which you sought assistance in obtaining records from a justice court.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, pertains to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts and court records are not subject to the Freedom of Information Law.

This not to suggest that court records may be inaccessible to the public. On the contrary, other statutes may provide significant rights of access to court records. For instance, as you are aware, §2019-a of the Uniform Justice Court Act generally requires that justice court records be made available "except as otherwise provided by law." If I understand the nature of the records of your interest, they involve cases in which charges were dismissed. In that event, the official records relating to a matter in which charges were dismissed in favor of an accused ordinarily are sealed pursuant to §§160.50 or 160.55 of the Criminal Procedure Law.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Denise Cookingham

FOIL-AO-13750

From: Robert Freeman
To: ppc9@westchestergov.com
Date: 12/4/02 10:30AM
Subject: Dear Mr. Costa:

Dear Mr. Costa:

I have received your message in which you asked whether the "Tuckahoe Housing Authority is exempt from FOIL."

In this regard, the Freedom of Information Law is applicable to agencies, and section 86(3) defines the term agency to include public authorities. While I am unfamiliar with that entity, I note, too, that it has been held that a public housing housing authority is required to comply with the Freedom of Information Law [see Westchester-Rockland Newspapers v. White Plains Housing Authority, Supreme Court, Westchester County, May 2, 1983; affirmed, 101 AD2d 840 (1984)].

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-1375

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 4, 2002

Hon. Gale M. Hatch
Clerk-Treasurer
Village of Ilion
P.O. Box 270
Ilion, NY 13357

The staff of the Committee 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. Hatch:

I have received your letter in which you sought an advisory opinion concerning a request made under the Freedom of Information Law. Specifically, the request involves all correspondence between the Village of Ilion and those residing at a particular address within the Village covering a period of year that relates to "billings errors, billing adjustments and/or billing revisions in connection with their participation as a budget customer in the (former) Village of Ilion Natural Gas Utility Program." The applicant for the records, Mr. Mark I. Cushman, has telephoned this office to discuss his request, and I will refer to an issue that he raised later in this response.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records "or portions thereof" fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I note that the quoted in the preceding sentence evidences a recognition on the part of the State Legislature that a single record or report may contain both accessible and deniable information, and that it is an agency's duty, therefore, to review records in their entirety to determine which portions, if any, may properly be withheld.

From my perspective, the only provisions authorizing a denial of significance in this instance are §§87(2)(b) and 89(2)(b), both of which permit agencies to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the exception concerning the protection of personal privacy, according to the state's highest court, enables government to prevent disclosures concerning personal or intimate details of individuals' lives [see Hanig v. NYS Department of Motor Vehicles, 79 NY2d 106 (1992)].

I am unfamiliar with the Natural Gas Utility Program. If, for example, participation in the Program is restricted to persons below a certain income level, disclosure of the fact that they participate would, by itself, indicate that they are perhaps poor or indigent. In that kind of situation, disclosure, in my view, would result in an unwarranted invasion of personal privacy, and the records could be withheld. If the correspondence includes similar information regarding a person's financial situation, or perhaps a medical problem resulting in a failure to pay a bill on time or at all, I believe that information of that nature could also be withheld, for it would be intimate and personal. On the other hand, insofar as the correspondence merely reflects routine information relating to billing, and not information of an intimate or personal nature, there would appear to be no basis for a denial of access.

Lastly, Mr. Cushman indicated that, following your receipt of his request, you indicated that you would delay responding until you obtain an opinion from this office. While your interest in compliance with the Freedom of Information Law is appreciated, I do not believe that your response to an applicant, in terms of the time to do so, can be contingent upon the receipt of an opinion from this office, unless the applicant for the record consents to an arrangement of that sort. As you may be aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

I 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.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply

> with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: Mark I. Cushman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13252

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 4, 2002

E-MAIL

TO: Cary LaCheen <lacheen@welfarelaw.org

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. LaCheen:

I have received your inquiry relating to requests made under the Freedom of Information Law for records of the New York City Human Resources Administration (HRA).

In consideration of your questions, first, I do not believe that the regulations to which you referred that were promulgated by the agency formerly known as the New York State Department of Social Services are applicable or pertinent. Those regulations deal only with procedure within that agency. I believe that HRA is subject to the Mayor's Uniform Regulations promulgated under the Freedom of Information Law.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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, 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)].

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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, I am unaware of the identity of the person designated at HRA to determine appeals. It is suggested, therefore, that you contact the person with whom you have been communicating at that agency and ask for the name of the appeals officer. Alternatively, an appeal may be made to the head of the agency, with a request that it be forwarded to the proper person in the event that the head of the agency does not determine appeals.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13259

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 4, 2002

Mr. Alfred J. Donahue
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Donahue:

I have received your letter and the materials relating to it. You have sought an opinion concerning a request for records pertaining to a former employee of the Metropolitan Transportation Authority ("MTA"). Although some elements of the request were granted, others were denied. 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) 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, the MTA does not maintain records involving the local telephone calls made by its employees, it would not be required to attempt to acquire those records from a source outside the agency.

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 key provisions under the circumstances are those cited in the correspondence, §§87(2)(b) and 89(2)(b), both of which pertain to the ability to deny access insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978);

Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

With respect to the items withheld, I note that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Additionally, in Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's public employment must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

> "Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

Kwasnik was later unanimously affirmed by the Appellate Division [262 AD2d 171 (1999)].

With regard to telephone bills, based on the decisions cited above, when a public officer or employee uses a telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's official duties. On

that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to an officer or employee serving as a government official.

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended by some that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call. When phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call. Therefore, an indication of the phone number would ordinarily disclose nothing regarding the nature of a conversation. Further, even though the numbers may be disclosed, nothing in the Freedom of Information Law would require an individual to indicate the nature of a conversation.

This is not to suggest, however, that the numbers appearing on every phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used in the performance of one's official duties to contact recipients of public assistance or persons seeking certain health services. It has been advised in the past that if a government employee contacts those classes of persons as part of the employee's primary ongoing and routine duties, there may be grounds for withholding phone numbers listed on a bill. For instance, disclosure of numbers called by a caseworker who phones applicants for or recipients of public assistance might identify those who were contacted. In my view, the numbers could likely be deleted in that circumstance to protect against an unwarranted invasion of personal privacy due to the status of those contacted. Similarly, if a law enforcement official phones informants, disclosure of the numbers might endanger an individual's life or safety, and the numbers might justifiably be deleted pursuant to §87(2)(f) of the Freedom of Information Law.

In this instance, it appears that portions of records indicating personal calls were deleted, in their entirety, with the exception of a notation of the date on which a call was made. In my view, if an employee made personal calls and reimbursed the agency for the cost of those calls, the numbers called may be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. However, I believe that the remaining entries must be disclosed. I believe that the public has the right to know whether a public employee is making personal calls during his or her workday, as well as the duration of those calls. Those items in my opinion clearly bear upon the performance of one's official duties and would, if disclosed, result in a permissible, not an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Roberta Bender
Ann Cutler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13754

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 5, 2002

Mr. Michael E. Michalski
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Michalski:

Your correspondence addressed to the Office of the Attorney General has been forwarded to this office. The Committee on Open Government, a unit of the Department of State, is authorized to provide advice and opinions concerning public access to government information, primarily under the state's Freedom of Information Law.

The issue pertains to access to military discharge and separation papers filed with a county clerk. In this regard, I offer the following comments.

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

cc: Lewis County Attorney
Lewis County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13755

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 9, 2002

Mr. Christopher D. Thomas
Nixon Peabody, LLP
P.O. Box 31051
Rochester, NY 14603-1051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Thomas:

I have received your letter and the materials attached to it. You wrote that you represent WHEC TV-10 in Rochester, which has requested a transcript of a parole hearing held in 1993 pertaining to a former inmate, and that "[d]uring that hearing, certain names and information were discussed in the full and open presence of the inmate." Although portions of the transcript were disclosed, others were deleted. In explaining the basis for the deletion, Counsel to the Division of Parole contended as follows: "[t]hat a discussion occurred upon the record before the inmate regarding a position taken by the district attorney with respect to his possible release to parole supervision does not prevent the Division from preserving the confidentiality attached to this information." In support of his contention, Counsel relied upon and transmitted copies of advisory opinions rendered by this office and judicial decisions consistent with those opinions (Rodriguez v. Travis, Supreme Court, Albany County, November 17, 2000; Phillips v. Travis, Supreme Court, Albany County, August 21, 2000).

From my perspective, Counsel's reliance on the precedents to which reference was made was misplaced. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, the opinions issued by this office and the judicial decisions cited all focused on §87(2)(g) and communications between offices of district attorneys and the Division. In those instances, as advised by this office and held by the courts, those records constitute "inter-agency materials", and insofar as they consist of opinions, advice, recommendations and the like, they may be withheld. However, the transcript indicates that the exchange involved a member of the Parole Board, Commissioner King, and the inmate. Since the inmate is not in any way employed by or

associated with an agency, the exchange could not be characterized as "inter-agency or intra-agency material", and §87(2)(g) would not serve as a basis for a denial of access. That exception, according to the Court of Appeals, is intended to authorize a denial of access reflective of an "internal government exchange" in the nature of "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" [Gould v. NYC Police Dept., 89 NY2d 267, 277 (1996)]. Again, since the communication involved a Commissioner and the former inmate, it did not reflect an internal governmental communication, and the provision upon which the Division appears to have relied is, in my view, inapplicable.

Third, while I do not know the contents of the deleted portions of the transcript, it appears unlikely that there would be a basis for a denial. As you indicated, the inmate was a participant in the exchange and, therefore, is aware of its content. The only basis for denial would appear to involve the possibility that others, such as witnesses or informants who are not otherwise identified in records of public proceedings, i.e., a trial, may be named. In that event, perhaps personally identifying details could be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)] or endanger such a person's safety [see §87(2)(f)]. In addition, the transcript relates to a hearing conducted in June of 1993, nearly ten years ago. The passage of time often diminishes or eliminates the potentially harmful effects of disclosure envisioned by the exceptions to rights of access.

Lastly, 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).

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74;

Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence X. Tracy

FOIL-AO - 13756

From: Robert Freeman
To: [redacted]
Date: 12/9/02 9:54AM
Subject: Dear Mr. Musmacher:

Dear Mr. Musmacher:

I have received your inquiry concerning access to medical records pertaining to your father.

In this regard, medical and mental health records are generally confidential and exempt from disclosure to the public under the Public Health Law and the Mental Hygiene Law and, therefore, fall beyond the coverage of the Freedom of Information Law. However, they are accessible to next of kin of a deceased if the next of kin can provide proof of his or her identity.

Having contacted Creedoor Psychiatric Center on your behalf, I was informed that most of the records as old of those of your interest have been destroyed or discarded, but that some remain at the Center. It was suggested that you write to the Center to seek the records and that, as proof of identity, you include your birth certificate if it includes your father's name, his death certificate, and whatever reasonably proves your identity. The address is: Creedmoor Psychiatric Center
80-45 Winchester Boulevard
Queens Village, NY 11427

Attn: HIM Dept.

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-13757

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 10, 2002

MEMORANDUM

TO: Loraine Wilson, Records Access Officer

FROM: Bob Freeman BF

SUBJECT: DMV Freedom of Information Request Form

I recently received a copy of the DMV Freedom of Information Request Form, and while it is not my intent to be overly technical, the form is, in my view, inappropriate.

At the top of the form, reference is made to the Driver's Privacy Protection Act and a requirement that an applicant for a record "must have a permissible use" as defined by the Act and must include a copy of his or her driver license or state-issued non-driver ID card. The difficulty, in short, is that not all requests for records involve driver license information or the application of the Drivers's Privacy Protection Act. Requests may be made for any number of Department records that are unrelated to the Act. Nevertheless the form appears to envision or be pertinent only to requests falling within the scope of the Act.

I note, too, that it has been advised that an agency, as a general matter, cannot require a person seeking records under the Freedom of Information Law to complete an agency's prescribed form (see attached opinion). On the contrary, in consideration of the language of the statute and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), it has been advised that any request made in writing that reasonably describes the records sought should suffice. In a similar vein, it has been held that records accessible under the Freedom of Information Law must be made equally available to any person, without regard to one's status or interest [see e.g., Farbman v. New York City, 62 NY2d 75 (1984); Burke v. Yudelson, 51 AD2d 673 (1976)]. As such, in ordinary circumstances, I do not believe that an agency may require that a person seeking records must indicate his or her purpose or the intended use of records.

It is suggested that the form in question might be modified and used only when requested records involve those falling within the scope of the Driver's Privacy Protection Act. If you would like to discuss the matter, please feel free to contact me.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3561
FOIL-AO-13757A

Committee Members

Randy A. Daniels
Mary O. Donohue
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 11, 2002

Ms. Dale C. Mangan
[redacted]

The staff of the Committee on 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. Mangan:

I have received your letter and the materials attached to it. You have raised a variety of issues relating to a request made under the Freedom of Information Law and the implementation of the Open Meetings Law by the Southern Cayuga School District Board of Education.

Having reviewed the materials, I offer the following comments.

First, your request involved "a list of all employees, past & present for whom the District paid for the fingerprinting process - Including the date it was done & their title." In response to the request, you were informed that "Record is not maintained by this school." Here I point out that the Freedom of Information Law pertains to existing records, and that §89(3) states in relevant part that an agency is not required to create a record in response to a request. In the context of the situation that you described, I would conjecture that there is no "list" that contains the items that you requested. If that is so, the District would not be required to prepare a list containing those items on your behalf. In the future, rather than seeking a "list" that may not exist, it is suggested that you request records, i.e., records identifying those employees who were fingerprinted by or for the District.

Second, with respect to meetings of the Board, the minutes attached to your letter indicate that the Board may schedule a meeting to begin at certain time in the Superintendent's office for the purpose of conducting a "proposed executive session", to be followed by an open session in a different location. From my perspective, assuming that the initial gathering is convened open to the public, that the Board complies with the procedure for entry into executive session and in fact discusses matters that may properly be discussed in private, it would be acting in compliance with law.

In this regard, it is noted that the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public,

whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings, such as "agenda sessions," held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, when a majority of the Board is present to discuss District business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, I believe that the Board's discussion of its agenda is itself a meeting.

Next, 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 that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session, or as in this instance, a "proposed" executive session, would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. In my view, indicating that an executive session is "proposed" would not be inconsistent with law.

The primary issue concerning the executive sessions is whether or the extent to which they are properly held. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session. Therefore, a public body cannot enter into an

executive session to discuss the subject of its choice. If indeed executive sessions are held to develop or review the agendas, the authority to enter into executive session may rarely arise.

Several questions were raised concerning the ability of persons present during executive sessions to discuss or divulge matters considered during those sessions. Here it is emphasized that both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

Even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For instance, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

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 Edcuation, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

Lastly, you asked what recourse you might have when you are the subject of discussion in executive session. That question in my view cannot be answered via the provisions of the Freedom of Information or Open Meetings Laws, and, therefore, I cannot effectively respond.

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-13758

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 11, 2002

Mr. John Claasen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Claasen:

I have received your letter in which you sought my opinion concerning rights of access to records pertaining to the HUD Section 8 program administered by the Huntington Housing Authority. Specifically, you wrote that you are interested in obtaining records indicating "what landlords are receiving in HUD money and for what properties and their locations."

In this regard, first, I note 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, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The case of Tri-State Publishing, Co. v. City of Port Jervis (Supreme Court, Orange County, March 4, 1992) in my view, serves as precedent in the context of your inquiry. 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 an 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, based on the thrust of court's decision, the identity of a landlord must be disclosed, for payments are made by governmental entities to the landlord. However, if a tenant rents in a unit other than a multiple dwelling and disclosure of the address of that unit would make the identity of the tenant easily traceable or known, I believe that the address could be withheld based on considerations of privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard Wankel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13759

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 11, 2002

E-MAIL

TO: Brian Murray <BMURRAY@Rabinlaw.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 Mr. Murray:

I have received your inquiry in which you asked what your remedies might be "if an entity refuses to respond to a FOIL request."

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13760

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 12, 2002

Ms. June Maxam
North Country Gazette
Box 408
Chestertown, NY 12817

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Maxam:

I have received your latest inquiry concerning the Freedom of Information Law.

You referred to a situation in which a complaint was made against a person who allegedly received two STAR exemptions. Although the local assessor conducted an investigation, you wrote that he "has refused to advise [as to] the outcome of his investigation." You have asked whether "his determination [is] considered a 'final agency determination' which is subject to public review and doesn't the public have the right to know the outcome of the investigation and whether or not that individual continues to be entitled to a STAR exemption and is receiving same."

In this regard, first, from my perspective, the assessor likely is not the person who has the authority to determine rights of access to records. Pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency, such as a municipality, must designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and that person typically makes an initial decision concerning rights of access. If that person or any other official, i.e., the assessor, denies access, the person denied access has the right to appeal to the governing body of the municipality or a person designated by that body to determine appeals.

Second, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

A "final agency determination" is one of the categories of accessible records within "inter-agency or intra-agency materials" and is accessible under §87(2)(g)(iii), unless there is a separate basis for a denial of access. If, for instance, a person is the subject of a charge, a complaint or an

allegation, and the outcome is that he or she did not engage in misconduct or a violation of law, it has been advised and held by the courts that records may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. On the other hand, if there is a finding or admission of misconduct or guilt, I would agree that a record reflecting such a finding would constitute a final agency determination that would be accessible, for disclosure would involve a permissible invasion of privacy.

Whether a person has received a STAR exemption is, in my view, clearly accessible. I believe that reference to such an exemption appears on an assessment roll.

Lastly, I know of no instance in which a person has been charged or prosecuted in relation to §89(8) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13761

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 12, 2002

Ms. Elizabeth C. Armstrong
[redacted]

The staff of the Committee 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. Armstrong:

I have received your letter and related materials, as well as correspondence concerning your appeal sent by the Village of Penn Yan as required by §89(4)(a) of the Freedom of Information Law.

According to your letter, the Village's code enforcement officer presented the Planning Board with a "revised use table" of the Village Code, and that document was "systematically discussed line by line" at meetings of that Board and the Long Range Planning and Development Committee with the public present. Similarly, you indicated that proposed revisions in special use permit legislation were "read aloud" at open meetings. Nevertheless, your request for those records was denied because they are not "in final form". You also requested a list of forty-one business that "would have to retroactively apply for special use permits". That request was denied, and the Village Clerk wrote that: "Once the special use permits are in final form, and the decision pertaining to the existing businesses affected has been proposed, they will most certainly be made public..."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The records in question fall within the scope of the provision to which the Clerk referred, §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.

I would agree that a proposed revised code or legislative proposal, which is, in essence, a recommendation, may ordinarily be withheld. However, insofar as the contents of records are disclosed to the public by means of consideration or having been read aloud at open meetings, I believe that disclosure of that nature constitutes a waiver of an agency's authority to deny access to the records. I note that any person present at an open meeting may tape record the meeting, so long as the use of recording device is neither obtrusive nor disruptive. That being so, records containing information "read aloud" or discussed "line by line" must in view be made available to the public due to their disclosure at open meetings.

With respect to the list of forty-one businesses, as you described the matter, the code enforcement officer determined that those entities will be required to seek retroactive use permits. If that is so, the list would in my view be accessible, for it would represent a final determination accessible under §87(2)(g)(iii) or statistical or factual information accessible under §87(2)(g)(i). I do not believe that the special use permits must, as the clerk wrote, be in final form as a condition precedent to the disclosure of the identities of the businesses that will need the permits. In short, as I understand the matter, it appears that the list must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor Marchionda
Linda K. Banach, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13762

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 12, 2002

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:

As you are aware, I have received your correspondence concerning a response to a request in which you were advised that you could review minutes of meetings of committees of the County Legislature in an effort to locate the information of your interest. You asked how you may do so "when we don't know where it is and when we can't find it."

In consideration of your remarks, I believe that the issue involves whether or the extent to which a request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the County, to extent that the records sought can be located with reasonable effort, I believe that the request would meet the requirement of reasonably describing the records. 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 or pages individually in an effort to locate those falling within the scope of a request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. In that instance, County officials would not be required to search the records for the purpose of locating or retrieving the items of your interest.

If, for example, minutes of committee meetings are indexed by subject matter and a person seeks minutes based on a subject heading, the task of locating the minutes of interest would likely be easy. However, if minutes are not indexed but rather are merely maintained chronologically, there may be no means of locating particular items by subject except by reviewing all the minutes of every committee covering a period of years, page by page, and a request for minutes pertaining to a particular subject would not, in my view, reasonably describe the records. Again, agency staff would not be required to search through the records in an effort to locate the items of interest.

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: Perry M. Ochacher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13763

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 13, 2002

Mr. James P. Paolantonio
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Paolantonio:

As you are aware, I have received your letter and the materials relating to it. You have sought assistance concerning a denial of your request for a certain record maintained by the Village of Sleepy Hollow.

You requested a copy of the "Santos Report", which, according to Village officials, is an "external audit." Access was denied because the report "reflects opinion, advise [sic], and recommendations which are not subject to release under the Freedom of Information Act." Following your appeal of the denial of your request, the Mayor sustained the denial on the same basis.

From my perspective, the responses by the Village indicate a misunderstanding of the Freedom of Information Law.

In this regard, 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.

One of the grounds for denial, §87(2)(g), pertains to internal governmental communications and records prepared for agencies, as in this instance, by a consultant [see Xerox Corp. v. Town of Webster, 65 NY2d 131 (1985)]. While some aspects of those kinds of records might in some instances be withheld from the public, due to the structure of that provision, 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..."

While opinions, advice and recommendations may be withheld in many instances when found within inter-agency or intra-agency materials, that is not so in the case of an external audit. As indicated by subparagraph (iv) of §87(2)(g), the State Legislature specified that external audits must be disclosed, even though they typically consist of statistical or factual information, as well as opinions or recommendations.

In short, in consideration of the clear direction provided by §87(2)(g)(iv), I believe that the record at issue must be disclosed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Philip E. Zegarelli
Sonja Goldstein-Suss

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3562
FOIL-AO-13764

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 16, 2002

Mr. Ted Rejman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rejman:

As you are aware, I have received your letter in which you raised a series of questions concerning your role as a member of the Southern Cayuga Central School Board of Education. Having reviewed the questions, I note that the duties of this office involve offering advice pertaining to the Freedom of Information and Open Meetings Laws. That being so, my remarks will be limited to matters to which those statutes relate.

You wrote that the Board has "scheduled executive sessions at every meeting prior to open session." In this regard, by way of background, 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..."

In consideration of the foregoing, it has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

As suggested above, a public body cannot conduct an executive session to discuss the subject of its choice. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that can properly be considered during an executive session. One of your questions involves the propriety of executive sessions "for the purposes of interrogating a Board member about his actions as a Board Member." In my view, it is unlikely that there would be a basis for entry into executive session in that situation. The only provision that may be pertinent, paragraph (f), authorizes 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;"

From my perspective, the "interrogation" of a board member concerning his actions would not likely fall within the subject areas appearing in the language quoted above.

With regard to your ability to speak, disclose or discuss issues relating to your duties, I believe, in general, that elected government officials should do so in order to represent the public, and to enable the public to know how they approach or feel about issues of significance. As your questions relate to matters involving open government statutes, I note that both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals, the state's highest court, that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I am unaware of any statute that would prohibit a Board member from disclosing the kinds of information that you generally described. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For instance, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matters described in your correspondence.

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 Edcuation, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13765

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 16, 2002

Mr. Dennis J. Winter
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Winter:

I have received your letter and the correspondence relating to it. You have sought an advisory opinion concerning a denial of your request for request for records of the Village of Bronxville.

You requested a copy of a letter from the Mayor to Counsel to the Village Ethics Board concerning a possible conflict of interest, and any notice from any member of the Ethics Board to the Board or other Village officials, or from Counsel that were transmitted to the Board or any Village official pertaining to the matter. In a response by the Village Administrator, you were informed that access to the letter was being denied on the ground that it consists of "inter-agency communications", and that the others were "not possessed by this office." You appealed, contending that the letter constitutes an instruction to staff that affects the public that must be disclosed under §87(2)(g)(ii) of the Freedom of Information Law. The appeal, however, was denied based on a claim that the Mayor's letter is "predecisional" and is "exempt as a 'communication exchanged for discussion purposes...'"

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.

While I am unfamiliar with the contents of the letter at issue, pertinent is the provision to which Village officials referred in their responses to you. 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.

Without knowledge of the contents of the letter, I cannot advise with certainty as to the propriety of the response. However, if indeed the letter the letter is a "request" for an opinion, I do not believe that it could be characterized as an "instruction to staff that affects the public" that would be accessible. On the other hand, if it is a directive, it would appear that that portion of the letter constituting an instruction may be available, while others, i.e., questions, expressions of opinion or conjecture, might justifiably be withheld. Further, insofar as the contents focus on a particular individual, those portions might be withheld under §87(2)(b) on the ground that disclosure would result in "an unwarranted invasion of personal privacy."

I note, too, that in the circumstances described in the materials, the correspondence that you requested might be considered to be attorney-client communications. If that is so and the attorney-client privilege can be properly asserted, the records would be "specifically 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:jm

cc: William T. Regan
Thomas Leslie

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13766

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 18, 2002

Mr. Richard Timmons
97-A-5810
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. Timmons:

I have received your letter in which you complained that you were denied access to "lab reports...of hair fibers found under the fingerprints of the murder victim" and photographs of you and the crime scene.

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, 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, under §86(4) of the Freedom of Information Law, photographs maintained by an agency in my view clearly constitute records subject to rights of access.

Third, with respect to your rights of access to the photographs and the other records to which you referred, they may have been introduced into evidence at your trial. If that is so, of likely relevance 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, but 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.

I note that, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

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

FOIL-AO-1276?

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 18, 2002

Mr. Bernard Cooper
01-A-4642
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. Cooper:

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 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, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by your 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 pertaining to yourself maintained by your facility, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

However, §18 of the Public Health Law generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Records Access Officer, Mid-State Correctional Facility

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13768

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 19, 2002

Mr. Rob Edwards
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Edwards:

I have received your letter in which you asked whether, in my view, Chemung County "abided by the law" in its response to your request made under the Freedom of Information Law.

With one possible exception, it appears that the response was consistent with law. In this regard, I offer the following comments.

First, as you may be aware, with certain exceptions, the Freedom of Information Law pertains to existing records and states that an agency is not required to create a record in response to a request or maintain records [see §89(3)]. One of your contentions involves a response indicating that no press statements or news releases were issued concerning the County Sheriff's heart attack. Since news articles referred to statements made by certain County officials concerning that event, it appears to be your view that the County failed to comply with law. From my perspective, that is not necessarily so. There are numerous instances in which my statements and the statements of others are published in newspapers based on telephone interviews. In those instances, no written statement or news release is prepared, and consequently, there is no record in existence to be disclosed or, conversely, withheld under the Freedom of Information Law. In that situation, the Freedom of Information Law would not apply.

Second, the exception to which I referred concerns your request for a reasonably detailed list of records by subject matter. The County indicated that the Sheriff's Office maintains no such document." As indicated earlier, an agency is not generally required to create, prepare or maintain a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule is found in §87(3) of the Freedom of Information Law, which states in relevant part that:

"Each agency shall maintain...

c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency.

It is possible that the County maintains a subject matter list that includes reference to categories of records maintained by all County offices or departments, and that no separate list is maintained with respect to the records of the Sheriff's Office. If that is so, the response, in my view, would not have been inconsistent with law.

I hope that the foregoing serves to enhance your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark M. Schneider

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13769

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 19, 2002

Mr. Norman H. Gross
Ferrara, Fiorenza, Larrison,
Barrett & Reitz, P.C.
5010 Campuswood Drive
East Syracuse, NY 13057

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gross:

I have received your letter in which you requested an advisory opinion concerning the availability of a certain record under the Freedom of Information Law. The record at issue is "a petition signed by school district employees which has been forwarded to members of a school board." You indicated that "this petition was circulated among employees by a school district resident and sent to all members of the Board of Education by that resident", and that the petition "expressed the staff's opinion about working conditions and about academic progress at that particular school."

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.

From my perspective, two of the grounds for denial of access are pertinent to an analysis of rights of access to the petition.

First, §§87(2)(b) and 89(2)(b) authorize an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective, those who choose to sign a petition do so based on a recognition or perhaps even an intent that their names may become known to the recipients and the public. Further, it has been held that the provisions concerning unwarranted invasions of personal privacy involve the ability of the government to withhold "intimate" information of a personal nature [see Hanig v. State Department of Motor Vehicles, 79 NY2d 106 (1992)]. In my view, disclosure of the identities of those who signed the

petition could not be characterized as intimate, particularly in consideration of the subject of the petition, and I do not believe, therefore, that disclosure would constitute an unwarranted invasion of personal privacy.

The other provision of significance pertains to inter-agency or 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."

"Inter-agency" materials consist of communications between or among officers or employees of two or more agencies. "Intra-agency" materials consist of communications between or among officers or employees of a single agency, such as a school district.

Whether the petition may be characterized as "intra-agency" materials is unclear based on your description of the document. If the petition was transmitted by a member of the public who is not a district employee and who sought signatures of district employees in an effort to support his or her contentions or positions, I do not believe that the petition would constitute "intra-agency" material. The member of the public is not an employee of the district, and that person's communication with district officials would not be an internal governmental communication. In that situation, I believe that the petition would be accessible.

On the other hand, if the petition was transmitted by the resident for district employees, and if it consists of a direct communication between district employees and board members, as in a memorandum addressed to the board by the employees, I believe that it would constitute intra-agency material. If that is so, §87(2)(g) authorizes the 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13770

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 19, 2002

Mr. David Paul Kuhn
The Yomiuri Shimbun
50 Rockefeller Plaza
Suite 903
New York, NY 10020

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kuhn:

I have received your letter and the materials attached to it. You have questioned the propriety of a denial of your request for a "list of persons born in Japan or labeled as Japanese by the City of New York Department of Health and Mental Hygiene who died due to the attacks on September 11, 2001..."

Although the names of all of those who died have been widely published and the Department has disclosed aggregate data indicating the number of those who died according to their nation of birth, Counsel to the Department wrote that under provisions of the New York City Health Code and the Public Health Law, "individualized data cannot be disclosed." He added that:

> "...an individual's nationality and/or ethnicity may reasonably be regarded as private information. Accordingly, even though a list of the names of victims may have been disclosed, as well as aggregate data concerning death by nationality, I believe that disclosure of victims' nationality and/or ethnicity on an individualized basis is unwarranted. See N.Y. Pub. Off. Law § 87(2)(b)."

In this regard, I offer the following comments.

First, as you may be aware, the advisory jurisdiction of the Committee on Open Government relates to the Freedom of Information Law. However, there are many instances in which other provisions of law must be considered and read in conjunction with the Freedom of Information Law in order to reach a proper legal conclusion. In this instance, I believe that other provisions must be reviewed in order to offer proper guidance.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 of denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by statute." There are indeed statutes that clearly limit public disclosure of particular documents that may be characterized as vital records. For instance, §§4160, 4173 and 4174 of the Public Health Law specify that fetal death, birth and death certificates, i.e., "a certified transcript of the record of any death" (§4174), are exempt from disclosure to the public. Similarly, the provisions in the New York City Health Code cited in response to your request indicate that certain records may be exempt from disclosure. However, as indicated by the publication of names of deceased and an array of aggregate data, it is clear the provisions concerning confidentiality pertain to particular records, and not to disclosure of names of those who died or other data separate from those records. In short, I do not believe that your request involves a record or records that may be characterized as "specifically exempted for disclosure...by statute."

Second, it has generally been advised that disclosure of names of individuals coupled with their nationalities or ethnicity would constitute an unwarranted invasion of personal privacy and may be withheld under §87(2)(b) of the Freedom of Information Law. However, that opinion has been expressed with respect to *living* persons.

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, and it has been so held under the federal Freedom of Information Act. Others suggest that privacy of a deceased should be protected for a certain, arbitrary period of time (i.e., two years, five years, ten years, etc.). Perhaps the greatest degree of agreement reflects the point of view that records about a deceased are generally public, but that those portions which if disclosed would "disgrace the memory" of the deceased may be withheld.

From my perspective, the last suggestion is most appropriate. I believe that a great deal of information pertaining to a deceased essentially becomes innocuous by virtue of his or her death and must be disclosed. Depending on their nature, however, disclosure of intimate details of an individual's life might indeed disgrace his or her memory, and arguably, those kinds of details might justifiably be withheld. In addition, depending upon the nature of the records, there may be privacy considerations relating to the family of the deceased as well.

In my view, particularly in consideration of the information already made public, release of the names of those who died, with their nationality or ethnicity, would not be so intimate or in any way disgraceful to their memories that disclosure would rise to the level of an unwarranted invasion of personal privacy. Consequently, I believe that the information sought should be made available.

In an effort to encourage reconsideration of their response, copies of this opinion will be forwarded to Department officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Wilfredo Lopez
Rena Bryant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13771

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 19, 2002

Mr. David Scott Jersey
02-A-2023
Lakeview Shock Incarceration Corr. Fac.
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. Jersey:

I have received your letter in which you explained your difficulty in obtaining "reports, witness statements, x-rays and other pertinent" information relating to an injury you suffered "while working on Rikers Island."

In this regard, I offer the follpwing comments.

First, with regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer 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, with respect to witness statements, of potential relevance are §§87(2)(b), (e)(iii) and (f), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy", identify a confidential source, or endager a person's life or safety That provision might be applicable relative to the deletion of identifying details in a variety of situations, such as where a record identifies a confidential source or a witness.

Lastly, as requested, enclosed is a copy of "Your Right to Know."

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13772

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 19, 2002

Mr. Gerard Foote
97-A-2344
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Foote:

I have received your letter addressed to the Secretary of State. You have sought the name of the records access of Queens Supreme Court, as well as related information concerning your request for records under the Freedom of Information Law.

In this regard, the Freedom of Information Law does not apply to the courts, and, therefore, I do not believe that the Supreme Court would be required to designate a records access officer. 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."

Based on the foregoing, the courts are excluded from coverage under the Freedom of Information Law.

Whether a court can require the physical appearance of a person in order to obtain court records involves a matter 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3561.
FOIL-AO-13223

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 19, 2002

Mr. Terry Williams
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Williams:

I have received your letter in which you raised a series of issues relating to the implementation of the Open Meetings Law by the Board of Education of the Greenburgh Central School District.

In this regard, I offer the following comments.

First, by way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue.

> There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Since a work session held by a majority of a board of education is a "meeting", it 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.

Second, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As indicated in the language quoted above, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

It has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive

> session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

Third, as suggested above, a public body cannot conduct an executive session to consider the subject of its choice. On the contrary, paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive sessions. There is no indication in your letter of the basis for consideration of a grant in private, and it is unclear whether any of the grounds for entry into executive session would have applied.

Lastly, you wrote that a reporter informed the Board, in you words, "that she had a story to write and needed to know how the members voted." Aside from her needs, I note that, even before the Open Meetings Law was enacted, the Freedom of Information Law has required that a record must be prepared indicating how each member voted in every instance in which a final vote is taken [see Freedom of Information Law, §87(3)(a)]. Typically, the record of votes of each member is recorded and included in the minutes of a meeting. Similarly, it has been held that both the Freedom of Information Law and the Open Meetings Law preclude secret ballot voting by members of public bodies [see Smithson v. Ilion Housing Authority, 130 AD2d 965 (1987), aff'd 72 NY2d 1034 (1988)].

In an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, a copy of this opinion will be sent to the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1374

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 19, 2002

Mr. Richard Glover
80-A-4216
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. Glover:

I have received your letter in which you explained your difficulty in attempting to obtain records related to a DNA sample you were required to provide as an inmate. You wrote that neither your facility nor the Department of Correctional Services has provided the records to you.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO
FOIL-AO-1377

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 20, 2002

Mr. Paul Rosenbauer
Reg. 06337-055/BA-23
LSCI-Allenwood
P.O. Box 1000
White Deer, PA 17887

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rosenbauer:

I have received your letter in which you asked "what state office [you] would have to write to obtain...information pertaining to a police officer in Newark, New York.

You wrote that you would like to obtain the name of the insurance company the officer has bonded with and the policy, surety and bond numbers. You are also interested in obtaining his social security number, date of birth and home address.

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.

Most significant in my opinion is §87(2)(b), which 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." In my view, an agency could withhold the information of your interest under that provision. If the information in question is maintained by a state agency, that agency is also obliged to comply with the Personal Privacy Protection Law. Section 96(1) of the Personal Privacy Protection Law precludes a state agency from disclosing personal information about a "data subject", unless disclosure is permitted pursuant to exceptions authorizing disclosure that appear in the ensuing portions of that provision. 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)].

Section 96(1) provides in relevant part that:

> "No agency may disclose any record or personal information unless such disclosure is:
>
> (a) pursuant to a written request by or the voluntary written consent of the data subject, provided that such request or consent by its terms limits and specifically describes:
> (i) the personal information which is requested to be disclosed;
> (ii) the person or entity to whom such personal information is requested to be disclosed; and
> (iii) the uses which will be made of such personal information by the person or entity receiving it."

Similarly, §89(2)(c) of the Freedom of Information Law states that, unless a different ground for denial applies, "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...when the person to whom a record pertains consents in writing to disclosure."

Further, §89(2-a) of the Freedom of Information Law states that:

> "Nothing in this article [the Freedom of Information Law] 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."

As such, when the Freedom of Information Law and the Personal Privacy Protection Law are read in conjunction with one another, a state agency cannot release records when disclosure would result in an unwarranted invasion of personal privacy, unless disclosure is otherwise permitted by §96. Therefore, assuming that disclosure would constitute an unwarranted invasion of personal privacy, and I believe that it would, in order to acquire the records, consent to disclose by the police officer, as described in §96(1)(a), would be needed to obtain records of your interest that may be maintained by a state agency.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13276

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 23, 2002

Mr. Willie Clark
98-B-2151
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. Clark:

I have received your letter in which you asked whether a Sheriff's Department is allowed to "sell transcripts from Court proceedings" pursuant to a Freedom of Information Law request.

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."

I note that the state's highest court, the Court of Appeals, recently held that while courts are excluded from the Freedom of Information Law, court records that come into the possession of an agency are agency records subject to availability under the Freedom of Information Law [Newsday v. Empire State Development Corporation, 98 NY 2d 746, 359 NYS2d 855 (2002)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial would be applicable.

In my view, when an agency, including a Sheriff's Department, maintains a record that would ordinarily be deniable under the Freedom of Information Law, it has been held that the records become available to the public if they have been disclosed by means of a public judicial proceeding. As stated in Moore v. Santucci [151 AD 2d 677, 679 (1989)], " 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."

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13227

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 23, 2002

Ms. Stephanie Abrutyn
TRIBUNE
220 East 42nd Street, Suite 400
New York, NY 10017

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Abrutyn:

I have received your letter and the materials attached to it. You have sought an advisory opinion on behalf of *Newsday* in relation to a response to a request by reporter Victor Ramos for "an electronic copy of the worksheet files (maintained in Microsoft Excel format of the Town of North Hempstead's proposed 2003 budget."

In its response, the Town indicated that Mr. Ramos had "already been provided with a complete printout of the worksheets", but that the "Excel worksheet file maintained by the Town includes inter-agency and/or intra-agency materials which reflect the opinions, advice and recommendations of the Director of Operations and the Comptroller's Office" and that "[s]ignificant editing and/or programming would be required in order to remove the protected information from the existing Excel worksheet file." It was concluded that "[d]oing so will also create a new computer file, which is beyond the requirements of the Freedom of Information Law."

In this regard, first, if my understanding of the matter is accurate, Mr. Ramos received hard copy printouts of the "same worksheets" that he requested in electronic form. If worksheets can be printed out, it does not follow, in my view, that equivalent information cannot be made available in the requested format. I note that in perhaps the first decision rendered under the Freedom of Information Law concerning records stored electronically, it was held that the format in which the records are maintained does not impact upon rights of access [Szikszay v. Buelow, 436 NYS2d, 558, 107 Misc.2d 886 (1981)]. That case involved an assessment roll that was clearly available in the traditional paper format that was found to be equally available in computer tape format.

Second, the Freedom of Information Law has been construed expansively in relation to matters involving records stored electronically. As you are aware, 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 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, as suggested in the response by the Town, 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 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, I believe that that an agency must 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 is a decision rendered a year 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. In that case, 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."

When requests involve similar considerations, in my opinion, responses to them 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. In this instance, it appears that the Town is required to engage in the kinds of steps described in NYPIRG in order to make available in Excel format those portions of the records that consist of "statistical or factual tabulations or data" that are accessible under §87(2)(g)(i).

Third, in a case that focused on budget worksheets that reached the Court of Appeals,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, and, therefore, were considered by the agency to be predecisional and advisory, 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, the Town Attorney wrote that the record made available to Mr. Ramos "was a snapshot of the data as it existed on a certain date" and that "[c]hanges and modifications occurred since that time until the final budget was adopted." That being so, she wrote that the document requested "ceased to exist in Excel format." She added that "the record in the form requested contains computer access codes which, if disclosed, would permit the recipient to shift, add, delete or alter information without authority to do so."

If a record represents a "snapshot"of data at a particular and is constantly changing, I would agree that an agency would not be required to recreate what had formerly existed on a given date.

However, I believe, in general, that an agency is required to provide the data representing snapshot of a given record, unless there is a basis for a denial of access.

With respect to the ability to "shift, add, delete or alter information", if indeed disclosure would enable a recipient of records to engage in those actions on an agency's computers remotely, §87(2)(i) may be applicable. That provision, which was amended last year, permits an agency to withhold records insofar as disclosure "would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." However, if disclosure would merely enable a recipient of data to engage in computing, i.e., shifting, adding or otherwise analyzing data, on his or her own computer, and without the capacity to shift, add or alter data stored by the Town and in its possession, I do not believe that the cited provision would be pertinent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bonnie Chaikin
Linda B. Zuech
Victor Ramos

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13228

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 23, 2002

Mr. Phillip Sayles
00-A-4256
Box 20
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sayles:

I have received your letter in which you complained that the Albany County Sheriff's Department and Office of the District Attorney have not responded to your requests for a "subject matter list."

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

In regard to the propriety of your request, 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.

Lastly, it is possible that records pertaining to the entities in question may not be referenced, in separate subject matter lists concerning those entities individually; they may be referenced in a subject matter list concerning all entities within Albany County Government.

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-13279

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 23, 2002

Mr. William J. Callahan
Administrative Officer
New York State Police
1220 Washington Avenue
Albany, NY 12226-2252

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Callahan:

I appreciate having received a copy of your determination of an appeal made under the Freedom of Information Law by Mr. Geoff Dougherty of the Chicago *Tribune*.

Your determination indicates that Mr. Dougherty requested records "pertaining to the NYSP pistol permit database". Although you wrote that the name and address of an approved pistol permit applicant are public, you added that:

> "The remaining records contained in the database are confidential and disclosure would constitute an unwarranted invasion of personal privacy of those concerned. The State Police would have to create a new record in order to provide only those portions of the database that are a public record in the format you have requested."

Based on the judicial interpretation of the Freedom of Information Law, I ask that you review and perhaps reconsider your determination. In this regard, I offer the following comments.

By way of background, the statute that deals with licenses pertaining to firearms is §400.00 of the Penal Law, and subdivision (5) states in relevant part that:

> "The application for any license, if granted, shall be filed by the licensing officer with the clerk of the county of issuance, except that in the city of New York, and in the counties of Nassau and Suffolk, the licensing officer shall designate the place of filing in the appropriate division, bureau or unit of the police department thereof, and in the county of Suffolk the county clerk is hereby authorized to transfer all records or applications relating to firearms to the licensing

> authority of that county. The name and address of any person to whom an application for any license has been granted shall be a public record."

Based on the foregoing, it is clear that the name and address of a person to whom a license is granted are accessible to the public. With respect to other aspects of pistol license applications and presumably sone elements of the New York State Police database, Sportsmen's Association for Firearms Education, Inc. v. Kane [680 NYS 2d 411, aff'd 266 AD2d 396 (1998)] concluded that other information submitted or acquired in the licensing process is, by implication, beyond the scope of public rights of access. I believe, however, that those portions of the database that are accessible under the law, such as names and addresses of licensees, that can be generated with reasonable effort must be disclosed.

As you are aware, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it constitutes 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, I believe that that an agency must follow the more reasonable and less costly and labor intensive course of action.

Perhaps most pertinent is a decision rendered a year 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. In that case, 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."

When requests involve similar considerations, in my opinion, responses to them 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. In short, in this instance, if the Division has the ability to extract and generate those portions of the database reflective of licensees' names and addresses, I believe that it is obliged to do so.

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: Geoff Dougherty

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO - 13280

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 23, 2002

Mr. Larry Boatwright
01-A-2890
Washington Correctional Facility
72 Lock 11 Lane, 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. Boatwright:

I have received your letter in which you requested this office to "investigate...and encourage" the Division of Parole to provide you with your "violation of release" and "condition of release" reports. You wrote that you have not received a response to your request from the Washington Correctional [Facility] 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 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

In regard to the propriety of 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 exceptions to rights of access 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13781

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 23, 2002

Mr. Oscar Fernandez
99-A-2698
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. Fernandez:

I have received your letter in which you requested advice on obtaining trial transcripts regarding an individual's "rape convictions."

In this regard, it is emphasized that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts 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 submit your request to the clerk of the appropriate court, citing an applicable provision of law as the basis for your request.

Since you are interested in obtaining trial transcripts related to a rape conviction. It should be noted that §50-b of the Civil Rights Law exempts records identifiable to a victim of a sex offense from disclosure.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13282

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 23, 2002

Mr. Alvaro A. Sanchez
87-A-7358
2911 Arthur Kill road
Staten Island, NY 10309

Dear Mr. Sanchez:

I have received your letter in which you requested this office to provide you with "all related Freedom of Information Law appeals, filed by every New York District Attorney who has denied the requested records after invoking the claim that, due to:

"* a 'loss' of the requested records;

* 'inability to locate' the requested records; or,

* the requested records 'cannot be found'."

As you may be aware, §89(3) of the Freedom of Information Law requires an applicant to "reasonably describe" the records sought. In my view, whether a request reasonably describes the records sought, based on judicial determinations, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. To the extent that the records sought can be located with reasonable effort, I believe that a request would meet the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps 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 consideration of the terms of your request and the record-keeping system of this office, your request does not reasonably describe the records of your interest. Appeals sent to this office are filed chronologically, and not by agency or subject matter. Since thousands of appeals would have to be reviewed, one by one, again, your request does not meet the standard of reasonably describing the records.

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-13283

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 23, 2002

Mr. Richard D. Hathaway
[redacted]

Dear Mr. Hathaway:

I have received your letter in which you sought guidance concerning your belief that the Ticonderoga Town Board suggested that the Essex County District Attorney file charges against you. The District Attorney apparently determined that no charges would be filed, and your ensuing request for records pertaining to the matter was denied by the Division of State Police.

In this regard, while I know nothing of the matter, it would be highly unusual for a town board to recommend that criminal charges be filed; that kind of activity is not typical of the functions of town boards. If my assumption is accurate, there would be no town board minutes relating to the matter.

With respect to the response by the State Police, the request was denied on two grounds. The first, §87(2)(b), permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." That provision is frequently cited to withhold information contained within records that would, if disclosed, identify a person who made a complaint, a witness, or an informant, for example. I would conjecture that that provision was cited for that reason. The other provision upon which the State Police relied is §87(2)(g), which authorizes an agency to deny access to records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Without additional information concerning the matter, I cannot offer more specific guidance. However, 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: Lt. Laurie Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13784

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 26, 2002

Mr. Jay Gusler
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gusler:

I have received your letter in which you sought an opinion concerning a denial of access by the City of Long Beach to records "concerning misconduct by members of the Long Beach Volunteer Fire Department" who have been "found guilty and been assigned penalties in connection with their misconduct." The City, according to your letter, has also withheld disciplinary records of two dispatchers that it employs.

In this regard, I offer the following comments.

First, if the records are maintained by both the City of Long Beach and a volunteer fire company, I believe that both entities would be 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, 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)].

In consideration of the legislative intent of the Freedom of Information Law to which the Court of Appeals referred, as well as the direction provided by the Court, I believe that records concerning volunteer firefighters should be accorded the same treatment for purposes of that statute as records pertaining to public employees generally. Again, the Court emphasized that it is "incumbent on the state and its localities to extend public accountability wherever and whenever feasible", and in view of the relationship between the City and the volunteer fire department, there is, in my opinion, an obligation on the part of both entities to disclose their records in a manner that guarantees accountability.

Second, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they, and given the decision rendered by the state's highest court, volunteer firefighters as well, 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 or a volunteer firefighter engaged in misconduct, I believe that a denial of access to the records based upon considerations of privacy would be consistent with law.

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 there are final determinations indicating misconduct on the part of those who are the subjects of your request, based on judicial determinations, such determinations would be accessible. Again, however, when there is no finding of misconduct, I believe that records may justifiably be withheld to protect personal privacy.

Further, although you suggested that personally identifying details could be deleted, I do not believe that deletions would, under the circumstances, serve to protect privacy. Since you are aware of the names of those involved, and since there are only seven persons, the deletion of names or other identifiers would, in my view, be all but meaningless. That being so, insofar as the records pertain to persons who were not found to have engaged in misconduct, the records, in my opinion, may be withheld.

Lastly, I recognize that City officials sought to distinguish City employees from volunteer firefighters in terms of protecting privacy. For reasons discussed earlier, I do not believe that such a distinction can reasonably be made. Moreover, there are numerous instances in which persons other than public employees are found to have engaged in some sort of violation, and in which the record indicating the nature of the violation and the penalty is accessible to the public. If a licensee has engaged in a violation and is fined or penalized, the record so indicating is public; records indicating code and other violations are public. In short, when a government agency determines that a violation has occurred and imposes a penalty, the record reflective of such a determination is typically public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Harold Porr, III
Noreen O. Costello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13785

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 26, 2002

Ms. Dale C. Mangan
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Mangan:

I have received your letter in which you referred, once again, to difficulty in obtaining records from the South Cayuga Central School District.

In this regard, first, while it is our hope that opinions rendered by this office are educational and persuasive, it is emphasized that they are advisory and can not be characterized as "decisions" or binding.

Second, opinions rendered at your request have dealt exhaustively with a variety of issues, and there is no need, in my view, to revisit them.

And third, if you believe that a request has been denied in a manner inconsistent with law and have exhausted your administrative remedies (if both an initial request and an appeal have been denied), you may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. I note that §89(4)(b) of the Freedom of Information Law specifies that the burden of defending a denial of access to records is borne by the government agency that withheld the records and that the courts have consistently held that the exceptions to rights of access should be construed narrowly. The Court of Appeals, the state's highest court, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of

> these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), 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:jm

cc: Peter Cardamone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13786

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 26, 2002

Mr. David M. Gregory
General Counsel
Niagara Frontier Transportation Authority
181 Ellicott Street
Buffalo, NY 14203

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated

Dear Mr. Gregory:

I have received your letter in which you sought an advisory opinion concerning a request made under the Freedom of Information Law to the Niagara Frontier Transportation Authority ("NFTA"), which you serve as General Counsel.

As I understand the request, it involves a Memorandum of Understanding ("MOU") signed by the Niagara Airport Development Corporation ("NADC") and the proposed operator of the Niagara Falls International Airport, as well as communications between those entities, and minutes of an NADC meeting during which the signing of the MOU was authorized. You wrote that:

> "The unsolicited proposal submitted by the NADC to the NFTA is for a transfer of the Niagara Falls International Airport from the NFTA to NADC. The two memoranda in question are between the NADC and an airport operator and a developer, respectively. The plan would be to have the airport operator run the airport and the developer conduct any development projects, both on the airport and the property surrounding the airport. The memoranda were submitted to the NFTA in order for the NFTA to be able to evaluate, among other things, the level of financial commitment for the proposal."

Co-Counsel to the Niagara County Industrial Development Agency appears to have received the same request ("IDA"), and that entity, citing an opinion rendered by this office, FOIL-AO-12727, denied the request.

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 only exception of apparent relevance under the circumstances is §87(2)(c), which permits an agency withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations."

The advisory opinion to which Counsel to the IDA referred involved a letter of intent, which was withheld by a New York City agency based on the following contention:

> "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 City Agency also specified that the letter of agreement included 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 at a clear disadvantage. Based on those considerations, it was advised that the letter of intent could be withheld under §87(2)(c).

The question, in my view, is whether the situation at issue is analogous to that considered in the advisory opinions referenced by Counsel to the IDA.

Based on a review of the materials and the facts as described in our conversation, the matter at hand is not comparable to that considered in the opinion referenced above. In that situation, there were multiple parties and multiple negotiations, the results of which were contingent upon one another. It was my understanding that disclosure of an agreement between the agency and a single party would have had an adverse impact on the agency's ability reach optimal agreements on behalf of the taxpaying public with the other parties engaged in a series of negotiations with the agency in

relation to a multi-faceted project. In the case of the matter that you have raised, it appears that the only parties involved in the proposal are the NADC and an airport developer. Additionally, you indicated that the only entities involved in reviewing the proposal are the NFTA and the Federal Aviation Administration (FAA). If the foregoing is accurate, I cannot envision how or why disclosure of the MOU could "impair present or imminent contract awards..."

Lastly, as you are likely aware, §89(4)(b) of the Freedom of Information Law places the burden of defending a denial of access on a government agency, and the courts have consistently construed the exceptions to rights of access 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).

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 sum, as I view the issue, the request could not justifiably be denied.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patrick Bradley
George W. Cregg, Jr.
Timothy T. Hollis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13787

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 26, 2002

Michael L. Saulpaugh
Chief of Police
Lake Placid Police Department
301 Main Street
Lake Placid, NY 12946

Dear Chief Saulpaugh:

I appreciate having received a copy of your letter to Mr. Roy A. Mura in which you indicated that the policy of the Lake Placid Police Department, which has been "endorsed" by the Village Board of Trustees, is to charge three dollars for copies of accident reports.

From my perspective, based on the language of the Freedom of Information Law and judicial decisions, the Department is permitted to charge a maximum of twenty-five cents per photocopy. In this regard, I offer the following comments.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until october 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute,

would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it was confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute. In addition, in a case in which you were involved, Sheehan v. City of Syracuse [521 NYS 2d 207 (1987)], a fee in excess of twenty-five cents per photocopy for certain records was established by an ordinance, and the court found the ordinance to be invalid. More recently, a provision of a county code authorizing a fee of twenty dollars for an accident report was struck down, and it was determined that the agency could charge no more than twenty-five cents per photocopy [Gordon Schotsky & Rappaport v. Suffolk County, 221 AD 2d 339 (1996)].

Further, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute. Therefore, absent statutory authority to do so, I do not believe that the Department could validly charge a fee other than a maximum fee of twenty-five cents per photocopy.

Moreover, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I note that confusion has arisen on occasion concerning fees for accident reports due perhaps to the provisions of §202 of the Vehicle and Traffic Law. Section 202(3) authorizes a copying fee of $15.00 for accident reports obtained from the Department of Motor Vehicles and one dollar per page for copies of other records. Section 202 also authorizes the Department to collect certain fees for searching for records. However, since the provisions of the Vehicle and Traffic Law pertain to particular records in possession of the Department of Motor Vehicles only, in my opinion, other agencies, such as municipal police or sheriff's departments, cannot unilaterally adopt policy or regulations authorizing fees in excess of twenty-five cents per photocopy or other fees without specific statutory authority to do so.

Similarly, §66-a of the Public Officers Law, a statute that deals with accident reports and certain other records maintained by the Division of State Police, provides in subdivision (2) that:

> "Notwithstanding the provisions of section twenty-three hundred seven of the civil practice law and rules, the public officers law, or any other law to the contrary, the division of state police shall charge fees for the search and copy of accident reports and photographs. A search fee of fifteen dollars per accident report shall be charged, with no additional fee for a photocopy. An additional fee of fifteen dollars shall be charged for a certified copy of any accident report. A fee of twenty-five dollars per photograph or contact sheet shall be charged. The fees for investigative reports shall be the same as those for accident reports."

Based on the foregoing, it is clear that a statute separate from the Freedom of Information Law authorizes the Division of State Police to charge fifteen dollars for the search and copy of accident reports.

In the two instances cited above, those dealing with the Department of Motor Vehicles and the Division of State Police, statutes have been enacted that enable those agencies to charge fees different from those ordinarily applicable under the Freedom of Information Law. Those are the only situations, however, of which I am aware in which agencies may charge more than twenty-five cents per photocopy in response to requests for accident reports.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Roy A. Mura
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13788

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 26, 2002

Mr. Alfred L. Streppa
Harris Beach LLP
99 Garnsey Road
Pittsford, NY 14534

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Streppa:

I have received your letter prepared in your capacity as attorney for the West Irondequoit Central School District.

You wrote that the District has in previous years obtained records from the Irondequoit Town Assessor's office indicating the "names, tax account numbers, reported income, assessed valuation and senior citizen tax exemptions of its residents." This year, however, the District "has refused to provide the income information reported by each senior citizen on their real property tax exemption form." The District, according to your letter, "uses this information to report to the Board of Education so that they can determine the number of residents who would be affected if the income eligibility level was changed, and the real property tax income affect to the District."

From my perspective, if the Freedom of Information Law serves as the basis for determining whether or the extent to which the data should be disclosed, the Town's response may be accurate. However, I do not believe that such a position should bar the District from acquiring the information it needs to carry out its governmental duties. 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. 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).

I note, too, 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)].

Second, I believe that certain records used in determining assessments may be withheld. For instance, for senior citizens to apply for STAR exemptions, they must submit records that include personal financial details. Having discussed the issue with representatives of the Office of the Office of Real Property Services, we agree that income tax forms or other personal financial information

submitted by senior citizens seeking STAR exemptions may be withheld from the public. Although the Freedom of Information Law is based upon a presumption of access, §87(2)(b) authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." The New York State Tax Law contains provisions that require that confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., §697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning taxpayers' income would constitute an improper or "unwarranted" invasion of personal privacy.

In short, I believe that an agency, such as the Town, has the authority to withhold portions of records that include intimate or sensitive details of their lives, i.e., their incomes.

Nevertheless, if the District's interest is in ascertaining the number of residents who may be affected by a change in income eligibility, the names and addresses of residents may be irrelevant. If that is so, portions of the records indicating income, valuation and the percentage of an exemption would be accessible, following the deletion of personally identifiable information, such as names and parcel ID numbers or addresses.

Lastly, the Freedom of Information Law is permissive, and the Court of Appeals has held that an agency *may* withhold records or portions thereof in accordance with the grounds for denial, but that it is *not required* to do so and has discretionary authority to disclose [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. In similar circumstances, when it is clear that a government agency is seeking records in the performance of its official duties, not as a member of the public, it has been suggested that, in the spirit of governmental cooperation, the agency in possession of the records may choose to disclose records or details within records that ordinarily would be withheld from the public.

In an effort to encourage Town officials to cooperate with the District, copies of this response will be forwarded to them.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Linda Dzus, Town Clerk
Town Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13789

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 26, 2002

E-Mail

TO: Jonathan E. Rubin <Rubinj@brooklynda.org

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rubin:

I have received your inquiry in which you asked whether a person who is the subject of a request for records made under the Freedom of Information Law has a right to know that such a request has been made.

In this regard, first, there is nothing in the Freedom of Information Law or any judicial decision indicating that a person who is the subject of a request made under that statute must be informed by an agency that such as request has been made. While an agency may do so, there is no obligation to do so.

Second, it has generally been advised that requests made in writing under the Freedom of Information Law are accessible. As you are likely aware, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, with the exception of portions of certain kinds of requests, the records sought are accessible under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. For instance, if a recipient of public assistance seeks records

pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a public body, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, Nay 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

In short, except in the situation in which a request includes intimate personal information, in which case identifying details may be withheld, I believe that requests made under the Freedom of Information Law should generally be disclosed.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13790

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 26, 2002

Mr. Harold Porr III
City Manager
City of Long Beach
Kennedy Plaza
Long Beach, NY 11561

Dear Mr. Porr:

I appreciate having received your letter of December 9 in which you indicated that "Mr. Gusler has been provided access to the retainer agreement which he sought." Mr. Gusler informed me, however, that he was given the opportunity to view the document, but that the City refused to provide him with a photocopy. In other correspondence you referred to Lee v. Corporation Counsel/City of Long Beach to support the decision to preclude Mr. Gusler from obtaining a photocopy of the agreement.

Since I am unfamiliar with that decision, if possible, I would be grateful to receive a copy. If the decision involved a request made under the Freedom of Information Law for a record accessible under that statute, I would disagree with the conclusion. Section 87(2) specifies that a record accessible under the law must be made "available for public inspection and copying"; §87(1)(b)(iii) prescribes the fees for copying; and §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 and certify to the correctness of such copy if so requested...."

In short, records subject to the Freedom of Information Law are clearly available for inspection and copying upon payment of the requisite fee. I am confused by your response and, again, would appreciate having an opportunity to read the decision to which you referred.

I thank you in advance for your cooperation.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Jay Gusler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13791

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 26, 2002

Mr. Michael Veitch
[redacted]

Dear Mr. Veitch:

I have received your letter in which you wrote, once again, in relation to difficulties in gaining access to records of the Town of Woodstock. Having reviewed the opinion addressed to you on December 2 and discussed the matter with the Supervisor, there is little additional guidance that I can offer.

Based on that discussion, it appears that the issue involves the ability of Town officials to locate the records of your interest or, for purposes of the Freedom of Information Law, the extent to which your request "reasonably describes" the records sought. While a person seeking records is not required to identify or specify exactly which records he or she is seeking, a request should include sufficient detail to enable the staff of an agency to locate the records. If you can provide dates, file designations or similar details, doing so may enhance the ability of staff to locate records. It is also suggested that you discuss the nature of the Town's filing or recordkeeping systems in relation to the records of our interest with staff, again to enhance your capacity to reasonably describe the records, as well as their ability to retrieve the records on your behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Jeremy Wilbur, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO · 13792

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 26, 2002

Mr. Steven M. Keisman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Keisman:

I have received your letter in which you sought assistance in relation to a delay in the disclosure of records under the Freedom of Information Law by the New York City Department of Education.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

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.

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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: Susan W. Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1393

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 26, 2002

Mr. Russell A. Mercier
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mercier:

I have received your letter in which you described difficulty in obtaining certain records from the Town of Southampton, those concerning the use of "bituminous materials" in relation to a particular project carried out by the Highway Department. You provided the location of the project, the purchase order number, and the date of the purchase order in your request. Nevertheless, the Superintendent of Highways wrote that the request was "not specific." You also complained with respect to delays in responding to requests for records.

In this regard, first, I note that the Freedom of Information Law as originally enacted in 1974 required that an applicant seek "identifiable" records. Because those requesting records often could not name, specify or identify records, the standard imposed upon a person seeking records was changed when the current version of the statute became effective in 1978. Since that time, §89(3) has merely required that an applicant must "reasonably describe" the records sought. In considering that standard, the state's highest court, the Court of Appeals, has held that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability

> under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the 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.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent of Highways
Hon. Marietta Seaman, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13794

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Mr. Juan Ramirez
96-R-7745/C4-32
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. Ramirez:

I have received your letter in which you sought assistance in obtaining rules, regulations and related materials concerning a sex offender program. You were initially informed that are manuals on the subject available at your facility library, but when you requested them, they were not maintained by the library. Thereafter, when you requested equivalent records under the Freedom of Information Law, you were told that the fee for copies would be sixty dollars. You have sought assistance in the matter.

In this regard, first, it is suggested that you contact the person who recommended that you review the materials at your facility library, inform that person that the materials are not maintained by the library, and ask that a set of those materials be sent to the library.

Second, there is nothing in the Freedom of Information Law that pertains to the waiver of fees, and it has been held that an agency may charge its established fee for copies, even when records are requested by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

And third, when records are available under the Freedom of Information Law, there can be no charge for the inspection of those records. As such, it is suggested that you ask to inspect the records of your interest, rather than seeking copies.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13795

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Mr. Louis A. Marinconz
00-A-2969
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024-0618

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Marinconz:

I have received your letter in which you complained with respect to a delay by the Division of Parole in responding to your request under the Freedom of Information Law.

In this regard, that statute provides direction concerning the time and manner in which agencies must respond to requests 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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-13796

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Mr. Alonzo Ross
02-B-0461
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. Ross:

I have received your letter in which you sought guidance in obtaining medical records from the Erie County Medical Center and the Erie County Jail.

In this regard, first, both facilities are governmental entities and, therefore, are subject to the Freedom of Information Law. Pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each government agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and a request should be directed to that person.

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.

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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 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-13797

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Mr. David Putland
84-B-2029
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Putland:

I have received your letter in which you asked, whether, in consideration of §§87(2)(a) of the Freedom of Information Law and 50-b of the Civil Rights Law, appeal briefs would be available under the Freedom of Information Law following the redaction of identifiable details pertaining to the victim of a sex offense.

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."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts are not subject to the Freedom of Information Law.

Second, in a case in which the state's highest court considered the question that you raised in relation to both the Freedom of Information Law and the Civil Rights Law, it was determined that there is no obligation "to provide the records even though redaction might remove all details which 'tend to identify the victim'" [Karlin v. McMahon, 96 NY2d 842 (2001)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13798

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Mr. Chetwynd T. Shanholtzer
83-B-2791
Auburn Correctional Facility
135 State Street - 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. Shanholtzer:

I have received your letter in which you sought guidance concerning your ability to gain access to certain court records under the Freedom of Information Law.

In this regard,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.

Lastly, since you indicated that you are interested in obtaining accusatory instruments filed against correction officers, I would conjecture that a court would not maintain its records in a manner that would enable staff to locate records on that basis. Court records are typically maintained alphabetically, by means of the names of the parties, or in the case of a docket, chronologically. It is unlikely in my view that there would be a method of locating records involving correction officers except by searching through thousands of records individually, which neither a court nor an agency subject to the Freedom of Information Law would be required to do.

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-13299

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Mr. Jerald Miller
00-A-0607
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024-0618

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Miller:

I have received your letter addressed to David Treacy of this office in which you sought an opinion concerning practices of the Division of Parole in relation to its response to a request made under the Freedom of Information Law.

You referred to a request for the Parole Guidelines Application Manual, and Mr. Terrence Tracy, Counsel to the Division, indicated that a copy is available at your facility law library. However, you wrote that the manual was not maintained at the library and questioned whether the Freedom of Information Law "allows a denial of a request on the sole basis that the requestor of a record might be able to attain [sic] a copy of the agency's record by viewing it in another (second) agency's file."

In my view, Mr. Tracy's response was reasonable. It is my understanding that the manual in question is routinely kept in correctional facilities' law libraries, and it that, therefore, it was reasonable for Mr. Tracy to assume that the manual would be available for your review at your facility law library.

It is unclear whether you informed Mr. Tracy or the facility librarian that the manual was missing from the library. I would conjecture that if that had been made known to either, a copy of the manual would have been forwarded to the library and that the problem would have been resolved.

I note, too, that inspection of the manual at your facility library can be accomplished at no charge. However, the Division has the authority to charge up to twenty-five cents per photocopy for records made available under the Freedom of Information Law. I point out that that statute does not

include any provision concerning fee waivers and that it has been held that an agency may charge its established fee for copies, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

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-13800

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Mr. Truman Frierson
02-R-4399
Butler Correctional Facility
P.O. Box 388
Red Creek, NY 13143

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Frierson:

I have received your letter in which you complained that the Troy Housing Authority has not responded to your requests for records.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I have also enclosed a copy of an October 7, 2002 opinion from this office addressed to you.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1380

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Mr. Dempsey Hawkins
79-B-0609
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. Hawkins:

I have received your letter in which you sought guidance in obtaining " the names of the 3 parole commissioners who interviewed" a certain former inmate on a particular date.

In this regard, to seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. It is suggested that a request be made to Ms. Ann Crowell, Records Access Officer, Division of Parole, 97 Central Avenue, Albany, NY 12206.

When making a request, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records of your interest. In this instance, you should include the name of the inmate, the date of her appearance and the name of the facility in which the proceeding occurred, as well as any other details that might be pertinent.

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, portions of a record indicating the names of parole commissioners involved in a particular proceeding 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13802

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Mr. Jayson Torres
01-A-1363
Mohawk Correctional Facility
6100 School Road/P.O. Box 8451
Rome, NY 13442-8451

The staff of the Committee on Open 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 and the correspondence attached to it. You have sought assistance in relation to a request for records pertaining to your case to the Office of the New York County District Attorney. A request was also made to the New York City Police Department.

In response to your request, an assistant district attorney indicated that the records could not be found, and that even if they could be located, the request would be denied because disclosure "would interfere with the pending judicial proceeding and the pending litigation."

In this regard, first, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Second, I believe that reliance on the cases cited by the Assistant District Attorney is misplaced. Your request *follows* your conviction; those decisions involved requests that *preceded* an initial determination of guilt or innocence. In Pittari v. Pirro, for example, the Court referred to the possibility that disclosure under the Freedom of Information Law "would have a chilling effect on the pending prosecution" and "interfere with the orderly process of disclosure in the criminal proceeding set forth in CPL article 240", which deals with discovery before a trial [258 AD2d 202, 206 (1999)]. Based on the foregoing, it is clear in my view that the exception at issue in those cases and which was cited by the Assistant District Attorney, §87(2)(e)(i), is pertinent when a criminal investigation is ongoing or when disclosure would interfere with an upcoming trial, and that it does not apply following a conviction.

Third, it is possible that many of the records that had been or should be in possession of the District Attorney are also maintained by the Police Department. The records of that agency are also subject to rights of access under the Freedom of Information Law. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 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). Again, §87(2)(e)(i)does not appear to be pertinent in the context of your request.

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: Maureen T. O'Connor
Leo Callaghan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13803

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Ms. Hope Moffett
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Moffett:

I have received your letter and the attached materials in which you requested an advisory opinion concerning your attempts to obtain records from the Schuyler County District Attorney's Office relating to a case that resulted in an individual pleading guilty to a murder charge.

You requested records related to the presence of other people at the scene of the murder, interviews of those who discovered the body and interviews with others during the investigation. You were denied access to the records in their entirety and appealed the denial to the records appeals officer. In response to your appeal, you received a letter in which the District Attorney affirmed the "original denial of your FOIL request." The letter provided in part that:

> "...complete access to the Brockaway homicide file (six boxes) is impermissible as the file contains Grand Jury minutes, criminal history reports of numerous witnesses, school records, psychiatric records and various other items of an evidentiary nature which are exempt from FOIL by State and Federal statute.
>
> "The denial of your specific request for 'records' relating to the presence of others at the murder site and for interviews of other witnesses is affirmed. Disclosure of such will identify confidential sources and reveal criminal investigative techniques and procedures. Furthermore, said documents include inter-agency and intra-agency materials which were compiled for law enforcement purposes but do not meet the criteria for disclosure set forth in §87 of the Public Officer's Law."

From my perspective, while many of the records sought might properly be withheld in whole or in part, the blanket denial of access is, in my view, 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 [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 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, 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. 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". For example, §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.

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."

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).

In my opinion, and 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, in my opinion, the agency could not claim that the records could be withheld in their entirety on the ground that they constitute intra-agency materials.

Lastly, the materials attached to your letter indicate that Mr. Joseph G. Fazzary, District Attorney, responded to your initial request for records addressed to the "Records Access Officer", but he did not inform you of your right to appeal. You did appeal, however, and he responded again. In this regard, it is noted that when an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§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, 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.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Joseph G. Fazzary, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13804

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Mr. William Crenshaw
98-B-0745
State Route 96, P.O. Box 119
Romolus, 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. Crenshaw:

I have received your letter in which you complained that the records access officer for Monroe County failed to respond to your requests for certain "original 911 broadcast transcripts..."

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.

Relevant to your inquiry is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §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. If those are the records of your interest, I believe that they are exempt from disclosure.

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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Riley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13808

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2002

Mr. David Lee
99-A-1700
Upstate Correctional Facility
P.O. Box 2001
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 facts presented in your correspondence.

Dear Mr. Lee:

I have received your letters concerning unanswered requests for medical and mental health records.

In this regard, the Elmhurst Hospital Center is part of the New York City Health and Hospitals Corporation and, therefore, is subject to the New York Freedom of Information Law. In terms of rights granted by that statute, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

With regard to mental health records, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. 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 correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. It is noted that under §33.16, there are certain limitations on rights of access.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt