FOIL-AO-13806

From: Robert Freeman
To: [redacted]
Date: 1/3/03 9:55AM
Subject: Dear Dukie:

Dear Dukie:

I have received your inquiry in which you sought guidance concerning which application you might use to request records pertaining to yourself that are maintained by a board of education.

In this regard, all government agency records in New York fall within the scope of the state's Freedom of Information Law. While an agency may require that a request be made in writing, there is nothing in the law that pertains to or requires that a particular form be used. I note, too, that section 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 the staff of an agency to locate and identify the records.

In short, any request made in writing that reasonably describes the records of your interest should suffice.

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-13807

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

January 3, 2003

Mr. Joey Berry
01-A-4384 HU C1-22
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508

Dear Mr. Berry:

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

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to government records, primarily under the state's Freedom of Information Law. This office does not maintain records generally, and we do not possess the records of your interest.

It is also noted that the records of your interest are beyond the coverage of the Freedom of Information Law, for they are maintained by a court, and courts are specifically excluded from the coverage of that statute. Further, although many court records are available pursuant to other provisions of law (see e.g., Judiciary Law, §255), several of the records of your interest are exempt from disclosure. For instance, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

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

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

Similarly, §390.50(1) of the Criminal Procedure Law states that:

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13808

41 State Street, Albany, New York 12231
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January 3, 2003

E-Mail

TO: Fred Isseks [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. Isseks:

I have received your letter and applaud the work of you and your students. In consideration of your remarks, I offer the following comments.

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

Second, 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.

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 the foregoing will be useful to you and your students and that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3571
FOIL-AO-13809

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January 6, 2003

Ms. Ronda C. Roaring
[redacted]

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

Dear Ms. Roaring:

I have received your correspondence and appreciate your kind words.

You wrote that you are a certified teacher and that you have been employed as a substitute teacher for several school districts in the vicinity of Ithaca. Since substitutes are typically approved by boards of education, minutes of meetings include names of substitutes or others hired by a district. According to your letter, the Lansing Central School District places minutes of meetings of its Board of Education on the District's website, "and that by searching [your] name, one can determine that [you] worked for the Lansing school district and make the association that [you are] working for districts in the area." You have objected to the inclusion of your name in a website and expressed the belief that its publication "is in violation of § 87.2 (b) and (f) and §89.2 (b) (i) of the Freedom of Information Law."

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law pertaining to the placement of records on the internet or an agency's website. In my experience, it is not unusual for a unit of local government to place minutes of meetings of public bodies on their websites. I note, too, that a recipient of minutes of a meeting could place the minutes or the contents of minutes on his or initiative on the internet, with or without approval or consent of the government agency that prepared those records. Further, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, 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)].

Second, when a board of education takes action during a meeting to employ a particular person or persons, I believe that §106(1) of the Open Meetings Law requires that the action be memorialized through the preparation of minutes.

Third, I disagree with your contention that disclosure of your name in minutes placed on website is "in violation" of the provisions of the Freedom of Information Law to which you referred. 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 provisions to which you referred deal with the ability of a government agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" or "endanger the life or safety of any person."

From my perspective, there is nothing secret about the names of substitute teachers; their identities are made known to students and, indirectly to parents and perhaps others. Further, payroll records required to be maintained by all agencies must include reference to the name, public office address, title and salary of every officer or employee of the agency [see Freedom of Information Law, §87(3)(b)]. While substitute teachers may not be "employees", they are paid by the District, and records of payments are public. For those reasons, I do not believe that disclosure of substitute teachers' names would constitute an unwarranted invasion of personal privacy or that it could be demonstrated that disclosure would endanger their lives or safety.

Lastly, it is emphasized that the Freedom of Information Law is permissive, and that the Court of Appeals, the state's highest court, 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, and no such statute would be applicable in this instance.

In short, I believe that the name of a substitute teacher appearing in minutes of a meeting must be disclosed, and that there is no restriction regarding the publication of minutes on a school district's website.

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: Robert J. Service

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13810

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January 6, 2003

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 letters concerning your efforts in gaining access to records of the Office of Temporary and Disability Assistance ("the Office").

One relates to fees for copies of records sought under the Freedom of Information or Personal Privacy Protection Laws that may be assessed by the Office. Although you referred to "an alleged conversation between [me] and Russell Hanks, Deputy General Counsel" on the subject of fees, I had never spoken directly with Mr. Hanks prior to the receipt of your letter.

With respect to the substance of the matter, I note that neither of those statutes makes reference to fee waivers, and that it has been held that an agency may charge its established fee for copies even though the applicant for records is indigent [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)]. I recognize that the Office, by means of practice and through its regulations, has determined to waive copying fees when a request is made by person involved in a hearing and the records are pertinent to the proceeding, or when a "data subject" seeking records pursuant to the Personal Privacy Protection Law "is a person applying for or receiving public assistance or care or food stamp assistance." However, I believe that the Office may charge fees in all other circumstances in which copies of records are requested. Moreover, it has been held that an agency may require payment of fees in advance of its preparation of photocopies when a request is made under the Freedom of Information Law (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

With regard to the other letter, you asked whether John Robitzek, Counsel to the Office, "can legally order others or instruct others to obstruct the physical delivery of a FOIL Request by [you] or others acting at your behest." While I am unaware of Mr. Robitzek's authority, it is my view that an agency has the inherent power to take action necessary to ensure the safety of its employees and to prevent disruption in the workplace. In addition, it is my understanding that your exclusion from the premises of the Office has not diminished your ability to request records. On the contrary, I was

informed that an 800 telephone number may be used to request records under the Freedom of Information Law or in relation to a hearing, and that verbal requests in those instances are accepted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Robitzek
Russell Hanks

FOIL-AO-13811

From: Robert Freeman
To: [redacted]
Date: 1/7/03 4:52PM
Subject: Re: (no subject)

Hi - -

Based on the assumption that the study was prepared by a consultant, the report would be treated as if it were prepared by agency staff and would consist of "intra-agency material." If that is so, portions containing statistical or factual information would be accessible, while opinions, recommendations and the like could be withheld. The result would be the same whether the study is in possession of the sewer district, the Town, either or both.

If my assumption is inaccurate, please let me know.

With respect to the other issue, I believe that the only instance in which a person must provide a name or proof of identity would involve the situation in which the record pertains to that person and would not be accessible to anyone else. In that instance, disclosure would result in an unwarranted invasion of privacy if made available to others, but the subject of the record could not invade his or her own privacy and would have a right of access.

I hope that this helps and that all is well.

Bob

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1381 2

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January 7, 2003

Mr. Ricky Smith
01-B-1216
Wyoming Correctional Facility
P.O. Box 501, Dunbar Road
Attica, NY 14011-0501

Dear Mr. Smith:

I have received your appeal following a denial of access to records by the Division of Parole.

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

The provision concerning the right to appeal a denial of access to records is §89(4)(a), which states in relevant part that:

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

As indicated in the response addressed to you on December 3, you had the right to appeal to Counsel to the Division of Parole.

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-1383

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

January 8, 2003

Mr. Samuel Lewis
02-A-0876 H3-41
Washington Correctional Facility
72 Lock 11 Lane
P.O. Box 180
Comstock, NY 12821

Dear Mr. Lewis:

I have received your letter in which you requested certain records from this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning public access to government records in New York, primarily under the state's Freedom of Information Law. The Committee does not have possession or control of records generally, and we do not maintain the records of your interest.

As a general matter, a request for records should be directed to the "records access officer" at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. If, for example, records of your interest are maintained by the Department of Correctional Services at your facility, the Department's regulations indicate that a request should be made to the facility superintendent or his designee. If the records are maintained by the Division of Parole at the facility, I believe that a parole officer assigned to the facility will accept a request for records; if they are kept at the Division's Albany office, the records access officer is Ms. Ann Crowell.

Lastly, the "U.S. Freedom of Information Act" applies only to records maintained by federal agencies; it does not govern rights of access to records kept by entities of state and local government in New York.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-13814

From: Robert Freeman
To: cmule@portjeff.org
Date: 1/8/03 2:49PM
Subject: Dear Ms. Mule:

Dear Ms. Mule:

I have received your inquiry concerning a "standard form" to be used when a person seeks records under the Freedom of Information Law.

In this regard, I know of any such form available online. Moreover, I note that although section 89(3) of the law authorizes an agency, such as a village, to require that a request for records be made in writing, there is nothing in the law that pertains to any particular form that may or should be used. While many agencies have prepared request forms and can ask that they be completed when it is convenient for an applicant to do so, it is has been advised that a person cannot be required to complete an agency's prescribed form as a condition precedent to the submission of a request. In short, any request made in writing that reasonably describes the records sought should suffice. Again, however, if a person is seeking records in person, I believe that you may ask that a form be used, so long as it is not inconvienient for the applicant to do so.

For a more expansive explanation of the matter, you might go to the index to opinions rendered under the Freedom of Information Law accessible via our website (the address is below), click on to "F", scroll down to "Form prescribed by agency" and click on to #10004.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 13815

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

January 8, 2003

Mr. John V. Oldfield
Board Member
Mental Patients Liberation Alliance
300 Berkeley Drive
Syracuse, NY 13210

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

Dear Mr. Oldfield:

As you are aware, I have received your letter and the materials attached to it. The matter relates to a request for records from Onondaga County that was denied in part on the ground that "they are non-final inter-agency documents revealing the nature of the governmental deliberative process and subjective matter which does not contain statistical or factual tabulations or final department policies or determinations."

In this regard, having contacted Christina Pezzulo, Senior Deputy County Attorney, her recollection was that the records in question consist largely of what she described as "predecisional notes" prepared by staff. While I am unaware of specific contents of the records, the provision to which Ms. Pezzulo alluded appears to govern with respect to rights of access. Specifically, §87(2)(g) states that an agency, such as the County, 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:tt

cc: Christina Pezzulo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FPPA-AO - FOIL-AO-13816

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

January 8, 2003

Mr. Michael G. Kessler
Kessler International
237 Park Avenue, 21st Floor
New York, NY 10017-3140

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

Dear Mr. Kessler:

I have received your letter of November 22 and the materials attached to it. You have sought an opinion concerning a request made under the Freedom of Information Law to the State Insurance Fund. Although voluminous materials were disclosed, certain items were redacted, such as the names of officers and employees of a vendor, "pedigree information", as well as "the names of independent contractors used to perform service under the contract..."

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.

From my perspective, the identities of employees of private companies generally may be withheld from records that come into the possession of a government agency. By means of analogy, 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' identities 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 the case of a state agency subject to both the Freedom of Information Law and the Personal Privacy Protection Law, a key element of that statute deals with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law,

§92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of Personal Privacy Protection Law, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves when a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter." It is noted, too, that §89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Therefore, if a state agency cannot disclose records or portions of records pursuant to §96 of the Personal Privacy Protection Law, it is precluded from disclosing under the Freedom of Information Law.

In my view, a different conclusion should apply with respect to the portion of your request involving the identities of independent contractors. If a contractor is a business entity, such as a corporation, the provisions pertaining to the protection of privacy would not, in my opinion, apply. Again, those provisions relate to information concerning natural persons. If a contractor is a person who serves as principal of a business entity, as you are aware, it has been held by the state's highest court that the provisions dealing with the protection of personal privacy involve "certain personal information about private citizens" [see Federation of New York State Rifle and Pistol Clubs, Inc., 73 NY 2d 92 (1989)]. In another decision rendered by the Court of Appeals and a discussion of "the essence of the exemption" concerning privacy, the Court referred to information "that would ordinarily and reasonably regarded as intimate, private information" [Hanig v. State Dept. of Motor Vehicles, 79 NY 2d 106, 112 (1992)]. In view of the direction given by the state's highest court, again, I believe that the authority to withhold the information based upon considerations of privacy is restricted to those situations in which records contain *personal* information about natural persons, as opposed to information identifiable to those acting in a business capacity.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jeffrey R. Ritter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13817

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January 8, 2003

E-Mail

TO: Ron Nowak, Editor <glnews@greenwoodlakenews.com>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Nowak:

I have received your letter in which you questioned the propriety of a denial of access by the Village of Greenwood to a "sewer study update paid for with a member's item grant." The Village contends that "the study is a draft and is considered inter/intra governmental communication."

In this regard, first, the Freedom of Information Law makes no specific reference to drafts, and in my view, documentation in the nature of a draft is subject to rights of access. That statute is applicable to agency records, and §86(4) defines the term "record" to include:

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

Based on the foregoing, a draft prepared by or for the Village would constitute a "record" as soon as it exists.

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, although §87(2)(g), the provision pertaining to inter-agency and intra-agency materials, 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 another 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, whether the study was prepared by Village employees or by a consultant, I believe that it could be characterized as intra-agency material. However, that it is a draft is not determinative of rights of access. Again, insofar as the record in question consists of statistical or factual information, I believe that it must be disclosed.

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

FOIL-AO-13818

From: Robert Freeman
To: mercadentem@colonie.org
Date: 1/10/03 12:57PM
Subject: Dear Ms. Pellegrini:

Dear Ms. Pellegrini:

I have received your inquiry concerning a request for records that have been sealed pursuant to section 160.50 of the CPL, and I agree that it involves what might justifiably be characterized as a "catch-22."

As you are likely aware, the basis in the FOIL for withholding records sealed under section 160.50 is section 87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." It has been suggested that, in the situation that you described, a request should be denied on the ground that the records "are exempted from disclosure by statute", without citing the statute or adding anything more. If you indicate that the records do not exist, that would be inaccurate; if you make specific reference to section 160.50, you would be telling the applicant that the subject of the records was charged with a crime but not convicted, thereby defeating the purpose of that section.

Whether a court would fully agree with a response of that nature remains unresolved . However, at this time, the suggestion offered above seems to represent a fairly reasonable solution to the problem.

Please feel free to contact me to consider the issue further. I hope that I have been of assistance.

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

FOIL-AO-1381G

From: Robert Freeman
To: moshenko@eng.buffalo.edu
Date: 1/13/03 10:23AM
Subject: Dear Ms. Moshenko:

Dear Ms. Moshenko:

I have received your fax concerning fees established by the Williamsville Central School District. It is noted that this office never received an email from you in December as you indicated.

With respect to the substance of the matter, section 87(1)(b)(iii) of the Freedom of Information Law pertains to fees and states that an agency may charge up to 25 cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing any other record (i.e., as in the case of a computer tape or disk, etc.).

From my perspective, the fee assessed in relation to your request is valid, for it involves a total based on twenty-five cents per photocopy. The fee for "compilation" appears to related to situations in which a request is made for information that does not exist in the form of a record or records. If that is the case, an agency, such as the District, would be performing a service that exceeds its responsibilities, and the limitations imposed by the Freedom of Information Law would not apply.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13820

41 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 13, 2003

Mr. Ronald Tucker
39032-053
F.C.I. Allenwood
P.O. Box 2000
White Deer Park, 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. Tucker:

I have received your letter in which you requested assistance in obtaining records from the New York State Department of Correctional Services. You indicated that you requested records several months ago, but you have not received a response.

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.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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: Daniel Martuscello, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3573
FOIL-AO-13821

41 State Street, Albany, New York 12231
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January 13, 2003

Mr. Don Slovak
[redacted]

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

Dear Mr. Slovak:

I have received your note in which you requested an advisory opinion. You have sought clarification under the Freedom of Information Law with respect to time limits for agencies to respond to requests for records, the degree of specificity required in a request for records, and the availability of "notices of claim." Under the Open Meetings Law, you sought clarification concerning "notice" requirements and the ability of a board member to disclose information acquired during an executive session.

In this regard, I offer the following comments.

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

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

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

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

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

Second, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the record keeping systems of the Town, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records.

However, as indicated in Konigsberg, 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, the request would have failed to meet the standard of reasonably describing the records.

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

It is possible that some records pertaining to litigation fall within the scope of the attorney-client privilege. Here I point out that the first basis for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." The courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, and Pennock v. Lane, supra Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has also found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, material prepared for litigation may be confidential under §3101 of the Civil Practice Law and Rules.

Nevertheless, legal papers filed against the Town would not have been prepared by the Town, its officials or its agents. As such, in my opinion, those papers would not be subject to the attorney-client privilege.

Fourth, regarding notices of meetings and special meetings, there is nothing in the Open Meetings Law that directly addresses the matter of notice of special meetings. Nevertheless, that statute requires that notice be posted and given to the news media prior to every meeting of a public body, such as a village board of trustees. Specifically, §104 of that statute provides that:

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

> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

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

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.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.

Lastly, you questioned the ability of a board member to disclose information obtained at an executive session of the board. In this regard, the Open Meetings Law requires that meetings of public bodies, 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 under §108(3).

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 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." In my opinion, 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 that context, 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. 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.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Town Board
Kimberly Pinkowski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13822

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January 14, 2003

Ms. Kathy A. Ahearn
The State Education Department
The University of the State of New York
Albany, NY 12234

The staff of the Committee on 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. Ahearn:

I appreciate having received a copy of Commissioner Mills' determination following an appeal of a denial of access to a certain list sought by a reporter for the New York *Daily News*.

The request was denied on the basis of §89(2)(b)(iii) of the Freedom of Information Law, which, as you are aware, provides that an "unwarranted invasion of personal privacy" includes the "sale or release or lists of names and addresses if such lists would be used for commercial or fund-raising purposes." While the statute does not define what might be characterized as a "commercial purpose", the Commissioner concluded that, since "the information...sought was intended to be used to build a database to further the general interests of this for-profit company", the request involved a commercial purpose that falls within the exception cited above.

From my perspective, assuming that the request involves an effort to enhance the news gathering capacity of a newspaper and to provide information in the nature of news to its readers, the request does not involve a commercial purpose. In this regard, I offer the following comments.

First, although members of the news media have no special rights under the Freedom of Information Law, it is clear that the State Legislature intended that the news media serve as an extension of the public, as the public's eyes and ears, when it enacted the law. The legislative declaration, §84 of the law, states in relevant part 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..." The reference to the press as the representative of the public in my view suggests that a request by a newspaper should be equated with a request by a member of the public in a manner fully consistent with the overall intent of the Freedom of Information Law.

The legislative history of the federal Freedom of Information Act (5 USC §552) and judicial interpretations of the Act also indicate that a request by a member of the news media for news gathering purposes does not constitute a commercial purpose, even though his or her employer is a profit-making entity.

As you are aware, the New York Freedom of Information Law is silent with respect to fee waivers for copies of records, and it does not distinguish among applicants for records regarding fees to be assessed. In contrast, the federal Act authorizes the assessment of fees for copying, as well as the cost of searching for and reviewing records, when a request is made "for commercial use" [5 USC §552(a)(4)(A)(ii)(I)]. However, a federal agency must waive or reduce fees when so doing would be "in the public interest because furnishing the information can be considered as primarily benefitting the general public" [5 USC §552(a)(4)(A)]. As such, fees charged under the federal Act are dependent in great measure on whether a request involves a commercial or non-commercial purpose.

A sponsor of legislation designed to clarify the federal Act, Senator Leahy of Vermont, indicated that a primary purpose of the Act is to encourage the dissemination of information in government files and stated that:

> "It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected....In fact, any person or organization which regularly published or disseminates information to the public...should qualify for waivers as a 'representative of the news media.'" (132 Cong.Rec.S14298).

The House sponsors, Representatives English and Kindness, expressed the same intent, offering that:

> "A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, or other entity that is in the business of publishing or otherwise disseminating information to the public qualifies under this provision" (132 Cong. Rec. H9463).

In short, the intent of both the State Legislature and Congress in considering requests for records by the news media appears to be based on the recognition that the exercise of first amendment principles cannot be characterized as a commercial use. Further, federal court decisions have reached the same conclusion. In a decision involving access to mug shots, "although recognizing that the newspaper would reap some commercial benefit from its access to the mug shots", it was held that "news interests should not be considered commercial interests" [Detroit Free Press v. Department of Justice, 73 F.3d 93, 98 (6th Cir. 1996); see also Fenster v. Brown, 617 F.2d 740, 742 (D.C. Cir 1979); National Security Archive v. Department of Defense, 880 F.2d 1381, 1386 (D.C. Cir 1989)].

If the request does not involve a commercial purpose, but rather a news gathering function, I do not believe that the basis for denial offered in the determination of the appeal would have been appropriately asserted.

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

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

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

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

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the

> disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

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

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

In short, in my opinion and as suggested in the decisions cited above, the exception concerning privacy, including §89(2)(b)(iii), does not apply to a list of persons identified as licensees or by means of their professional or business capacities.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Nellie Perez
Jonathan R. Donnellan
Russ Buettner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13823

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January 14, 2003

Mr. Jean Corriolan
00-A-6187
Fishkill Correctional Facility
P.O. Box 307
Beacon, NY 12508-0307

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

Dear Mr. Corriolan:

I have received your letter in which you sought assistance in obtaining a "Tier III Appeal Form...in which the incident took place while at Auburn Correctional Facility." You wrote that you requested the record from various officers at your current facility, but you have not received a response.

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, you wrote that the "Tier III Officer" and the "Deputy Commissioner" at your facility failed to reply to your requests for the record of your interest. It is suggested that future requests for records be directed to the person designated as the "Inmate Records Coordinator" at the appropriate facility. That person has the duty of coordinating a facility's response to requests.

Third, since I am unfamiliar with the content of the records 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. Several grounds for denial may be pertinent to an analysis regarding the availability of the "Tier III Appeal Form."

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.

Additionally, records compiled for law enforcement purposes may be withheld under §87(2)(e)(i), (iii), which if disclosed would interfere with a law enforcement investigation or identify a confidential source. Records may also be withheld under §87(2)(f) to the extent that disclosure "would endanger the life or safety of any person", or under §87(2)(b) if disclosure would constitute "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

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January 15, 2003

Mr. David Paul Haka II
02-B-2100
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. Haka:

I have received your letter in which you questioned the propriety of denials of your requests 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 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

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January 15, 2003

Mr. Kwane Dozier
99-A-3689
Hudson Correctional Facility
P.O. Box 576
Hudson, NY 12534

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

Dear Mr. Dozier:

I have received your letters in which you explained that you have requested records from various entities and asked whether you were proceeding "in the right direction with [your] present FOILs." You also asked this office to "look into" a request that you directed to the Hudson Correctional Facility.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

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 requests for records sent to your attorney and a county court clerk, it is noted that the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

Based on the provisions quoted above, the courts 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.

Regarding requests made to your attorney, 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 that 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.

I hope that the foregoing serves to enhance your understanding of the Law.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13826

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January 17, 2003

Mr. William Burch
99-A-2848
Franklin Correctional Facility
62 Bare Hill Road, P.O. Box 10
Malone, NY 12953

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

Dear Mr. Burch:

I have received your letter in which you wrote that the New York State Education Department has not provided you with your G.E.D. test results from 1978 or 1979.

In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my opinion, if the record of your interest exists and can be located with reasonable effort, it would likely be available to you because it appears that none of the grounds for denial would be applicable.

Second 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 Education Department does not maintain the record sought, the Freedom of Information Law would not apply. For instance, if there is no record indicating your test results, there is nothing to be disclosed under the Freedom of Information Law.

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

There is no
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13827

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January 17, 2003

Ms. Eleanor Kapsiak
[redacted]

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

Dear Ms. Kapsiak:

I have received your letter in which you questioned the authority of a school district to require that a person seeking records under the Freedom of Information Law sign a form indicating that the records sought "shall not be used for any private, commercial, fund raising, or other purpose."

With one exception, the purpose for which a request is made is irrelevant when a person requests records under the Freedom of Information Law. Only in that instance may an agency require the kind of assertion that is reflected in the form. In this regard, I offer the following comments.

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

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, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant.

Third, the only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose of which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought. In that decision, it was stated that:

> "The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses. That situation, however, represents the only case under the Freedom of Information Law in which an agency may inquire as to the purpose for which a request is made, or in which the intended use of the record has a bearing upon rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Steven Achramovitch

FOIL-AO-13829

From: Robert Freeman
To: [redacted]
Date: 1/17/03 3:36PM
Subject: Dear Mr. Steinmetz:

Dear Mr. Steinmetz:

I have received your inquiry. You asked how you may appeal an "apparent denial" of a request for records made to the Eden Town Supervisor on January 6, and you had not received a response as of the 16th.

In this regard, first, pursuant to regulations promulgated by this office, each agency, such as a town, is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records, and requests ordinarily should be made to that person. Because the town clerk is the legal custodian of all town records, the clerk is the records access officer in the great majority of towns.

Second, notwithstanding the foregoing, assuming that the Supervisor is not the records access officer, I believe that, once in receipt of your request, he had the obligation to respond directly in a manner consistent with the Freedom of Information Law, or forward the request to the proper person, i.e., the records access officer.

Third, irrespective of which Town official received the request, the Town was required to respond in some manner within five business days of the receipt of the request. A failure to do so constitutes a denial of access that may be appealed. Under the circumstances, should you appeal, it is suggested that you indicate to the appeals person or body (either the Town Board or a person or body designated by the Board) that a request was made on January 6, that no response has been given as yet, that you consider the failure to respond within the statutory time as a denial of your request, and that you are appealing the denial. Pursuant to section 89(4)(a) of the Freedom of Information Law, an appeal must be determined within ten business days of its receipt.

Lastly, it is suggested that you telephone the Clerk and/or the Supervisor to ascertain the status of the request. Unless you are told that the response has been mailed, it is suggested that you ask the Clerk for the name of the person or body to whom you may appeal and that you appeal the constructive denial of your request.

I hope that I have been of assistance.

cc: Town Supervisor
Town Clerk

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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January 21, 2003

Mr. Michael Kessler
[redacted]

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

Dear Mr. Kessler:

I have received your letter and the correspondence attached to it. You have sought an opinion concerning a denial of your request for certain records by the State Insurance Fund.

The request involved invoices submitted to the Fund by certain vendors for the third quarter of 2000 and the first quarter of 2002. In response to an appeal, you were informed that disclosure would provide competitors "commercially valuable information about [the Fund's] business strategy" and that, therefore, the records could be withheld under §87(2)(d) of the Freedom of Information Law. In addition, you were told that the records sought "are scattered among thousands of individual files in twelve district offices" and that "[i]dentifying and retrieving those invoices would require an unreasonable degree of effort that is beyond what is required under FOIL."

In this regard, I offer the following comments.

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

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

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

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

While I am unfamiliar with the recordkeeping systems of the Fund, 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, 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.

As I understand its functions, the Fund essentially operates as an insurance company in competition with other insurance carriers licensed to do business in the state. While the Fund as a state agency is not typical of commercial enterprises, my understanding is that, in many respects, it carries out many of its duties as an entity in competition with private firms in the insurance industry. Most pertinent to the matter, I note that there is case law indicating that when a governmental entity performs functions essentially commercial in nature in competition with private, profit making entities, it may withhold records pursuant to §87(2)(d) in appropriate circumstances (Syracuse & Oswego Motor Lines, Inc. v. Frank, Sup. Ct., Onondaga Cty., October 15, 1985). In this instance, assuming that the Fund is engaged in competition with private firms engaged in the same area of commercial activity, I believe that §87(2)(d), the so-called "trade secret" exception would serve as a potential basis for a denial of access.

As you may be aware, the cited provision permits an agency to withhold records that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

The question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity. The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize

records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Also relevant to the analysis is a decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury" [(Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could

> easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

In sum, I believe that the State Insurance Fund could in the context of the preceding remarks be characterized as a commercial entity and therefore, assert §87(2)(d). This is not to suggest that the Fund's records necessarily may be withheld in their entirety, but rather that those records or portions of records that fall within the scope of §87(2)(d) may be withheld in accordance with the preceding commentary.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth J. Ross
Jeffrey R. Ritter

From: Robert Freeman
To: cadler@co.dutchess.ny.us

Dear Ms. Adler:

I have received your inquiry concerning access to pistol permit records.

There has been a degree of confusion due to a change in the governing statute, section 400.00(5) of the Penal Law. That provision stated for many years that an approved pistol license application was accessible in its entirety. It was amended, however, to require only that the name and address of a licensee must be made available. That being so, I do not believe that a member of the public has a right to inspect the entirety of a permit.

If you have questions regarding the foregoing, please feel free to contact me. I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13832

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

January 23, 2003

Mr. Sheldon L. Randolph
01-A-0947
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Randolph:

I have received your letter in which it appears that you have appealed a denial of access to records to this office.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-13833

From: Robert Freeman
To: [redacted]
Date: 1/23/03 12:33PM
Subject: Dear Mr. Snyder:

Dear Mr. Snyder:

I have received your letter in whith you referred to a statement that the Freedom of Information Law pertains to records and that government officers or employees are not required to provide information in response to questions. You also referred to a situation in which you "asked a local government official a question about his office, but he didn't answer." You have asked what you can do "to make him answer."

In this regard, first, the statement acquired from the Irondequoit Town website is, in my view, accurate. It is true that the Freedom of Information Law deals with requests for records and does not require government officials to answer questions.

Second, rather than seeking answers to questions, it is suggested that you request records that contain the information of your interest. For instance, instead of asking how many employees work in a certain government office, a person might request records that identify persons working in that office. I note, too, that the law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate the records.

Third, pursuant to regulations promulgated by this office, each agency, such as a town, is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records, and requests should ordinarily be made to that person. In most towns, and I believe that this so in the Town of Irondequoit, the town clerk is the records officer. If that is so, it is suggested that a request for records containing the information of interest be made to the Town Clerk rather than the official in question.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
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January 23, 2003

E-Mail

TO: Melvyn Meer [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. Meer:

I have received your letter concerning a delay in response to your request on the part of the New York City Department of Transportation.

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.

RJF:jm

cc: Penny Jackson
Iris Weinshall

FOIL-AO-13835

From: Robert Freeman
To: [redacted]
Date: 1/23/03 1:22PM
Subject: Dear Ms. Pedicone:

Dear Ms. Pedicone:

I have received your inquiry concerning the need to "file a formal FOIL request" to gain access to an eligible list in which your name appears.

In this regard, since the FOIL includes all agency records within its coverage, and since section 89(3) authorizes an agency to require that a request be made in writing, I believe that an agency may require you submit a "formal" FOIL request. I note, however, that an agency may accept an oral request or respond informally to an informal request. Many agencies do so when it is clear that a record is public (as in the case of an eligible list, according to section 71.3 of the regulations of the Department of Civil Service) and can be readily located.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
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January 24, 2003

Ms. Ralene Adler
[redacted]

The staff of the Committee 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. Adler:

I have received your letter and the correspondence attached to it. You have raised a series of questions concerning access to certain records of the Great Neck Library ("the Library") under the Freedom of Information Law.

In this regard, first, I do not believe that the Library, a free association library, is subject to or required to comply with the Freedom of Information Law."

It is noted at the outset many libraries are characterized as "public", in that they can be used by the public at large. Nevertheless, some of those libraries are governmental in nature, while others are not-for-profit corporations. The latter group frequently receives significant public funding. Because they are not governmental entities, they would not be subject to the Freedom of Information Law. Boards of trustees of all such libraries would, however, be subject to the Open Meetings Law.

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

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

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

In conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, which includes Valley Cottage within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

Confusion concerning the application of the Freedom of Information Law to association libraries has arisen in several instances, perhaps because its companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with that statute.

Second, notwithstanding the foregoing, it is my understanding that the Library Board determined that it would treat requests for records in accordance with the standards applied by the Freedom of Information Law, even though it is not required to do so. In applying those standards to the kinds of records at issue, I believe that some of the records would be accessible, but that others could likely be withheld in whole or in part, depending on their contents.

When the Freedom of Information Law applies, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In consideration of the records at issue, it appears that the provision most pertinent is §87(2)(g), which permits an agency to withhold records that:

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

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

determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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., an architect) may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Arlene Nevens

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3576
FOIL-AO-13837

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January 24, 2003

Mr. Richard Hathaway
[redacted]

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

Dear Mr. Hathaway:

I have received your letter of December 30 and the materials attached to it. Having reviewed their contents, which in some instances are conflicting, I offer the following comments.

First, the Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements pertaining to their contents. Specifically, §106 states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter 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 generally 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.

Second, it is emphasized 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 the context of the matter as I understand it, §87(2)(e) of the Freedom of Information Law may have been pertinent. That provision permits an agency, such as a town, to withhold records that:

> "are compiled for law enforcement purposes and which if disclosed would:
>
> i. interfere with law enforcement investigation 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, for example, disclosure of action taken by the Town Board, if indeed action was taken, would have interfered with an investigation, I do not believe that the minutes would have to have included that information.

Lastly, with respect to rights of access to records of the investigation, since I am unaware of the specific contents of the records in question, I do not believe that I can offer comments additional to those appearing in the letter addressed to you on December 23.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13838

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January 27, 2003

Mr. John P. Schrade, 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. Schrade:

I have received your letter in which you asked whether you can obtain records relating to your application for a position with the Port Authority.

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

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

Since the Port Authority is a bi-state entity operating in New York and New Jersey, I do not believe that it is subject to the New York, New Jersey or federal freedom of information statutes. In short, a state cannot impose its laws beyond its borders, and it has been held that the Freedom of Information Law does not apply to a bi-state agency (see e.g., Metro-ILA Pension Fund v. Waterfront Commission of New York Harbor, Sup. Ct., New York County, NYLJ, December 16, 1986). However, I believe that the Port Authority has adopted a policy on disclosure that is generally consistent with the New York Freedom of Information Law.

Assuming that the Port Authority were to give effect to the New York Freedom of Information Law, several points should be made.

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

Second, relevant in consideration of the records of your interest would be §87(2)(g), which authorizes an agency to withhold records that:

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

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

From my perspective, insofar as the records at issue consist of opinions, i.e., of interviewers, psychologists, etc., they could justifiably be withheld if the entity in question were to give effect to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 27, 2003

Ms. Patricia C. Rosen
[redacted]

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

Dear Ms. Rosen:

I have received your letter and the materials attached to it. You have sought assistance concerning a request for records of the Jamestown School District, specifically, a variety of records relating to your employment by the District from 1977 through 1988.

In this regard, I offer the following comments.

First, since your request involves records that were prepared between approximately fifteen and twenty-five years ago, some of the records may have been properly destroyed and no longer exist. To that extent, the Freedom of Information Law would not apply or be pertinent.

Second, also in consideration of the time that has passed since the creation or use of the records, a key issue may involve the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. 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

Third, insofar as the request has reasonably described existing 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

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: Karen Briner Peterson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13840

41 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, 2003

Mr. & Mrs. Sidney 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 facts presented in your correspondence.

Dear Mr. Sloves:

I have received your latest letter, and if I understand your question correctly, you asked whether you can request a financial report of a union under the Freedom of Information Law.

In this regard, that statute applies to agency records, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, as a general matter, the Freedom of Information Law is applicable to records of entities of state and local government in New York. A union would not constitute an agency and, therefore, would not be subject to the Freedom of Information Law.

If I have misconstrued your question, please so inform me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13841

41 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, 2003

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 again expressed frustration concerning your attempts to gain access to certain records of the Elmont Union Free School District.

In terms of the substance of the matter, I believe that rights of access were exhaustively explained in my earlier response to you. In short, it is clear that an agency must maintain a record setting forth the name, public office address, title and salary of every officer or employee of the agency, and that records indicating public employees' gross wages and collective bargaining agreements are accessible under the Freedom of Information Law. However, I offer the following additional 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 the Freedom of Information Law states in part that:

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

Lastly, should a challenge to a denial of access be initiated in court, §89(4)(c) states that a court may award reasonable attorney's fees to a person denied access when he or she substantially prevails, when the court finds that the agency had no reasonable basis for withholding the records, and when the records are of clearly significant interest to the general public.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Maria Palandra
Deanna Doreson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13842

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

January 28, 2003

Mr. Gerald Spencer
89-A-3902
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

Dear M r. Spencer:

I have received your letter in which you sought assistance in obtaining a copy of a decision from the New York County Supreme Court.

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 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 supreme court, it is suggested that a request for records be made to the clerk of the court, citing §255 of the Judiciary Law as the basis for the 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-13843

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

January 28, 2003

Mr. Ronald Davidson
76-A-1166
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. Davidson:

I have received your letter and the correspondence attached to it. You have sought an advisory opinion concerning what you consider to have been refusals from the Elmira Correctional Facility and the Department of Correctional Services to provide you with certain records. Mr. Anthony J. Annucci...wrote that "the facility does not have any records responsive to your request as no such reports have been provided to the facility." The records sought involve asbestos removal at your facility.

In this regard, 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 your facility 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.

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, I would agree with advice indicated in Mr. Annucci's letter that you send requests for records "directly to the appropriate agency" that may maintain the records of your interest. His letter suggested that "the project in question is being conducted by the Office of General Services."

For your information, the records access officer for the Office of General Services is Anthony M. Rudman, Corning Tower - 41st Floor, Empire State Plaza, Albany, NY 12242,

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 - 13844

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

January 28, 2003

Mr. John Martino
95-B-1167
Attica Correctional Facility
Attica, NY 14011-0149

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

Dear Mr. Martino:

I have received your letter and attached materials in which you requested assistance in obtaining records from the Ontario County Court. It appears that you have requested from the Court and from the Unified Court System records "concerning [your] co-defendant's plea bargain, arrest report and disposition, her grand jury testimony and a copy of her indictment." Mr. Shawn Kerby, Assistant Deputy Counsel of the Unified Court System, responded in part that "we have no public records pertaining to that 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.

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.

Lastly, but possibly most importantly, §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 or the Judiciary 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 those laws.

I hope that the foregoing serves to enhance 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-13845

41 State Street, Albany, New York 12231
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January 28, 2003

Mr. Daryle Manigault
00-A-1187
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. Manigault:

I have received your letter in which you asked whether a court-appointed defense attorney is required to answer a Freedom of Information Law request.

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.

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-13846

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

January 29, 2003

E-MAIL

TO: Sonja Pascatore [redacted]t

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. Pascatore:

As you are aware, I have received your letter in which you sought advice concerning a particular situation. You indicated that the supervisors of five towns located on Chautauqua Lake developed a "lake management plan" and sent it as proposed legislation to your state senator. If approved, a commission with substantial powers would be created, and you asked whether it is "legal for supervisors of townships to meet in private and set up 'acts' which would change the town laws, to allow for the formation of a 'lake district' which will be financed on the backs of the taxpayers, without the taxpayers being privy to such action." It is assumed that the five supervisors could not take any final or binding action and that they could only recommend a plan or legislation.

In this regard, 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."

A "meeting", according to §102(1), is a gathering of a quorum, a majority of a public body, for the purpose of conducting public business. A typical meeting of a town board, for example, would be subject to the Open Meetings Law.

If I understand the situation correctly, the Open Meetings Law would not have applied, for there was no majority of any particular public body at the gatherings that you described. Rather, it appears that the gatherings involved one member each from five public bodies, the town boards of the each of the towns represented by their supervisors. If there was no majority of any particular board present, the gatherings would not have fallen within the scope of the Open Meetings Law. If, however, a supervisor who attended the private gatherings met with at least two other members of his or her town board to discuss the proposal, any such gathering in my view would have constituted a meeting of a public that fell within the coverage of the Open Meetings Law.

I note that any group of individuals has the ability to gather to discuss issues of common concern and express their opinions or recommendations to their elected representatives. If, for example, friends or neighbors share your views, you have the ability to meet, discuss the matter, and offer an alternative to your senator or express opposition to the proposal offered by the supervisors.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13847

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

January 29, 2003

E-MAIL

TO: Kathy Snyder <[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. Snyder:

As you are aware, I have received your letter in which you asked whether "budgetary changes" involving the transfer by a village from one fund to another "has to be open for the public to view."

In this regard, while I know of no requirement that action of that nature must be explained to the public during a meeting of the village board of trustees, records indicating the transfer, as well as any factual material relating to the transfer, must in my opinion be made available on request.

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

Pertinent is one of the grounds for denial. However, due to its structure, it requires the disclosure of the information of your interest. Specifically, §87(2)(g) permits an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Based on your description of the matter, the information of your interest would consist of statistical or factual information. If that is so, insofar as the village maintains records containing the information of your interest, I believe that they must be disclosed.

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3579
FOIL-AO-13848

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Fax (518) 474-1927
Website Address:http://www.dos.state.ny us/coog/coogwww.html

January 29, 2003

E-MAIL

TO: Dan Trachman [redacted]

FROM: Robert J. Freeman

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

Dear Mr. Trachman:

As you are aware, I have received your letter concerning the status of the New York Public Library under the Freedom of Information Law.

In this regard, I offer the following comments.

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

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

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school

> library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division 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.

Having reviewed a variety of information on the New York Public Library's website, <www.nypl.org>, it is clear that that entity is a private, not-for-profit institution. It was founded in 1895 by the Astor, Lenox and Tilden foundations to provide "private philanthropy for the public good." That being so, I do not believe that it is subject to the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to non-governmental libraries open to the public has arisen in several instances, perhaps because its companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to

public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries must be conducted in accordance with that statute.

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-13849

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

January 30, 2003

Mr. Latherio Stokes
95-B-2545
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. Stokes:

I have received your letter and attached material in which you questioned the propriety of responses from the Office of the Monroe County Clerk and County Executive concerning your request for a "surveillance warrant in [your] present felony conviction."

In regard to the response from the County Clerk's Office, which indicated that a surveillance warrant is not in your file, it is noted that the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

Based on the provisions quoted above, the courts 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.

The response from the Office of the County Executive indicated that your "request was denied because if such a warrant was issued, it would have been issued by the court and is therefore exempt from disclosure. Furthermore, to the extent that such records exist, they were previously furnished to you or your attorney."

In this regard, it is noted that 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 [98 NY 2d 746, 359 NYS2d 855 (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 County, irrespective of their origin, are subject to rights conferred by the Freedom of Information Law.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney it was found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request

> for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions"[Moore v. Santucci, 151 AD 2d 677, 678 (1989)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Maggie Brooks
Richard F. Mackey
James P. Smith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13850

41 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, 2003

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 most recent letters in which you asked this office to "address" a matter regarding an alleged "unlawful prevention of public access to records" and to provide you with "prosecution information." You also asked whether an agency is required to compare a record provided by you to an original maintained by the agency and certify that it is a true copy. Finally, you questioned the propriety of a response from the Chemung County District Attorney's Office which indicated that your request was "too general and unspecific."

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, it is noted that in response to one of your previous requests for an advisory opinion, this office wrote to you on August 26, 2002, regarding the applicability of Penal Law §240.65, which relates to the unlawful prevention of public access to records. This office does not maintain "prosecution information" on this or any other matter. In the event you have misplaced our previous correspondence, enclosed please find a copy of that opinion.

Second, regarding the certification of records, §89(3) of the Freedom of Information Law states in relevant part that, in response to a request for a record, "the entity shall provide a copy of such record and certify to the correctness of such copy if so requested..." From my perspective, the certification required by the Freedom of Information Law does not involve an assertion that the contents of a record are accurate, but rather that a copy of a record made available in response to a

request is a true copy. In essence, the certification is supposed to signify that the applicant received an actual copy of a record maintained by an agency, irrespective of the accuracy or the "factuality" of the contents of the record.

Lastly, you questioned the propriety of a response which indicated your request was "too general and unspecific." In this regard, I note that 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 District Attorney's office, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

As requested, a copy of this opinion is being sent to the Chemung County District Attorney's Office.

I hope that I have been of assistance.

Sincerely,

David M. Treacy
Assistant Director

DT:jm
cc: Chemung County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13851

41 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, 2003

Mr. Mohammad Bhiuyan
00-A-5128
Auburn Correctional Facility
P.O. Box 618
Cayuga, NY 13924

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

Dear Mr. Bhiuyan:

I have received your letter in which you requested that this office "keep an eye" on your request for records from the New York City Department of Correctional Services which would indicate the identity of your visitors while you were "being held in the pen area of the Queens County Court Building" on a particular date.

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 record 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 record exists, none of the grounds for denial would be applicable.

If, however, no separate visitors log 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 has 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 quoted above that the agency could not reject the request due to its breadth and also stated that:

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

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

I am unaware of the 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 extensive 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-13852

41 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, 2003

Mr. Melvin Kimbrough
00-A-2134
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. Kimbrough:

I have received your letter in which you complained concerning your unsuccessful attempts to obtain "information [you] need on getting [your] property released" from the Bronx County District Attorney's Office. You wrote that you have not received a response to your request for records which indicate such information.

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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13853

41 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, 2003

Mr. Kevin Sheils
99-A-5444
Barehill 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. Sheils:

I have received your letter in which you appear to appeal to this office the denial of access to records you have requested from your facility and Mr. Anthony J. Annucci, Deputy Commissioner and Counsel, New York State Department of Correctional Services.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to determine appeals, 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 DeCorsc 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-13854

41 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, 2003

E-MAIL

TO: [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. [redacted]

As you are aware, I have received your inquiry concerning the Freedom of Information Law.

You wrote that a fire department installed video surveillance cameras in its rec room and has accused your son, a member of the department, of "inappropriate behavior" that was captured on videotape. His request to view the tape was denied, and you asked for my views concerning the propriety of that response.

In this regard, I offer the following comments.

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

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

A fire district is a public corporation [see General Construction Law, §66, and Town Law, §174(7)]. Consequently, I believe that a fire district is required to comply with the Freedom of Information Law.

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

While I am not familiar with the contents of the tape, pertinent are §§87(2)(b) and 89(2)(b), both of which deal with the ability of an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Although the tape might justifiably be withheld from the public pursuant to those provisions, your son could not invade his own privacy. Further, §89(2)(c) states in relevant part that 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."

In short, it appears that the tape in question should be accessible to your son pursuant to the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13855

41 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, 2003

Mr. Bobby Shabahs Shabazz
99-B-1170
Wyoming Correctional Facility
P.O. Box 501, E1-45
Attica, NY 14011-0501

Dear Mr. Shabazz:

I have received your letter in which you appealed a denial of access to records to this office.

In this regard, please be advised that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records.

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

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

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

I hope that 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-13856

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

January 31, 2003

Mr. Nathaniel R. Collins
00-A-0780
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. Collins:

I have received your letter concerning your difficulty in obtaining a reproduction of a photograph from the Office of the Bronx County District Attorney. You wrote that you were informed by the District Attorney's office that " you would have to purchase a 'xerox' copy...as they were not required by the Freedom of Information Law to make a duplicate of the photograph."

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, based upon §86(4) of the Freedom of Information Law, photographs maintained by an agency in my view clearly constitute records subject to rights of access.

Further, §89(3) of the Freedom of Information Law states in part that, upon payment of the appropriate fee, an agency "shall provide a copy of such record." Further, the provision in the Law pertaining to fees, §87(1)(b)(iii), states that an agency's rules and regulations must include reference to:

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

As I interpret the language quoted above, unless a different statute authorizes other fees, the first clause provides that an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches. The next clause, which deals with the "actual cost of reproduction", pertains to "other" records, i.e., those records that cannot be duplicated by means of photocopying. In my view, if a photocopy of a photograph serves as an adequate reproduction of such a record, a photocopy would likely suffice to comply with the Law. However, if a photocopy does not serve to provide an accurate method of reproducing what appears on a photograph, as agency, in my view, would be obliged to "copy" the record, i.e., prepare a reprint of a photograph upon payment of the actual cost of reproduction [see Mixon v. Gallivan, Supreme Court, Erie County March 4, 2002].

Lastly, in a decision concerning a request for records maintained by the office of a district attorney it was found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his

counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions"[Moore v. Santucci, 151 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-13857

41 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 3, 2003

Mr. Antonio Cruz
96-A-2811
Orleans Correctional Facility
Gaines Basin Road
Albion, NY 14411-9199

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

Dear Mr. Cruz:

I have received your letter in which you asked whether you could obtain under the Freedom of Information Law general information concerning the functions of the branches of federal government.

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

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

The language quoted above indicates that an agency is an entity of state or local government in New York.

In my opinion, a library, not the New York Freedom of Information Law, would be the best source of general information concerning the federal 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-13858

41 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 3, 2003

Mr. Horace Gaines
91-A-8829
Wende Correctional Facility
Wende Road, P.O. Box 1187
Alden, NY 14004-1187

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

Dear Mr. Gaines:

I have received your letter in which you requested assistance "in showing the Department of Correctional Services" that an error has been made in the calculation of your conditional release date.

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 as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 records containing the material of your interest would consist of factual information. If that is so, I believe that they should be available.

To request records related to the calculation of your conditional release date, you may wish to write to David Martuscello, Records Access Officer, Department of Correctional Services, Building 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-13859

41 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 3, 2003

Mr. William H. Collins
[redacted]

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

Dear Mr. Collins:

I have received your letter and the materials attached to it. You have sought assistance in obtaining records pertaining to an arrest for shoplifting that occurred nearly two years ago. As of the date of your letter to this office, a police report was made available, but you are interested in obtaining additional information, including the disposition of the case and the name of the attorney who handled the case.

In this regard, I would conjecture that the case has been resolved, for the incident occurred nearly two years ago. If the charge was dismissed in favor of the accused, the records pertaining to the matter would have been sealed pursuant to §160.50 or 160.55 of the Criminal Procedure Law. Therefore, I would conjecture further that the matter was disposed of by means of an admission of guilt, a plea, or a conviction by means of a trial. If my assumptions are accurate, the information sought, insofar as it exists in the form of a record or records, should be made available by the Office of the District Attorney. In short, if the matter has been concluded by means of a conviction, I do not believe that any of the grounds for denial could properly be asserted to withhold the kind of information that you are seeking.

With respect to what appears to be a delay in responding to one of your 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 responsc to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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, while the courts are not subject to the Freedom of Information Law, court records are generally available pursuant to other statutes (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a). You might consider seeking records pertaining to the case from the court in which the proceeding was conducted, citing an applicable provision of law as the basis for such a request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John L. Kotchick, III

FOIL-AO-13860

From: Robert Freeman
To: [redacted]
Date: 2/3/03 11:45AM
Subject: Dear Mr. Hartman:

Dear Mr. Hartman:

I have received your inquiry concerning rights of access to reports prepared by the Police Department following your complaints relating to "noisy neighbors."

In this regard, I believe that the answer is dependent on the contents of the reports and the effects of disclosure.

As a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, all government agency records are accessible, except to the extent that one or more grounds for denial listed in the law may be asserted. If, for example, police officers interviewed other neighbors, it is likely that portions of a report identifiable to those persons could be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy." Records may also be withheld insofar as disclosure would interfere with an investigation or include the advice, opinions, conjecture or recommendations of police officers or other public employees. However, factual information, such as the time of a visit, findings and the like would be accessible, unless one of grounds for denial (as in the situations described above) may be asserted.

If you are interested in acquiring additional information, a great deal of material is available on our website. For instance, complaint follow up reports are also known as "DD5's", and rights of access are described in opinions available via our website. Go to the advisory opinions rendered under the Freedom of Information Law, click on to "D" and "DD5 report" will be first listing. The higher numbered opinions are the 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

From: Robert Freeman
To: ltras@dmv.state.ny.us
Date: 2/3/03 11:22AM
Subject: Hi Ida - -

Hi Ida - -

If you've got records indicating which employees worked in a certain unit during a particular time, I believe that they would be available. While disclosure would result in an invasion of privacy, it would not constitute an "unwarranted" invasion of privacy.

As you may be aware, it has been held in a variety of contexts that public employees have less privacy than others and, in general, that records involving the performance of public employees' official duties are accessible. Disclosure in those instances would constitute a permissible rather than an unwarranted invasion of personal privacy.

If you need additional information or would like to discuss the matter further, please feel free to contact me.

Robert J. Freeman
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FOIL-AO- 13862

From: Robert Freeman
To: Dave Mack
Date: 2/3/03 10:52AM
Subject: Re:

In short, if an agency fails to determine an appeal within ten business days as required by section 89(4)(a) of the FOIL, the person seeking records is deemed to have exhausted his or her administrative remedies and may consider the appeal to have been denied. If that is the case, that person may initiate an Article 78 proceeding to challenge the agency's denial of access in court.

With respect to mugshots, case law indicates that the mugshot of a person who has been convicted or against whom charges are pending is accessible under the FOIL. The situation in which it is confidential involves the case in which charges are dismissed in favor of an accused. In that instance, the records would be sealed under section 160.50 of the Criminal Procedure Law. For additional information, go to our FOIL index to opinions, then to "M" and scroll down to "mugshots". The highest numbered opinion considers the issue in detail.

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13863

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

February 3, 2003

E-MAIL

TO: Maureen Reutter [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. Reutter:

As you are aware, I have received your correspondence in which you sought clarification concerning the application of the Freedom of Information Law. You referred to a requirement imposed by your school district that you "must file a FOIL request in order to view and/or receive copies of [your] child's educational records." You questioned the basis of that requirement "since school records are not considered public record and are protected by the Privacy Act."

From my perspective, while the school district need not require a request in writing, it may do so. As I understand the matter, the issue relates to your view of what constitutes "public records." I believe that all government records constitute public records; whether or the extent to which they are accessible is a separate matter.

It is noted that the Freedom of Information Law includes within its scope all records of an agency, such as a school district, and that §86(4) of the law defines the term "record" expansively to mean:

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

Based on the foregoing, all records maintained by or for an agency fall within the coverage of the Freedom of Information Law. From there, 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. I note that §89(3) states in part that an agency may require that a request for records be made in writing.

In short, again, every record kept by or for an agency is a "public record" subject to rights of access. In some instances, records may be available in whole or in part; in others, separate statutes may remove them from access to the general public, as in the case of education records pertaining to students, which are accessible to parents, but generally confidential with respect to third parties. Although rights of access to student records are governed by the federal Family Educational Rights and Privacy Act (20 USC 1232g), because those records are maintained by a school district that is subject to the Freedom of Information Law, I believe that the records fall within the coverage of that statute with respect to the procedure for seeking those records.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13864

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

February 3, 2003

Mr. Steven M. Silverberg
Wilson, Elser, Moskowitz
Edelman & Dicker LLP
3 Gannett Drive
White Plains, NY 10604

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

Dear Mr. Silverberg:

I have received your letter and the correspondence attached to it. You have sought an opinion concerning delays by the City of Mount Vernon in responding to your requests for records.

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

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

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

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

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

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

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: Hina Sherwani

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13865

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February 4, 2003

E-MAIL

TO: "Joe Merendino" <[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. Merendino:

I have received your letter concerning rights of access to records contained in a case file of an unemployment insurance hearing.

In this regard, although the Freedom of Information Law grants broad rights of access to government records, one of the grounds for denial of access pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §537 of the Labor Law, which is entitled "Disclosures prohibited." That statute states in subdivision (1) that:

> "[I]nformation acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provisions of law. Such information insofar as it is material to the making and determination of a claim for benefits shall be available to the parties affected and, in the commissioner's discretion, may be made available to the parties affected in connection with effecting placement."

To the extent that the records sought fall within the scope of §537, they would be confidential, unless they are "material to the making and determination of a claim for benefits" or the Commissioner of Labor asserts her discretionary authority to disclose records for the purpose of effecting placement in a job. Although there are provisions in the remainder of §537 that authorize disclosure in certain

instances, I do not believe that any would be applicable in the context of the situation that you described.

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 11, 2003

Mr. Gerald Stevens
01-A-2283
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. Stevens:

I have received your letter in which you asked whether various "directives" from the Department of Correctional Services would be available to you under the Freedom of Information Law.

In this regard, I offer the following comments.

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

Second, since I am unfamiliar with the content of the directives, I cannot conjecture as to their availability. However, I direct your attention to §87(2)(g) of the Freedom of Information Law, which permits an agency to withhold records that:

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

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

A directive may in my view be available on the ground that it constitutes agency policy, unless a different ground for denial applies. For instance, directives which involve security at a facility might justifiably be denied under §87(2)(f). That provision permits an agency to withhold records when disclosure would "endanger the life or safety of any person."

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13867

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February 12, 2003

Mr. Michael Ravnitzky
Reporter
American Lawyer Media
173 M Street N.W., Suite 800
Washington, DC 20036

The staff of the Committee 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. Ravnitzky:

As you are aware, I have received your letter of January 22 in which you requested an advisory opinion.

The matter involves a request sent to the Metropolitan Transportation Authority (MTA) to "inspect onsite certain historical documents the MTA holds in its library." You indicated that most of the forty-seven documents sought were prepared between ten and thirty years ago. In response to the request, thirty-five of the documents were withheld in their entirety pursuant to §87(2)(g) of the Freedom of Information Law.

Having discussed the matter with the MTA's records access officer, Ann Cutler, I was informed that the records at issue are voluminous and that substantial time and effort would be needed to review their contents for the purpose of determining rights of access. She also indicated that such a task could be carried out more quickly if you choose to restrict your request to a lesser number of documents that are of particular interest.

Based on my understanding of the matter, §87(2)(g), as well as a different exception, are pertinent to an analysis of 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.

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..."

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

I emphasize that 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.).

In short, insofar as inter-agency or intra-agency materials consist of any of the items described in subparagraphs (i) through (iv) of §87(2)(g), I believe that they must be disclosed, unless a different exception may properly be asserted.

While I am not familiar with the contents of the reports, since September 11, 2001, attention has focused frequently on risk assessments, vulnerability analyses and similar records. In my view, those kinds of records consist in part of opinions, conjecture or, in essence, best guesses. To that extent, I believe that they include material that may be withheld.

Also of possible relevance is §87(2)(f), which authorizes an agency to withheld records insofar as disclosure "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 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), 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 at a public library, which you suggested is so with regard to some of the documents at issue.

Lastly, when a record is available in its entirely under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, as you are aware, there are often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the grounds for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record. When portions of records must be disclosed, an agency may 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Kalikow
Ann Cutler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13868

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February 12, 2003

Mr. Brian D. Murphy
Murphy Stecich & Powell, LLP
828 South Broadway, Suite 300
Tarrytown, NY 10591-6650

Dear Mr. Murphy:

I have received your letter of January 17 in which you offered information concerning the "DeSantos Report", which was the subject of an advisory opinion prepared on December 13 at the request of Mr. James P. Paolantonio. In short, he indicated that the report was characterized as an "external audit" by officials of the Village of Sleepy Hollow, and it was advised that §87(2)(g)(iv) of the Freedom of Information Law specifies that external audits must be disclosed.

You wrote, however, that the DeSantos Report:

> "...was commissioned by the Village Board of Trustees for the purpose of providing a legal and practical analysis of the operations of the Village Police Department. The principals of DeSantos and Associates are practicing attorneys. At the time that DeSantos & Associates were retained, the Village was involved in several law suits naming the police department and individual officers. One of the principal reasons for initiating the study by outside consultants, was to analyze issues of potential liability and to advise village officials regarding appropriate measures to protect the village from future litigation."

You added that:

> "The consultant's report also reviews and addresses various policy and practices of the village police department. Some of the policies reviewed or addressed by the report could, if disclosed, have a direct effect on public safety. Such policies as departmental storage of weapons as well as investigative procedures, could if revealed, raise the risk of compromising police investigative techniques and the security of police officers and the public. As such, it is also our belief that such information in the report should not be disclosed."

In this regard, first, based on your description of the "DeSantos Report", it appears that the characterization of that document as an "external audit" was misleading and erroneous. As you described it, the report represents, at least in part, advice offered by an outside legal consultant. If that is so, the provision cited in the response to Mr. Paolantonio, as well as others, are pertinent to an analysis of rights of access.

Assuming that it is not an external audit, but rather a report prepared by a consultant, §87(2)(g) would enable the Village to withhold those portions that consist of advice, opinion, recommendations and the like.

As you suggested, records prepared by consultants for agencies are treated as "intra-agency materials." 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)].

Whether the report is considered that of a consultant or an external audit, other exceptions to rights of access are significant.

Insofar as the consultant served as legal advisor, 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", and I believe that §3101(c) and (d) of the Civil Practice Law and Rules (CPLR) might be properly be asserted.

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."

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 or the public under the Freedom of Information Law.

Based on your comments, also potentially significant is §87(2)(e)(iv), which enables an agency to withhold records compiled for law enforcement purposes which if disclosed would reveal non-routine criminal investigative techniques and procedures. The leading decision on the matter, Fink v. Lefkowitz [47 NY2d 567 (1979)], 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 inferred, 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 in accordance with §87(2)(f). That provision permits an agency to deny access to records insofar as disclosure 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."*

In sum, it appears that the description of the report as it was referenced in the opinion addressed to Mr. Paolantonio was inaccurate and that substantial portions of the report may be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James P. Paolantonio

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February 12, 2003

Mr. Walter Pasternak
[redacted]

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

Dear Mr. Pasternak:

As you are aware, I have received your letter of January 16 in which you raised a series of questions relating to the Open Meetings Law and public access to certain information.

Your first area of inquiry pertains to executive sessions held for "personnel reasons."

In this regard, first, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. 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.

Further, even when §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "personnel" or "personnel reasons" 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; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as a "personnel" is inadequate, for it fails to enable the public or even members of the Board to know whether subject at hand may properly be considered during an executive session.

The other area of inquiry relates to closed sessions held to discuss property tax litigation and whether a public body is required to disclose the details of a settlement of the litigation "at the subsequent reconvened regular meeting if requested to do so."

Here, I point out that public body (other than a board of education) may take action during a properly convened executive session. If action is taken, §106 of the Open Meetings Law requires that minutes of the executive session reflective of the nature of the action taken, the date and the vote of each member must be prepared and made available to the public to the extent required by the Freedom of Information Law within one week of the executive session.

From my perspective, the minutes, as well as the actual terms of such a settlement must be disclosed under 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, 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)].

Finally, I believe that any such settlement agreement must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Unless records may justifiably be withheld in accordance with one or more of the grounds for denial, a claim, a promise or an agreement to maintain confidentiality would, based on judicial decisions, be meaningless.

From my perspective, none of the grounds for denial could apparently be asserted to withhold a record reflective of a settlement between a local government and a property owner.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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February 12, 2003

Mr. Timothy D. Bunn
Deputy Executive Editor
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The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bunn:

I have received your letter and the materials attached to it. You have sought an advisory opinion pertaining to rights of access to "incident reports" prepared by law enforcement agencies.

The issue apparently arose due to comments offered by the Onondaga County District Attorney, William Fitzpatrick, following an incident in which a gun was confiscated from a person who was about to board an airplane at Hancock Airport. Following the arrest, one of your reporters indicated that the District Attorney stated that: "It will be put to bed once and for all this myth that when there is a felony arrest the public is entitled to see police reports. They're not. And they won't in the future." Your reporter added that "Questioned afterward, Fitzpatrick repeated to the TV, radio and print reporters that 'police reports' are not public documents." The District Attorney apparently later clarified his statement and told your reporter that arrest reports are public but that other police reports are not.

In this regard, I offer the following comments.

First, there is no provision in the Freedom of Information Law or any other statute of which I am aware that directly refers to or mentions police "incident reports." I note, however, that the Freedom of Information Law as originally enacted listed categories of records that were accessible and that one of those categories involved "police blotters and booking records." Issues arose relative to those records because they are not legally defined. While many are familiar with the phrases "police blotter" and "booking record", the contents of those records differ from one police department the next. Similarly, the contents of incident reports differ from one department to the next, and from one event to another.

Second, the records at issue in my view are, as a group, neither exempt from disclosure nor necessarily available in their entirety.

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

The Court of Appeals, the state's highest court, reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, a police department contended that certain reports, so-called "complaint follow up reports" that are similar in nature to incident 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.).

Considering the matter in relation to issues that arose concerning the traditional police blotter or equivalent records, I believe that such records would, based on case law, be accessible. In Sheehan v. City of Binghamton [59 AD2d 808 (1977)], it was determined, based on custom and usage, that a police blotter is a log or diary in which events reported by or to a police department are recorded. That kind of record would consist of a summary of events or occurrences, it would not include investigative information, and would be available under the law.

If a police blotter, incident reports or other records, regardless of their characterization, include more information than the traditional police blotter, it is possible that portions of those records, depending on their contents and the effects of disclosure, may properly be withheld. The remainder, however, would be available. For instance, the fact that a robbery of a convenience store occurred and is recorded in a paper or electronic document would clearly be available, even if no one has been arrested or arraigned; the names of witnesses or suspects, however, might properly be withheld for a time or perhaps permanently, depending on the facts. The fact that an arson fire occurred and is recorded would represent information accessible under the law; records indicating the course of the investigation might, perhaps for a time, justifiably be withheld.

In considering the kinds of records at issue, several of the grounds for denial might be pertinent and serve to enable a law enforcement agency to withhold portions, but not the entire contents of records.

For example, the provision at issue in a decision cited earlier, Gould, §87(2)(g), enables an agency to withhold records that:

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

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

appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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

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

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

Based on the foregoing, the agency could not claim that the complaint reports may be withheld in their entirety on the ground that they constitute intra-agency materials. The Court also found that portions of reports reflective of information supplied by members of the public are not inter-agency or intra-agency communications, for those persons are not officers or employees of a government agency (id., 277). However, the Court was careful to point out that other grounds for denial might apply in consideration of the contents of the records and the effects of disclosure.

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 perhaps a victim.

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

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

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

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

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

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

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

In sum, incident reports, by their nature, differ in content from one situation or incident to another. To suggest that they may be withheld in their entirety, categorically, in every instance, is in my opinion contrary to both the language of the Freedom of Information Law and its judicial construction by the state's highest court. As indicated in the preceding commentary, the extent to which those records may be withheld is dependent upon their content and the effects of disclosure. I am not suggesting that incident reports or similar records must in every instance be disclosed; I concur, however, with your statement that determining rights of access to records by an agency should be likened to the use of a "scalpel and not a meat ax."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. William Fitzpatrick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 12, 2003

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 sought an advisory opinion concerning the propriety of a denial of your request made under the Freedom of Information Law for records of the Lake George Park Commission.

Among the records sought were "the employment application and FOILable records of receptionist Kitty Ledinham, the disposition of any post complains and/or disciplinary action taken, if any." In response, you were informed that the employee in question was not the subject of any complaint other than yours and that the employment application is "exempt from disclosure under §87 (2)(b) of the Public Officers law because disclosure would constitute an unwarranted invasion of personal privacy."

In this regard, I offer the following comments.

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

Second, based on the judicial interpretation of the Freedom of Information Law, it is likely that portions of the employment applicant must be disclosed.

By way of background, as you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. As suggested in the response to your request, 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 decision, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

In conjunction with the foregoing, I note that it has been held by the Appellate Division, Third Department, that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

Additionally, in the lower court decision rendered in Kwasnik v. City of New York, (Supreme Court, New York County, September 26, 1997), the court cited and relied upon an opinion rendered by this office and held that those portions of applications or resumes, including information detailing one's prior public employment, must be disclosed. The Court quoted from the Committee's opinion, which stated that:

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

> by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

Quoting from the opinion, the court also concurred with the following:

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

Items within an application for employment or a resume that may be withheld in my view would include social security numbers, marital status, home addresses, hobbies, and other details of one's life that are unrelated to the position for which he or she was hired.

In affirming the decision of the Supreme Court, the Appellate Division found that:

> "This result is supported by opinions of the Committee on Open Government, to which courts should defer (*see, Miracle Mile Assocs. v. Yudelson,* 68 AD2d 176, 181, *lv denied* 48 NY2d 706), favoring disclosure of public employees' resumes if only because public employment is, by dint of FOIL itself, a matter of public record (FOIL-AO-4010; FOIL-AO-7065; Public Officers Law §87[3][b]). The dates of attendance at academic institutions should also be subject to disclosure, at least where, as here, the employee did not meet the licensing requirement for employment when hired and therefore had to have worked a minimum number of years in the field in order to have qualified for the job. In such circumstances, the agency's need for the information would be great and the personal hardship of disclosure small (*see*, Public Officers Law §89[2][b][iv])" [262 AD2d 171, 691 NYS 2d 525, 526 (1999)].

In sum, again, I believe that the details within an employment applicant application that are irrelevant to the performance of one's duties may generally be withheld. However, based on judicial decisions, those portions of such a record or its equivalent detailing one's prior public employment and other items that are matters of public record, general educational background, licenses and certifications, and items that indicate that an individual has met the requisite criteria to serve in the position, must be disclosed.

In an effort to resolve the matter, a copy of this opinion will be sent to the Commission.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Bruce E. Young
Michael P. White

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 12, 2003

E-MAIL

TO: Mary Thill <mthill@adirondacklife.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. Thill:

As you are aware, I have received your inquiries concerning what you described as a denial of access to certain records and the propriety of an executive session held by the Village of Saranac Lake Planning Board.

With respect to the first inquiry, you wrote that residents requested a map larger than nine by fourteen inches relating to a proposed subdivision. In response, you were informed that the Village does not have the equipment to copy the maps "in house" and that the maps cannot be removed until action on the proposal is taken by the Planning Board. You asked whether the maps are subject to the Freedom of Information Law.

In this regard, the Freedom of Information Law is applicable to records maintained by or for 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, the maps in my view clearly constitute Village records that fall within the coverage of the Freedom of Information Law.

Section 87(2) of the Freedom of Information Law provides that accessible records must be made available for inspection and copying. In addition, §87(1)(b)(iii) authorizes an agencies to charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing other records, i.e., computer tapes or disks, or records in excess of nine by fourteen inches.

In situations similar that described several possibilities have been suggested. First, the maps may be inspected at no charge. Second, a person could photograph the maps with his or her own camera equipment at no charge. Or third, several photocopies of a large map could be made and thereafter cut and pasted together.

Your second question concerns a meeting held by the Planning Board concerning the same proposal during which an executive session was held with the developer.

Here, I refer to the Open Meetings Law, which applies to meetings of public bodies, including planning boards. In brief, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be held open to the public, except to the extent that an executive session may properly be held. 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, and paragraphs (a) through (h) of §105(1) specify and limit the subjects that may be considered in executive session.

In my view, unless the Village owned the property under consideration, it is unlikely that there would have been any basis for conducting an executive session. In that event, the only ground of possible significance would have been §105(1)(h), which authorizes 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 or securities held by such public body, but only when publicity would substantially affect the value thereof."

If the issue involved property owned by a private person or entity, I do not believe that §105(1)(h) would have applied. If the property was owned by the Village, only to the extent that publicity would have substantially affected the value of the property could an executive session, in my opinion, have validly been held.

I hope that I have been of assistance.

RJF:tt

cc: Building Officer
Planning Board

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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February 12, 2003

Ms. Nancy Holiday
[redacted]

The staff of the Committee on 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. Holiday:

I have received materials concerning your request for a tape recording of a meeting of the Wyandanch Union Free School District. You were apparently informed that the tape would not be available until the minutes of the meeting were approved. Further, although you were told by the Business Manager that the fee for a copy would involve the cost of a cassette, in a memorandum to him, the Board President asked "who will pay for the time the District Clerk works copying audio tapes" and "who will take care of the wages?"

In this regard, first, it is noted that §106 of the Open Meetings Law requires that minutes of meetings must be prepared and made available within two weeks. Further, there is nothing in the Open Meetings Law or other statute that requires minutes to be approved. While most public bodies do approve their minutes, they do so based on policy or tradition, not because any provision of law requires that the minutes be approved.

Second, the Freedom of Information Law pertains to records of an agency, such as a school district, 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."

Therefore a tape recording of a meeting constitutes a "record" subject to the Freedom of Information Law.

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

Lastly, 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 reproducing a tape recording as suggested by the business manger, would involve the cost of a cassette.

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals, the state's highest court, has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a

governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Rev. Michael Talbert
Calvin Wilson

STATE OF NEW YORK
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February 12, 2003

Mr. Eugene Driscoll
Reporter, The Patent Trader
185 Kisco Ave.
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 facts presented in your correspondence.

Dear Mr. Driscoll:

I have received your letter in which you referred to a response to a request by the Town of Bedford and questioned whether it is consistent with the Freedom of Information Law.

According to your letter, on January 21, you requested two documents referenced on the agenda pertaining to the Town Board's meeting that night. The documents sought were letters sent to the Town by a local company and by the Town Attorney. You indicated that you were denied access to both and told that they would be accessible once they were "made public" at the meeting. You added that you were told that "this is town policy, presumably for any communication on a town board agenda."

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 town, 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."

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. Therefore, irrespective of its origin, its use, or whether it is referenced or never used or

read by Town officials, documentation maintained by or for a town would constitute an agency record subject to rights of access.

Third, pursuant to §89(3) of the Freedom of Information Law, an agency may require that an applicant request records in writing. That provision also states that an agency must respond to a request in some manner within five business days of the receipt of a request. In consideration of the foregoing, I do not believe that an agency is required to respond instantly to a request. Nevertheless, §84, the legislative declaration, states in relevant part that agencies must make records available "wherever and whenever feasible." That being so, if for example, a record is clearly available and can be readily retrieved, there may be no rationale for delaying disclosure.

In consideration of the foregoing, while I am not suggesting that the response to your request was fully inconsistent with law, a delay in disclosing records until they are "made public" at a town board meeting as a matter of policy, would, in my opinion, be contrary to law. Again, many records are never made public at meetings, and the absence of a public disclosure at a meeting does not, in my opinion, serve as a valid means of delaying disclosure or denying access.

With respect to rights of access to the letters that you requested, the communication from a local company would likely be accessible, for none of the ground for denial would appear to apply. The letter from the Town Attorney might, however, justifiably be withheld.

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 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 if the letter prepared by the Town Attorney is subject to the attorney-client privilege, consists of attorney work product or was prepared in anticipation of litigation, and if it has not been filed with a court or disclosed to an adversary, it appears that it would be exempt from disclosure under the Freedom of Information Law.

I note that the client, the Town Board may waive the privilege. In the context of the situation that described, the Board could choose to disclose the letter from its attorney at a meeting or at any time.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 12, 2003

Mr. Larry Tomlin
85-A-7396
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

Dear Mr. Tomlin:

I have received your letter in which you requested that this office assist you in obtaining records. You wrote the Division of Criminal Justice Services has not responded to your requests.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of 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
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February 12, 2003

Mr. Alphonso Samuels
82-A-5791
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 facts presented in your correspondence.

Dear Mr. Samuels:

I have received your letter and attached materials in which you complained about your difficulties in obtaining a variety of information from your facility since July, 2001.

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

cc: Superintendent, Gowanda Correctional Facility

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 13877

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February 12, 2003

Hon. Eunice O. Esposito
Town Clerk
Town of Rotterdam
Town Hall
J.F. Kirvin Government Center
1100 Sunrise Boulevard
Rotterdam, NY 12306

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

Dear Ms. Esposito:

I have received your letter of January 23 in which you requested an advisory opinion concerning "the location of perusal and supervision constraints" that may be employed when records are requested under the Freedom of Information Law. Based on our discussion of the matter, I believe that the question is whether the Town can determine the location where records may be inspected.

In this regard, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate general regulations concerning the procedural implementation of the law. The Committee did so at the time that the current statute became effective in 1978 (see 21 NYCRR Part 1401). In turn, §87(1) of the Freedom of Information Law requires the governing body of a public corporation, i.e., a town board in a town, to adopt rules and regulations consistent with law and the Committee's regulations.

Section 1401.3 states that "Each agency shall designate the locations where records shall be available for public inspection and copying." Based on that provision, the Town Board has the authority to designate where within Town offices the public may inspect and copy records.

From my perspective, every law, including the Freedom of Information Law, must be implemented in a manner that gives reasonable effect to its intent. In this instance, if the Town Board has designated a location or locations where member of the public can reasonably inspect and copy records, I believe that it would be acting in compliance 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

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February 12, 2003

Ms. Janet Krivak
Assistant
Putnam County Consumer Affairs/
Weights & Measures
Donald B. Smith County Government Center
110 Old Route Six - Bldg. 3
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. Krivak:

I have received your letter in which you sought "input" concerning a request made under the Freedom of Information Law.

The request involved the names, addresses and telephone numbers of licensed contractors in Putnam County. You wrote that the County maintains both electronic and paper files pertaining to contractors and that the only list that can be generated electronically includes contractors' names and addresses; telephone numbers are not included within the electronic data. You added that "[a]ccess to phone numbers would have to be manual and personal information deleted prior to releasing copies of approximately 950 records." Although you granted access to the list that could be computer generated, the portion of the request involving telephone numbers was denied and has been appealed. You have contended that the request for telephone numbers "appears to be beyond the intent of the law for the 'people's right to know process of government'" (emphasis yours).

In this regard, I offer the following comments.

First, notwithstanding §84 of the Freedom of Information Law, the legislative declaration that focuses on the intent of the law, it has been held that records must be disclosed, even if they are unrelated to "the process of government" or accountability, unless an exception to rights of access may be asserted.

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

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

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

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

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

In another decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although

the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

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

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

Similarly, the Court of Appeals has held that the records may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)] insofar as records include information of a personal or intimate nature [see Hanig v. State Department of Motor Vehicles, 79 NY2d 106 (1992)]. A contractor's business address and business telephone number would not, in my view, represent items of a personal or intimate nature. A home address or home phone number on the other hand (assuming that they are different from a business address or business phone number) could, in my opinion, justifiably be withheld as an unwarranted invasion of personal privacy.

In sum, I believe that business telephone numbers of contractors should be made available, since none of the grounds for denial of access would apply.

Lastly, when records are available in their entirety under the Freedom of Information Law, the public may inspect them at no charge. However, the records containing telephone numbers apparently also include personal information that the public has no right to inspect. In that kind of situation, disclosure would involve preparing a photocopy, from which certain items would be deleted. It has been held that an agency may charge up to twenty-five cents per photocopy and may require payment of the requisite fee in advance of photocopying (see VanNess v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999). As such, prior to disclosure of 950 records containing contractors' telephone numbers, I believe that the County could require advance payment of $237.50.

If the information appears on a form, it has been advised in similar situations that a stencil be prepared to cover those portions of a form that may be withheld or that have not been requested.

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-13879

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February 12, 2003

Mr. Kevin B. Barry
[redacted]

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

Dear Mr. Barry:

I have received your letter of January 23 and the materials relating to it.

As I understand the situation, your wife requested certain records in August of 2001 pertaining to an attempt by her former employer, the Freeport Public School District, "to secure written allegations of felony conduct" in which she may have engaged. Although the District denied that any such records existed, the records sought were introduced by the District in a federal court proceeding initiated by your wife. In September of 2002, you requested certain items, but the District, according to your letter, failed to reply in a timely manner. Your appeal that followed a denial of request has not, as of the date of your letter to this office, been answered. Further, in response to an ensuing request for the District's "FOIL policy", you were informed that no such policy exists.

You have sought my views concerning the foregoing, and in this regard, I offer the following comments.

First, with respect to the existence of a "FOIL policy", by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the Board of Education, was required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law within sixty days following the effective date of the Freedom of Information Law, which was January 1, 1978.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

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

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

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

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." When you consider it worthwhile to do so, you could seek such a certification.

Fourth, while I am not necessarily suggesting that they apply, I note that §89(8) of the Freedom of Information Law and §240.65 of the Penal Law pertain to "unlawful prevention of public access to records" and include essentially the same language. Specifically, the latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record that must be maintained.

Next, in one aspect of the response to your wife's request, it was stated that "unproven allegations of misconduct against a school employee" may be withheld on the ground that disclosure "would constitute an unreasonable invasion of personal privacy." While I agree with that conclusion with respect to the public at large, I do not believe that such a rationale for denying access would apply if the request involved records pertaining to your wife. In short, I do not believe that a person can invade his or her own privacy.

Lastly, in some instances, reference was made to a failure to seek a specific record. Here I point out that the original version of the Freedom of Information Law enacted in 1974 required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an

applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the District's recordkeeping systems, insofar as records sought can be located with reasonable effort, I believe that a request would meet the requirement that you "reasonably describe" the records.

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. Eric Eversley
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3582
FOIL-AO-13880

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February 12, 2003

Mr. Jerry Ravnitzky
[redacted]

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

Dear Mr. Ravnitzky:

As you are aware, I have received your letter in which you requested an advisory opinion.

You referred to a recommendation offered some time ago by the Town of Carmel Board of Ethics that the Chairman of the Zoning Board of Appeals recuse himself when applicants before the Board are represented by a particular law firm. You wrote that the Town Board, "at an executive work session", voted to reject the recommendation of the Ethics Board.

In this regard, unless it has adopted its own rule to the contrary, the Board may engage in the same activities during a work session as a regular meeting.

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

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official

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

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

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

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

With respect to minutes of work sessions, as well as other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

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

> information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based on the foregoing, if an executive session has been properly convened, a public body may take action during the executive session, unless the action is to appropriate public money. If action is taken, minutes indicating the nature of the action taken, the date, and the vote of each member, must be prepared and made available within one week to the extent required by the Freedom of Information Law.

In your second area of inquiry, you wrote that the Town Ethics Code states that the "complaint records and other proceedings related thereto shall remain confidential until the Board of Ethics makes a recommendation for action to the Town Board or dismisses the complaint." You have asked whether the "entire record of this complaint" must be disclosed.

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

From my perspective, an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my opinion guarantee or require confidentiality.

Moreover, it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with an ethics code must be disclosed; rather, I am suggesting that those records may in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, and that any local enactment that is inconsistent with that statute in relation to the obligation to disclose would be void to the extent of any such inconsistency. I point out that the Freedom of Information Law permits an agency to disclose record, even though it may have the authority to deny access [see Capital Newspaper v. Burns, 109 AD3d 92, aff'd 67 NY2d 562 (1986)].

It is likely in my view that two the grounds for denial would be particularly relevant with respect to records maintained by a board of ethics.

Section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy. Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers or 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. The courts have found that, as a general rule, records that are relevant to the performance of a public officer's or employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

There may also be privacy considerations concerning persons other than those who may be subjects of a board's inquiries. For instance, I believe that the name of a complainant or witness could be withheld in appropriate circumstances as an unwarranted invasion of personal privacy.

The other provision of relevance, §87(2)(g), states that an agency may withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Records prepared in conjunction with an inquiry or investigation would in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. Factual information would in my view be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

It is unclear whether or the extent to which there have been public disclosures relating to the matter. If little or nothing has been disclosed, it is likely that the records in question could be withheld in great measure as an unwarranted invasion of personal privacy. However, the more that records or other information have been made available to the public, less is the ability to deny access based on consideration of privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Board of Ethics

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13881

41 State Street, Albany, New York 12231
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February 12, 2003

Mr. Martin Clark
95-A-4933-A-1-5
Bare Hill Correctional Facility
Caller Box 20, Cady Road
Malone, NY 12953

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

Dear Mr. Clark:

I have received your letter in which you requested assistance in obtaining records from the District Attorney's office in New York County. You explained that it has been several months since the Records Access Officer acknowledged the receipt of your request and indicated "[t]he relevant case files that must be reviewed in order to rule upon your request have been ordered from the closed cases unit." You wrote that you have not received a further response.

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

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

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,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13882

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February 12, 2003

Mr. Alex Jimenez
96-A-2632
Bare Hill Correctional Facility
Caller Box 20. Cady Road
Malone, NY 12953

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

Dear Mr. Jimenez:

I have received your letter in which you requested assistance in obtaining a "copy of [your] visiting list under FOIA."

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.

For purposes of clarification, it is noted that the federal Freedom of Information Act pertains only to records maintained by federal agencies. The New York Freedom of Information Law is applicable to state agencies, such as a facility of the Department of Correctional Services.

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 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 that the agency could not reject the request due to its breadth, it also stated that:

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

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

I am unaware of the means by which a visitors log, if it exists, is kept or compiled. If an inmate's name of other identifier can be used to locate record 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

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13883

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February 12, 2003

Mr. Robert Kahler
01-A-2924 D-W-I- I-3-B
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 facts presented in your correspondence.

Dear Mr. Kahler:

I have received your letter in which you requested assistance in obtaining "investigative reports" from your facility related to grievances you have filed.

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)].

Since I am unfamiliar with the contents of the "investigative reports", I cannot conjecture as to their availability. However, 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. For instance, one ground for denial that would likely be applicable 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.

Additionally, records may be withheld under §87(2)(f) to the extent that disclosure would endanger the life or safety of any person, or under §87(2)(e), if compiled for law enforcement purposes and disclosure would identify a confidential source.

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-13884

Committee Members

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February 12, 2003

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 facts presented in your correspondence.

Dear Mr. Werner:

I have received your letter in which you asked this office to "investigate" the "failure of Bayport town officials to comply with [your] request for public records."

In this regard, as indicated in my July 29, 2002 letter to you, the Committee on Open Government is authorized to provide advice and opinions relating to the Freedom of Information Law. This office has neither the staff nor the authority to "investigate" complaints about 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 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-13865

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February 12, 2003

Mr. Scott Petrie
92-B-0106
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442-4580

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

Dear Mr. Petrie:

I have received your letter in which you asked for assistance in obtaining a variety of "information relating to D.O.C.S. disapproved vendor 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)].

With respect to your requests for various information, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request for information. Similarly, an agency is not required to provide "information" in response to questions; its obligation is to provide access to existing records to the extent required by law. Therefore, if, for instance, the Department of Correctional Services has not prepared records which provide answers to your questions, the request would not involve existing records and the Freedom of Information Law would not apply.

I hope the foregoing serves to enhance your understanding of the law.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 13, 2003

Ms. Dionne A. Wheatley
Associate Counsel
NYS Public Employees Federation
P.O. Box 12414
Albany, NY 12212-2414

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

Dear Ms. Wheatley:

I have received your letter and attached materials in which you requested an advisory opinion regarding the Office of Mental Health's (OMH) release of certain records pertaining to a particular employee to the Archdiocese of New York. You also questioned OMH's denial of the employee's request for those records.

Your letter indicates that the records provided to the Archdiocese relate to allegations of misconduct by the employee and his subsequent exoneration by OMH. While your letter and the attached materials appear to indicate that OMH considered rights of access to such records exclusively under the Freedom of Information Law, in my opinion, the Personal Privacy Protection Law is of primary relevance.

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." 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; 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).

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 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 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., Suffok Cty., October 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 or a finding of misconduct, it has been found that disclosure of the records relating to such allegations 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 disclosure would constitute an unwarranted invasion of personal privacy.

In consideration of the foregoing, unless the data subject consented to disclosure of the records at issue, OMH's authority to disclose them was, in my view, questionable.

With respect to the employee's ability to obtain records under the Personal Privacy Protection Law, that statute requires that state agencies disclose records about data subjects to those persons. Under §95 of the Personal Privacy Protection Law, a data subject, a person such as an employee in the context of your request, has the right to obtain from a state agency records pertaining to him or her, unless the records sought fall within the scope of exceptions appearing in subdivisions (5), (6) or (7) of that section or in §96, which would deal with the privacy of others.

Of potential relevance to the matter is subdivision (6)(d) of §95, which states that rights of access by a data subject do not extend to:

> "attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivision (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena, search warrant or other court ordered disclosure."

The references to the work product of an attorney and material prepared for litigation are based on subdivisions (c) and (d) §3101 of the Civil Practice Law and Rules.

While I am unaware of the specific nature of the records sought, §3101 pertains to disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. It is also noted that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

In sum, again, I am unaware of the contents of the records of interest to the employee. However, as suggested earlier, as a "data subject", I believe that the employee generally enjoy rights of access to records about himself. In conjunction with the preceding commentary, I believe the records at issue may be withheld to the extent that they fall within the exception appearing in §95(6)(d) or would, if disclosed, constitute an unwarranted invasion of personal privacy regarding persons other than the employee that you represent. The remaining aspects of the records pertaining to him would, in my view, appear to be accessible to him pursuant to the Personal Privacy Protection Law.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Robin Goldman
Roger Klingman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13887

Committee Members

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February 14, 2003

E-Mail

TO: Gary L. Rhodes [redacted].net>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Rhodes:

I have received your letter of January 26. In brief, you complained that officials of the Town of Henderson routinely failed to respond to your requests for information.

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 hope that I have been of assistance.

RJF:jm

cc: Town Board
Hon. Charlotte Richmond, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 13888

41 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, 2003

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 facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Winter:

I have received your letter of January 20 concerning access to records of the Eastchester Fire District and the District's responsibilities under Article 11 of the Town Law.

In this regard, I note that the advisory jurisdiction of the Committee on Open Government is limited. Consequently, I have neither the authority nor the expertise to address issues relating to Article 11 of the Town Law. As the issues relate to the Freedom of Information Law, however, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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, 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 obtain a record that is not maintained by agency.

Third, while I believe that a retainer agreement between a governmental entity and an attorney or law firm is generally available, in consideration of the nature of the records sought, it appears that §87(2)(b) is pertinent to an analysis of rights of access. That provision 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, records pertaining to 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)].

It is my understanding that the retainer agreement pertains and is identifiable to a particular person who is or was the subject of an allegation involving a conflict of interest, and that at the time of the request, the matter had not been resolved. If that is so, it appears that §87(2)(b) would justify a denial of access on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Christopher J. Cade

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13889

41 State Street, Albany, New York 12231
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February 18, 2003

Mr. Anthony Wright
02-A-1812
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929

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

Dear Mr. Wright:

I have received your letter in which you explained your difficulty in obtaining "under cover numbers...and a short term buy operational plan...used in open courts, when testifying or as evidence, identification purposes."

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.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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. In my view, several of the grounds for denial could be pertinent.

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."

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).

Also potentially relevant is §87(2)(f), which permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, or the contents of a "short term buy operational plan", I could not conjecture as to the relevance of that provision. However, in my view, disclosure of numbers used in open court to identify undercover law enforcement officers, for example, would not, in most instances, endanger their lives or safety.

Section 87(2)(g) authorizes an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Lastly, 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 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 - 13890

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February 19, 2003

Mr. Willie Chandler
94-B-1737
Wende Correctional Facility
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. Chandler:

I have received your letter and the materials attached to it. In brief, you have requested from this office various records relating to grants sought or obtained by Erie Community College.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have custody or control of records generally, and it is not empowered to compel an agency to grant or deny access to records. In short, I cannot provide the records of your interest because this office does not possess them. Nevertheless, I offer the following comments.

First, pursuant to regulations promulgated by the Committee (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." That person has the duty of coordinating an agency's response to requests, and requests should ordinarily be sent to the records access officer. While I believe that those in receipt of your requests should have responded to you in a manner consistent with the Freedom of Information Law or forwarded your requests to the records access officer, it is suggested that you renew your requests and send them to the records access officer, in care of the Office of the President of Erie County Community College.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3588
FOIL-AO-13891

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February 19, 2003

Mr. Gary A. Bennett, Sr.
[redacted]

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

Dear Mr. Bennett:

I have received your letter and the materials attached to it. You described a series of difficulties in gaining access to certain records of the Town of Minisink.

Specifically, you requested a letter prepared by the Town Engineer and his staff "read into the minutes" of a meeting of the Planning Board held on November 27. Following your request for the letter, he characterized the document as an "inter-office memo" that need not be made available to the general public. Later, having requested minutes of the meeting, you were told that they are not available until they are read and corrected and "signed off" by the Planning Board Secretary. You added that Planning Board meetings are tape recorded, but that the tapes are not available to the public.

In this regard, I offer the following comments.

First, when a record is read aloud at an open meeting, even if the record may ordinarily be withheld in accordance with§87(2) of the Freedom of Information Law, I believe that it must be disclosed, for the public disclosure of the record 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 apparently purposeful and intentional rather than inadvertent. If that is so, even though there may have been a basis for withholding prior to a public reading of the record, that activity in my view precludes the Town from withholding any portion of the letter that was read aloud.

Second, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals,

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, again, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Lastly, the Freedom of Information law pertains to agency records, such as those of a Town, 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."

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)].

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for you and others were or could have been present, and none of the grounds for denial would apply. Moreover, a decision rendered more than twenty years ago 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].

Moreover, since a person present at an open meeting of a public body could have tape recorded the proceedings [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], I do not believe that there would be a valid basis for withholding the tape, particularly since you were present.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Planning Board
Hon. Carol Van Buren
Town Engineer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13892

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February 19, 2003

Mr. Guy Dejean
[redacted]

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

Dear Mr. Dejean:

I have received your correspondence relating to a request to the New York City Police Department for "all investigative files" that the Department maintains pertaining to you.

In this regard, I offer the following comments.

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

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

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

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

While I am unfamiliar with the recordkeeping systems of the Department, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. Further, in the context of the request, a real question involves, very simply, where Department officials might begin to look for records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within the Department, and that those units maintain their records by means of different filing and retrieval methods.

It is suggested that your request be modified to include reference to dates of events, their location, identification numbers and similar details that might enable Department staff to locate records of your interest.

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

Often significant is §87(2)(g) of the Freedom of Information Law, which enables an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical

or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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

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

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

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Leo Callaghan, Records Access Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13893

41 State Street, Albany, New York 12231
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February 19, 2003

Mr. J. Gerhard Marschall
[redacted]

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

Dear Mr. Marschall:

I have received your letter and the materials attached to it concerning a request made to the Long Island Railroad (LIRR) on July 29 under the Freedom of Information Law.

The correspondence indicates that the receipt of your request was acknowledged on August 14 and that you spoke with a representative of the LIRR two days later to clarify the nature of the records sought, and you were informed then that it would take thirty to sixty days to locate the records and determine rights of access. Having received no further response, you considered the request to have been denied and appealed on December 9. As of the date of your letter to this office, no additional communication had been received from the LIRR.

In this regard, I offer the following comments.

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

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

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)]. Based on the foregoing, I believe that your appeal was proper and that the LIRR appeals officer was obliged to determine the appeal within ten business days of the receipt of the appeal.

Second, in consideration of your request, a possible 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 LIRR, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

Third, since you asked for a "complete inventory" of records withheld and the basis for denying access to each such record, I note that 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.

Lastly, insofar as a request reasonably describes 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, two of the grounds for denial are likely pertinent to an analysis of rights of access.

Since the request relates to negotiations between the LIRR and either a municipal agency or a private company, §87(2)(c) may be relevant. That provision authorizes an agency to deny access to records insofar as disclosure "would impair present or imminent contract awards..."

The other exception of possible significance pertains to communications between the LIRR and the municipal agency. Specifically, §87(2)(g) 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.

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

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

determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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: Tricia Troy Alden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13894

41 State Street, Albany, New York 12231
(518) 474-2518
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February 19, 2003

Ms. Cynthia A. Motter
[redacted]

The staff of the Committee on 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. Motter:

I have received your letter of February 3 and the materials attached to it. You asked that I confirm comments offered during a conversation we had in relation to a request made to the Owego Police Department for "a list of parking tickets issued between 11/1/02 -1/28/03." You added that you want information indicating the "date of issuance, time of issuance and street where issued and license plate numbers."

The Village's freedom of information officer responded by providing the "date and number of tickets issued." She also referred to the Privacy Act of 1974 and the "No Disclosure without Consent Rule" and wrote that "it is unlawful to give out any D.M.V. information under State Law."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if there is no list that includes the items of your interest, Village officials would not be required to prepare a list or new record on your behalf.

Second, the Privacy Act of 1974 is a federal statute that generally applies to federal agencies. I do not believe that it applies to the Village in relation to your request.

Third, the documentation of your interest would have been prepared by Village employees, not by the Department of Motor Vehicles. I would conjecture that the reference to "DMV records" relates to the federal Driver's Privacy Protection Act, 18 USC §2721 *et seq.*, which prohibits the disclosure of personal information maintained by the Department that is derived from license records. In the context of your request, I do not believe that that federal law would apply. In short, that law applies to departments of motor vehicles, not to municipalities. Further, the Driver's

Privacy Protection Act specifically excludes records involving accidents and violations from its coverage.

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

In my view, unless it has been rescinded or in some way dismissed, a parking ticket is accessible. I note that it has been held by the state's highest court that speeding tickets including the names, addresses, license plate numbers and dates of issuance are available under the Freedom of Information Law, unless a charge is dismissed [Johnson Newspapers Corp. v. Stainkamp, 94 AD 2d 825, 61 NY 2d 958 (1984)].

Based on that decision, I believe that parking tickets, records indicating a violation of law, must be disclosed, again, unless the violation has been dismissed or rescinded.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chief James P. DeVito
Lynn A. Micezkawski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13895

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February 19, 2003

Ms. Elaine Schneider
[redacted]

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

Dear Ms. Schneider:

I have received your letter of January 30, as well as the materials attached to it. You asked that I offer clarification concerning a variety of issues relating to requests made under the Freedom of Information Law to the Jordan-Elbridge Central School District, and in this regard, I offer the following comments.

First, several responses to requests indicated that the records sought were not maintained by the District. While that may be so, possession of records by an agency, such as a school district, is not necessarily determinative or fully responsive to a request. The Freedom of Information Law pertains to agency records, and §86(4) defines the term "record" expansively to include:

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

Based on the foregoing, if, for example, records were prepared by or for the District but are maintained outside of District offices (i.e., by a consultant, an attorney for the District, or by a Board member at his or her home), I believe that they would be subject to rights of access conferred by the Freedom of Information Law. In that circumstance, the District's records access officer, the person designated by the Board to coordinate the District's response to requests, should in my view either direct the custodian of the records to disclose the records to the extent required by law or acquire and review the records to determine rights of access.

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

If indeed records are neither maintained by or for an agency, if they do not exist, a response so indicating is not a denial of access. A denial of access that may be appealed occurs, in my opinion, when an agency withholds an existing record maintained by or for the 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..."

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 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)].

Third, although its nature is not specified, you referred to a request for "employee information." Here I point out that, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent to the issue is §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While that standard is not completely clear, the courts have provided substantial guidance. In brief, it has been found in various contexts that those individuals are required to be more accountable than others. As a general rule, it has been held that 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].

Some of the requests involve recommendations or advice offered by the District's attorney. Relevant in that instance is §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

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

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

Based on the foregoing, assuming that the privilege has not been waived, records falling within the scope of the privilege would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

Another ground for denial of potential significance concerning internal governmental communications or communications between government officials and consultants they have retained, §87(2)(g), permits an agency to withhold records that:

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

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

I hope that the 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: Marilyn Dominick
Arthur F. Martignetti
Nelson L. Wellspeak

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13896

41 State Street, Albany, New York 12231
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February 19, 2003

Ms. Belle Brown
[redacted]

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

Dear Ms. Brown:

I have received your letter and the materials attached to it. If I have interpreted their contents accurately, it appears that the Camillus Volunteer Fire Company indicated that it does not maintain a record in which you are interested.

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 note that although volunteer fire companies often are not-for-profit corporations, it was held more than twenty years ago that they are "agencies" that are required to comply with the Freedom of Information Law.

If you have additional questions concerning rights of access to records, please feel free to contact this office.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Robert J. Allan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13897

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

February 19, 2003

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 concerning an alleged failure on the part of the Hyde Park School District to respond to a request for a record displayed on a screen at a School Board meeting. You added that the request was made because the numbers on the screen were "unreadable."

In this regard, if indeed documents were disclosed at the meeting to members of the public, I believe that they must be disclosed, for the prior public disclosure would constitute a waiver of the ability to deny access. 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 was apparently purposeful and intentional rather than inadvertent. When that is so, even when there may have been a basis for withholding prior to a public reading or other disclosure of the record, that activity in my view precludes an agency 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.

Even if the documents had not been shown to the public at a meeting, it appears that it would be accessible. Pertinent is §87(2)(g). Although that provision may serve as a basis for denying access, due to its structure, it often requires disclosure. 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. Numbers or figures would likely constitute "statistical or factual" information that would be accessible under §87(2)(g)(i).

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

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

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13898

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February 19, 2003

Mr. Rafael Ramirez
89-A-8935
P.O. Box 700
Walkill, 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. Ramirez:

I have received your letter in which you requested assistance in obtaining records from the Division of Criminal Justice Services and Division of Parole. You wrote that you requested "a copy of the Statistics Report on how many Violent Inmates has been released thru-out the State of New York Max. Facilities and was informed that such information either both office above has such report."

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:tt

FOIL-AO-13899

From: Robert Freeman
To: jrosen@syracuse.com
Date: 2/19/03 4:58PM
Subject: Hi Jerry - -

Hi Jerry - -

Hope all is well. I'm not optimistic about the Sox, but sometimes we're pleasantly surprised.

With respect to the issues that you raised, the FOIL is applicable to agency records, and section 86(3) defines the term "agency" to mean any governmental entity performing a governmental function. The definition refers specifically to public authorities, and there is no question that the Thruway Authority and its subsidiary, the Canal Corporation, are required to comply with the FOIL. Further, having dealt with staff of the Thruway Authority on many occasions, they are well aware of their responsibilities under FOIL.

In terms of rights of access, the reports in question appear to have been prepared and transmitted by public employees. If that is so, they would fall within the exception regarding "inter-agency and intra-agency materials", section 87(2)(g) of the FOIL. Although that provision authorizes an agency to withhold those portions of the materials that reflect advice, opinion or recommendation, for example, it specifies that other aspects of those kinds of communications must be ordinarily be disclosed. Most significant in this instance is subparagraph (i), which requires that those portions of inter-agency or intra-agency materials consisting of statistical or factual information must be disclosed, unless a separate exception may properly be asserted.

Often a single record or report includes combination of opinions (i.e., "I think that the cause of the problem is....") and facts ("I looked out the window at 4 p.m. and it was snowing"). An agency in that situation would be required to review the record in its entirety for the purpose of disclosing those aspects consisting of statistical or factual information.

For more detail regarding rights of access to the kinds of records that you described, you can connect to our website and to the index to FOIL opinions. From there, click on to "I" (eye) and scroll down to "inter-agency & intra-agency materials - statistics, facts and opinions intertwined." The opinions prepared within the past ten years are available online in full text.

I hope that this helps.

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-13900

Committee Members

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February 20, 2003

Mr. Michael G. Kessler
Kessler International
245 Park Avenue, 39th Floor
New York, NY 10167-0002

The staff of the Committee 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. Kessler:

I have received your note in which you indicated that I "overlooked" consideration of those portions of your request for records of the State Insurance Fund pertaining to 1099 forms and invoices. You asked that I address your right to gain access to those records.

In this regard, as stated in a letter addressed to you on December 20 by Kenneth J. Ross, the Fund's Executive Director, and confirmed in a conversation with Jeffrey Ritter today, the process of locating those records "would require an unreasonable degree of effort." Both Mr. Ross and Mr. Ritter indicated that the records at issue are not maintained in any centralized manner, but rather are kept in twelve offices and may be filed in a variety of ways. That being so, I do not believe that your request for the 1099 forms and invoices met the requirement that records sought be "reasonably described" [see Freedom of Information Law, §89(3)].

I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)]. The Court in Konigsberg found that the agency could not reject the request due to its breadth but also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that

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

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

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. In the context of your request for 1099 forms and invoices, again, it is my understanding that those records are 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 that is so, the request for the records in question would not, in my view, meet the requirement that records be reasonably described, and the staff of the Fund would not be required to engage in a search for 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:jm

cc: Kenneth J. Ross
Jeffrey Ritter

STATE OF NEW YORK
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February 20, 2003

E-MAIL

TO: Dod Crane <dodc@sca-corp.com>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Crane:

I have received your letter in which you referred to our conversation concerning the Freedom of Information Law and asked that I confirm its key elements.

My understanding is that your "customers" are municipalities that use your software to track real property tax and lien payments. In this regard, irrespective of their use of your software or the nature of your contractual relationships, every "agency" as that term is defined in §86(3) of the Freedom of Information Law, which includes all municipalities, must respond to requests for records.

It is emphasized that the Freedom of Information Law pertains to all agency records, and that §86(4) of the Law defines the term "record" expansively to include:

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

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

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved with reasonable 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 disk.

I point out, too, that it has been held that an agency is required to make records available in the medium of the applicant's choice, if the agency has the ability to do so and the applicant is willing to pay the actual cost of reproduction.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

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

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

In short, assuming that the data sought is available under the Freedom of Information Law, that it can be made available in the format in which an applicant requests it, and that the applicant is willing to pay the requisite fee, I believe that an agency would be obliged to do so.

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

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose

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

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

The only exception to the principles described above involves the protection of personal privacy. Section 89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

With respect to the assessment of fees for copies, §87(1)(b)(iii) of the Freedom of Information Law states that, unless otherwise provided by statute (i.e., an act of the State Legislature, not a local enactment), an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing other records, such as those stored or generated electronically. "Actual cost" in the context of electronic records in my view typically involves the cost of computer time plus the cost of a storage medium, such as a tape, a disk or paper.

Lastly, there is nothing in the Freedom of Information Law that requires agencies to make records available via the internet or by means of an online, remote service. In my opinion, if, for example, an agency chooses to exceed its responsibilities by making certain records available by remote means, it may do so based on contractual terms and with limitations. For example, online access may be authorized by subscription, the use of passwords, etc. Further, in those instances in

which an agency provides a service beyond the requirements of the law, I do not believe that provisions pertaining to fees in the Freedom of Information Law would be applicable.

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

RJF:jm

STATE OF NEW YORK
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February 20, 2003

Mr. Luke Elcock
200204344
Orange County Jail
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. Elcock:

I have received your letter in which you questioned the propriety of a county jail providing your photograph to a newspaper following your arrest for a parole violation.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 of greatest significance is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted invasion of privacy. From my perspective, that standard is flexible and is subject to a variety of interpretations. A reasonable person viewing a particular item of personally identifiable information might feel that disclosure would be offensive, thereby resulting in an unwarranted invasion of personal privacy. An equally reasonable person might contend that disclosure of the same item would be appropriate or inoffensive, thereby resulting in what might be characterized as a permissible invasion of privacy.

With respect to the subjects of mugshots, it is assumed that individuals arrested could have been seen during judicial or other proceedings (i.e., arraignments) that were open to the public. If the public can be present at or view a proceeding during which an arrestee can be identified, it is difficult to envision how a photograph of that individual would constitute an unwarranted invasion of personal privacy.

While disclosure of mugshots might embarrass or humiliate the individuals in those photos, there are many instances in which records have been determined to be available even though they represent events or occurrences that may be embarrassing. When individuals are arrested and/or convicted, their names and other details about them are generally made available and may be published; when a public employee is the subject of disciplinary action, that person's name and other

details about him or her are accessible to the public, irrespective of whether the individuals to whom the records pertain may be embarrassed by their actions [see e.g., Daily Gazette v. City of Schenectady, 673 2d 783, (A.D. 3 Dept. 1998); Anonymous v. Board of Education for Mexico Central School District, 616 NYS 2d 867 (1994); Scaccia v. NYS Division of State Police, 520 NYS 2d 309, 138 AD 2d 50 (1988); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981]. In short, in many cases, even though individuals may be embarrassed by particular aspects of their lives, that factor may have little or no bearing upon public rights of access to records concerning what might be considered as public events in which the public interest in disclosure outweighs an individual's interest in privacy.

In the only decision of which this office is aware that dealt with facts pertinent to the instant situation, a similar argument was offered, but the court determined that the mugshots regarding all persons arrested must be disclosed, unless charges were dismissed in favor of the accused. In general, when charges against an accused are dismissed or terminated in favor of the accused, the records pertaining to the event become sealed under the Criminal Procedure Law, either §160.50 or §160.55. When the records are sealed, they are exempted from disclosure under the Freedom of Information Law [§87(2)(a)]. With respect to disclosure of the mugshots of those persons against whom the charges were pending in which the records had not been sealed, the court held that the agency could not meet its burden of proving that the privacy exception could validly be asserted [Planned Parenthood of Westchester, Inc. v. Town Board of the Town of Greenburgh, 587 NYS2d 461, 463 (1992)].

In sum, unless cases against individuals charged are considered to have been terminated in their favor, in which instances the mugshots would be sealed, I believe that the mugshots must be disclosed under the Freedom of Information Law.

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

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
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February 20, 2003

E-MAIL

TO: Patrick Healy <pjhealy@healyville.com

FROM: David Treacy, Assistant Director DT

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

Dear Mr. Healy:

I have received your correspondence in which you asked whether there is a provision of law which would allow a citizen to request that "frivolous" Freedom of Information Law requests be denied.

You wrote that you have notice of "what appears to be excessive FOI requests from a village resident." You further indicated that "[t]hese FOI requests have been going on for several months and appear to be focused on the village official as some kind of vendetta. ...The village official spends so much of his time satisfying the FOI requests from a single resident, he is having a hard time completing the job we pay him for..."

In this regard, I offer the following comments.

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

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access 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 Village Board of Trustees 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. There is no provision within that law or the regulations promulgated by the Committee on Open Government that would authorize another citizen or municipal officer or staff person to ask a records access officer to deny a request for records.

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)].

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.

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..."

Thus, 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."

Based on the foregoing, there is no requirement that a records access officer or other agency staff end the performance of their other duties to accommodate a person seeking records. However, I believe that an agency must, in accordance with the kinds of factors described above, grant or deny access to records within a reasonable time.

I hope that I have been of assistance.

DT:jm

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February 21, 2003

Mr. Donald Williams
Zoning and Building Code Officer
Village of Warsaw
Warsaw, NY 14569

Dear Mr. Williams:

I have been contacted by Ms. George Anna Almeter concerning a request for records made pursuant to the Freedom of Information Law. As you may be aware, the Committee on Open Government was created by the enactment of that statute, and its primary function involves providing guidance and opinions in an effort to enhance understanding of and compliance with open government laws.

In brief, Ms. Almeter some time ago requested a variety of records, some of which were made available by the Department of State. However, she indicated that she has been unsuccessful in her efforts in gaining access to a "blue covered file", which has been characterized as your "private file." Based on the language of the law and its interpretation by the courts, there cannot be a "personal" or "private" file, for all records relating to the performance of your duties as a village officer fall within the coverage of the Freedom of Information Law. In this regard, I offer the following comments.

Most importantly, 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, a file need not be in the physical possession of the Village to constitute an agency record; so long as it is produced, kept or filed for an agency, the law specifies and the courts have held that it constitutes an "agency record", even if it is 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 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).

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

In another case in which it was claimed that records were "personal", Kerr v. Koch (Supreme Court, New York County, NYLJ, February 1, 1988), the issue 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, assuming that the "private file" relates in any way to the performance of your duties for the Village, its contents would constitute agency records that are subject to rights of access conferred by the Freedom of Information Law. Further, while the file may be in your physical possession, I believe that it is the property and in the legal custody of the Village.

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 the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance. If you have questions regarding the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: George Anna Almeter
Board of Trustees, Village of Warsaw

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13905

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February 21, 2003

Mr. John Snyder
02-B-1939 5B-B-5 Cell 6-6B
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. Snyder:

I have received your correspondence, but it is unclear whether you intended to view it as an appeal to this office.

In this regard, for purposes of clarification, I note that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records.

If you believe that your facility has denied access to records, you may appeal the denial in accordance with §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 therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13906

41 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, 2003

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, in brief, you raised questions concerning the fees that may be charged for preparing copies of records pursuant to the Freedom of Information Law.

In this regard, §87(1)(b)(iii) of that statute provides that agencies, by rule, may establish fees "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." Based on the foregoing, there are two standards for charging fees. One involves photocopies up to nine by fourteen inches, in which case an agency may charge up to twenty-five cents per photocopy, irrespective of its cost; and the second involves "other records", those that cannot be photocopied (i.e., tape recordings, computer disks and tapes, etc.), in which case the fee is based on the actual cost of reproduction. If another statute, an act of the State Legislature, authorizes an agency to charge a different fee, that provision would supersede the Freedom of Information Law.

With respect to clerical or other costs associated with responding to a request for copies of records, 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. In addition to §87(1)(b) of the Law, 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 1401.8)."

Further, §1401.8(c)(3) states in relevant part that "the actual reproduction cost...is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries."

Based upon the foregoing, I believe that a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or disk) to which data is transferred.

Although allusion has been made to personnel costs in some judicial decisions, none specifies that those costs may clearly be assessed. Moreover, unless and until a court finds to the contrary, the regulations promulgated by the Committee have the force and effect of law. That being so, I do not believe that an agency may charge for its personnel or administrative costs in determining the amount of a fee based on the actual cost of reproduction when responding to a request made under the Freedom of Information Law.

I hope that I have been of assistance.

cc: Daniel Pacos
Philip Brothman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13907

41 State Street, Albany, New York 12231
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February 21, 2003

E-MAIL

TO: Loren J. Bialik [redacted]m

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. Bialik:

I have received your letter in which you asked whether government agencies in New York may deny access to records under the Freedom of Information Law because the records would be used for commercial purposes.

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.

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

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

Based on the foregoing, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for

commercial use, is in my opinion irrelevant; when records are accessible, once they are disclosed, the recipient may do with the records as he or she sees fit.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names of natural persons and their residence addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

Lastly, as you may be aware, the State Comptroller carries out statutory functions in relation to abandoned property. Section 1402 of the Abandoned Property Law requires that the Comptroller publish an annual statement in the State Register that includes "[t]he names and last known addresses of all persons appearing from the records of the comptroller's office to be entitled to receive such abandoned property consisting of money not less than twenty dollars in amount..." That publication is available to any person, regardless of its intended use.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13908

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February 24, 2003

Ms. Marianna Wohlgemuth
[redacted]

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

Dear Ms. Wohlgemuth:

I have received your letter of February 1. You asked whether, in response to a request for an attorney's bill transmitted to the Great Neck Library, it is "permissible to redact information contained in an invoice when supplied to a member of the public."

In this regard, first, I do not believe that the Great Neck Library, a free association library, is subject to or required to comply with the Freedom of Information Law."

It is noted at the outset many libraries are characterized as "public", in that they can be used by the public at large. Nevertheless, some of those libraries are governmental in nature, while others are not-for-profit corporations. The latter group frequently receives significant public funding. Because they are not governmental entities, they would not be subject to the Freedom of Information Law. Boards of trustees of all such libraries would, however, be subject to the Open Meetings Law.

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

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

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

In conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, which includes Valley Cottage within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

Confusion concerning the application of the Freedom of Information Law to association libraries has arisen in several instances, perhaps because its companion statute, the Open Meetings

Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with that statute.

Second, notwithstanding the foregoing, it is my understanding that the Library Board determined that it would treat requests for records in accordance with the standards applied by the Freedom of Information Law, even though it is not required to do so. In applying those standards to the kinds of records at issue, I believe that some aspects of the records would be accessible, but that others could likely be withheld in whole or in part, depending on their contents.

When the Freedom of Information Law applies, 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.

Perhaps most pertinent in the context of your inquiry is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §4503 of the Civil Practice Law and Rules, codifies the attorney-client privilege. In short, insofar as the records at issue include a description of legal advice, a legal opinion, litigation strategy and the like, I believe that they would fall within the scope of the attorney-client privilege and, therefore, would be exempt from disclosure. In addition, on occasion, depending on the contents of such records, they may include names of persons interviewed, witnesses and others. In those circumstances, §87(2)(b) might apply. That provision authorizes an entity to withhold records insofar as 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: Arlene Nevens

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 24, 2003

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, unless otherwise indicated.

Dear Maddock:

I have received your letter of February 2 and the materials attached to it. Once again, you have alleged that the Town of North Hempstead has failed to comply with the Freedom of Information Law. I note that I have discussed your requests at length with both the Town Attorney, Ms. Chaikin, and the Town's Records Access Officer, Ms. Zuech, and that I believe that both have seriously attempted to comply with law. In this regard, I offer the following comments.

First, although you contend that a determination concerning a request for records "should not be decided arbitrarily by Town employees; it should be decided by the Records Access Officer..." In this regard, I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) state that the records access officer has the duty of "coordinating" an agency's response to requests; the regulations do not require that the records access officer "decide" what may be available or deniable.

Similarly, you wrote that when you request a certification from the Records Access Officer, "**she** should make such certification to [you]" (emphasis yours). Neither the Freedom of Information Law nor the Committee's regulations specifies who should prepare the certification envisioned in §89(3). The regulations, in fact, provide that the records access officer "is responsible for assuring that agency personnel....Upon failure to locate 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" [§1401.2(b)(6)].

Second, the "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

As indicated by Town officials, 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. You may request a copy of the schedule from the Town or the State Archives and Records Administration by calling (518)474-6926.

Third, 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.

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, with respect to the requirement that a request "reasonably describe" the records sought, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

on the basis of an inmate's name and identification number. In this instance, I am unaware of the means by which the Town maintains records relating to a particular parcel. If the Town maintains all such records in a file or group of files that are retrievable on the basis of the terms of your request, I believe that you would have met the requirements that the records be reasonably described. On the other hand, however, it is possible that the Town maintains records falling within the scope of your request in a number of locations or departments and by means of different filing systems within those departments. It is possible, for example, that your request may involve records of the Town Clerk, building inspector, code enforcement officer, the police and fire Departments, as well as the departments of public works, traffic, water, and perhaps others. If indeed the records sought are kept by a variety of agencies and by means of a variety of filing methods, a request by address and parcel number may not be adequate in every instance to locate records relating to the parcel. In that kind of situation, I do not believe that a request would meet the standard of reasonably describing the records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bonnie P. Chaikin
Linda B. Zuech

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13910

41 State Street, Albany, New York 12231
(518) 474-2518
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February 24, 2003

Mr. Pedro Rodriguez
01-A-4154
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403-3600

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

Dear Mr. Rodriguez:

I have received your letter in which you complained that the New York City Police Department has not responded to your requests for records.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, 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 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-1391

41 State Street, Albany, New York 12231
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February 24, 2003

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

I have received your letters in which you requested that this office "compel Mr. Anthony Annucci...to provide [you] with the information sought on an outstanding number of F.O.I.L. requests" and 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, 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 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-13912

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February 24, 2003

Mr. Hector Matos
97-A-0832
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. Matos:

I have received your letters in which you requested assistance in reviewing and obtaining certain videotapes and medical records maintained at your 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.

With regard to your request for certain videotapes, you wrote that you were informed that your facility did not retain the tapes. 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 facility's ability to charge a fee for reviewing your medical records, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by the Department of Correctional Services and its facilities. In terms of rights of access 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.

The Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records

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

However, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records.

With respect to fees, unless another statute permits the assessment of a different fee, records accessible under the Freedom of Information Law may be inspected free of charge, and the agency cannot impose a fee involving personnel costs, for instance. When copies are requested, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing records that cannot be photocopies, unless otherwise provided by a statute other than the Freedom of Information Law. Section 18(2)(e) of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person [i.e., a patient] shall not be denied access to patient information solely because of the inability to pay."

In view of the foregoing, it appears that fees assessed by your facility are being imposed pursuant to the Public Health Law rather than the Freedom of Information Law. There are no judicial decisions of which I am aware that deal with whether fees for the records in question should be properly assessed under the Freedom of Information Law or under §18 of the Public 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-13913

41 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 24, 2003

Mr. Joseph Berry
00-A-6515
Wyoming Correction Facility
P.O. Box 501
Attica, NY 14011-0051

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. Berry:

I have received your letters in which you requested assistance in obtaining records from a variety of agencies. You also asked several questions that are not related to the functions 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. While this office has neither the authority nor the expertise to answer some of your questions, I offer the following comments in response to your questions pertaining to the Freedom of Information Law.

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 your difficulties in obtaining Inspector General's reports, it appears that your requests may have been inappropriately directed. It is suggested that you might resubmit your requests to the New York State Department of Correctional Services' records access officer. According to the Department's regulations, the records access officer is Daniel Martuscello whose office is located at Building 2, State Campus, Albany, NY 12236.

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.

Several grounds for denial may be pertinent with respect to a report 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 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...
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

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.

Lastly, with respect to responses you have received indicating that records of your interest could not be found, 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-13914

41 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 24, 2003

Mr. Michael M.J. Mathie, IV
90-T-1282
Oneida Correctional Facility
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. Mathie:

I have received your letter in which you questioned the authority of your facility to charge a fee for reviewing your medical chart.

In this regard, I offer the following comments.

The Freedom of Information Law pertains to agency records, including those maintained by the Department of Correctional Services and its facilities. In terms of rights of access granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

However, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records.

With respect to fees, unless another statute permits the assessment of a different fee, records accessible under the Freedom of Information Law may be inspected free of charge, and the agency cannot impose a fee involving personnel costs, for instance. When copies are requested, an agency

may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing records that cannot be photocopies, unless otherwise provided by a statute other than the Freedom of Information Law. Section 18(2)(e) of the Public Health Law states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. A qualified person [i.e., a patient] shall not be denied access to patient information solely because of the inability to pay."

In view of the foregoing, it appears that fees assessed by your facility are being imposed pursuant to the Public Health Law rather than the Freedom of Information Law. There are no judicial decisions of which I am aware that deal with whether fees for the records in question should be properly assessed under the Freedom of Information Law or under §18 of the Public 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

FOIL-AO-13915

From: Robert Freeman
To: Ilike@ritalaw.com
Date: 2/24/03 3:38PM
Subject: Dear Mr. Like:

Dear Mr. Like:

I have received your inquiry and note that I attempted on several occasions to return your phone call. However, after calling the number (631- 691-3000), I received a recording each time indicating that the number was out of service.

With respect to your question, section 89(4)(a) of the Freedom of Information Law requires that an agency determine an appeal within ten business days of its receipt. If an agency fails to do so, the person denied access may consider the appeal to have been constructively denied. In that circumstance, he or she would be deemed to have exhausted his or her administrative remedies and could seek judicial review by initiating a proceeding under Article 78 of the CPLR [see Floyd v. McGuire, 87 AD2d 388 (1982)].

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-1396

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

February 26, 2003

Mr. David C. Shampine
[redacted]

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

Dear Mr. Shampine:

I have received your letter and the materials attached to it. You indicated that you are attempting to write a book about an unsolved murder that occurred in Jefferson County nearly thirty-five years ago. The matter was investigated by the State Police, and you requested a variety of records relating to the event, as well as records pertaining to a former state trooper. In response to the request, the Division of State Police denied access, indicating that the records sought "were compiled for law enforcement purposes and would interfere with a law enforcement investigation if disclosed."

In this regard, first, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and requires that an agency's determination of an appeal must either grant access to the records or "fully explain in writing... the reasons for further denial." In this instance, the determination following your appeal merely repeated a rationale expressed in the initial denial of access and essentially reiterated the statutory language of §87(2)(e). From my perspective, the response to the appeal could not be characterized as having "fully explained" the reasons for further denial. I note that the New York City Department of Investigation was criticized in Lewis v. Giuliani (Supreme Court, New York County, NYLJ, May 1, 1997) for a denial of access also based merely on a reiteration of the statutory language of an exception, stating that "DOI may not engage in mantra-like invocation of the personal privacy exemption in an effort to 'have carte blanche to withhold any information it pleases'". In this instance, the "law enforcement purposes" exception, §82(2)(e)(i), appears to have been used in much the same manner.

Second, in a related vein, the denial appears to be inconsistent with the language and intent of the Freedom of Information Law and its judicial construction. In short, it appears to evince a refusal to follow or recognize the clear direction provided not only by Lewis, but also by the Court of Appeals in Gould v. New York City Police Department, [87 NY 2d 267 (1996)].

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

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

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

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

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town*

> *of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

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

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

Third, with respect to the nature of the records sought, some clearly were compiled for law enforcement purposes in relation to the murder. Others, however, such as those pertaining to complaints or instances of misconduct on the part of a particular trooper during the entirety of his employment with the Division appear to be separate from and perhaps unrelated to the murder.

With regard to those records relating to the investigation, §87(2)(e) authorizes an agency to withhold records that:

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

In view of the fact that nearly thirty-five years have passed since the murder, it is inconceivable that every aspect of every record relating to the murder would, if disclosed, interfere with an investigation. Whether investigative activity has recently occurred or is in any way ongoing is questionable. The less such activity has recently occurred or is ongoing, the less is the ability, in my view, to contend that disclosure would interfere with an investigation. If the case has effectively

been closed, it might be contended that disclosure at this juncture would neither have an effect on nor interfere with the investigation; in essence, the investigation would be over.

I note that other grounds for denial might be pertinent, even if the case is closed. For instance, those portions of records identifying witnesses or persons interviewed might be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Further, many of the records prepared in relation to the investigation would likely fall within §87(2)(g), the provision upon which the Court of Appeals focused in Gould in its consideration of certain police reports. That exception 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 Court stated that:

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

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

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

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the

> Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department,89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports could be withheld in their entirety on the ground that they constitute intra-agency materials.

The remaining category of records of your interest pertain to the possibility that a particular former trooper was the subject of complaints or disciplinary action. Relevant in that context is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, in reviewing the legislative history leading to its enactment, found that:

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

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

It is emphasized that the bar to disclosure imposed by §50-a deals with personnel records that "*are used to evaluate performance toward continued employment or promotion.*" Since the officer in question has retired, there is no issue involving continued employment or promotion; he is no longer an employee or a police officer. That being so, in my opinion, the rationale for the

confidentiality accorded by §50-a is no longer present, and that statute no longer is applicable or pertinent. I note that my view, as expressed in an earlier opinion, was confirmed in Village of Brockport v. Calandra, [745 NYS 2d 662 (2002)].

Assuming that §50-a does not apply, relevant is a provision cited earlier concerning the ability to deny access when disclosure would constitute an unwarranted invasion of personal privacy. In this regard, 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].

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)].

In Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefitted by maintaining harmonious relationships between government and its employees", the

court found that no ground for denial could justifiably be cited to withhold the agreement. In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under §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 a decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education 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" (supra, 870).

As suggested by the Court in Anonymous, there is no distinction in substance between a finding of guilt after a hearing and an admission of guilt as a means of avoiding such a proceeding. The same decision also referred to contentions involving privacy as follows:

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

In response to those contentions, the decision stated that:

> "This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (*Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.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).

More recently, in LaRocca v. Board of Education of Jericho Union Free School District, supra, the Appellate Division held that a settlement agreement was available insofar as it included admissions of misconduct. In that case, charges were initiated under §3020-a of the Education Law, but were later "disposed of by negotiation and settled by an Agreement" (id., 577) and withdrawn. The court rejected claims that the record could be characterized as an employment history that could be withheld as an unwarranted invasion of privacy, and found that a confidentiality agreement was invalid. Specifically, it was stated that:

> "Having examined the settlement agreement, we find that the entire document does not constitute an 'employment history' as defined by FOIL (*see, Matter of Hanig v. State of New York Dept. of Motor Vehicles, supra*) and it is therefore presumptively available for public inspection (*see,* Public Officers Law § 87[2]; *Matter of Farbman & Sons v. New York City Health and Hosps. Corp., supra,* 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437). Moreover, as a matter of public policy, the Board of Education cannot bargain away the public's right of access to public records (*see, Board of Educ., Great Neck Union Free School Dist. v. Areman,* 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943)" (id., 578, 579).

In sum, insofar as records pertaining to the trooper reflect a determination indicating a finding of misconduct, an admission of misconduct or any penalty imposed as a result of such a finding or admission, I believe that they must be disclosed.

In an effort to encourage Division officials to review the matter more closely, copies of this opinion will be forwarded to them.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: William J. Callahan
Lt. Laurie M. Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 26, 2003

Ms. Kathy Snyder
[redacted]

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

Dear Ms. Snyder:

I have received your letter and the attached materials in which you asked several questions pertaining to the Village of Brockport's responses to your Freedom of Information Law requests.

In this regard, I offer the following comments.

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

When 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, you wrote that:

> "The records access officer for the village forwards all requests to the Village attorney who determines if request(s) are approved or denied. He is also the appeals officer. Is this consistent with the rules of the Freedom of Information Law?"

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural

implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., a village board of trustees, to adopt rules and regulations consistent with the Law and the Committee's regulations.

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, §1401.7 of the regulations state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer."

Because the regulations indicate that "the Records Access Officer shall not be the Records Appeals Officer", in my view, the determination of one should be independent from that of the other.

Third, you asked whether access to records may be denied on the basis that they are not maintained by the Village. From my perspective, if records sought are maintained for the Village by an attorney or a consultant, for example, they are Village records subject to the Freedom of Information Law.

It is emphasized that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

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

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

As such, insofar as the records sought are maintained for the Village, I believe that the Village would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

Fourth, you asked whether advance payment may be required before "reviewing items." In this regard, it has been held that an agency may require payment of fees for copying in advance of preparing copies (see Sambucci v. McGuire, Supreme Court, New York County, Nov. 4, 1982). If, for example, a request is voluminous, an estimate of the numbers of copies could be made, and the applicant could be informed of the approximate cost and that copies will be made upon payment of the appropriate fee.

I note that 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, you asked whether the Village may restrict the availability of records to "the period of 2:00 p.m. until 4:00 p.m., or at such other times as the Clerk may reasonably designate and informing the person or entity requesting the record accordingly, in writing." Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Relevant to your inquiry is a decision rendered by the Appellate Division in which one o f the issues involved 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].

In consideration of the foregoing, in my opinion, a local resolution or policy restricting the ability to inspect records to a period less than the Clerk's regular business hours would be inconsistent with the Committee's regulations and judicial precedent.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Edward Riley
Hon. Leslie Ann Morelli

STATE OF NEW YORK
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February 26, 2003

Mr. Phil A. Rodriguez
Attorney and Counselor at Law
38 North Ferry Street
Schenectady, NY 12305

The staff of the Committee on Open 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 of February 6 and the correspondence attached to it. The materials indicate that you represent Shuey's Rocash, Inc., which owns Shuey's Restaurant in Ghent. Shuey's is the site of a fire that occurred on April 9, and you requested records pertaining to the fire from the Columbia County Sheriff's Office. That agency denied your initial request and the ensuing appeal in their entirety on the ground that the "the investigation is ongoing and...the records will not be released pending closure." You have sought assistance in the matter.

From my perspective, while it is possible that some elements of the records sought might justifiably be withheld, the expressed basis for the affirmance of the denial is, in my opinion, inadequate. Further, based on judicial decisions, it is likely that a blanket denial of access to the records sought is inconsistent with law. In this regard, I offer the following comments.

First, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and requires that an agency's determination of an appeal must either grant access to the records or "fully explain in writing... the reasons for further denial." In this instance, the determination following your appeal merely indicated that an investigation is ongoing; no express reference was made to any statutory exception. From my perspective, the response to the appeal could not be characterized as having "fully explained" the reasons for further denial.

Second, in a related vein, the denial appears to be inconsistent with the language and intent of the Freedom of the Freedom of Information Law and its judicial construction. In short, it appears to evince a failure to recognize the clear direction provided by the Court of Appeals in Gould v. New York City Police Department, [87 NY 2d 267 (1996)].

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

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

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

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

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

Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

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

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

Third, 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, 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 Court stated that:

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

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

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

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

Based on the foregoing, the agency could not claim that the reports at issue could be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records.

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

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

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

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

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

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

In consideration of the fact that nearly a year has passed since the fire, it is doubtful that every aspect of every record relating to the fire would at this juncture interfere with an investigation if disclosed. Whether investigative activity has recently occurred is unknown to me. However, the less such activity has recently occurred or is ongoing, the less is the ability, in my view, to contend that disclosure would interfere with an investigation.

In sum, while some records or portions of records might justifiably be withheld, others in my view should be disclosed, even though the matter may not be officially closed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Sheriff Walter K. Shook
Captain J.R. Sweet

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 27, 2003

E-Mail

TO: Drew Lynch <[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. Lynch:

I have received your letter in which you questioned the propriety of a denial of access to certain records by a village. The records sought include:

> "(1) Any information regarding what the Village presented to NYS Dept of Environmental Conservation (DEC) at the Jan 30th 'compliance conference' held in Tarrytown, responding to issues raised in DEC representative Cesare Manfredi's 1/9/03 letter to the Village requesting details of the Village's plans to map, identify, and remove stormwater inflows into sewer system.
>
> "(2) A copy of the Planning Board's (Nov/Dec?) letter advising Village Board on the advisability of making revisions to zoning code in response to Hess Corporation's request about their property on Jefferson Ave."

In this regard, I offer the following comments.

First, to put the matter in perspective, the Freedom of Information Law applies to agency records, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law is generally applicable to entities of state and local government in New York.

Second, in brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. One of the grounds for denial pertains to communications between or among officers or employees of agencies. Due to its structure, however, certain aspects of those communications may be accessible.

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 the context of your inquiry, communications between the village and a state agency would constitute "inter-agency" materials. I would conjecture that some aspects of the correspondence between the two would consist of statistical or factual information. To that extent, I believe that the records must be disclosed, unless a different exception may properly be asserted. The letter from the planning board to the board of trustees would constitute "intra-agency" material, for both boards are village entities, and insofar as it reflects advice or an opinion, again, I believe that it may be withheld. I would conjecture, however, that both the planning board and the board of trustees have discussed or will discuss revisions to the zoning code during meetings open to the public. If that is so, the rationale for withholding the letter in question may be weak, for its contents may be effectively disclosed to the public during open meetings..

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13920

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

February 28, 2003

Mr. Joseph Evans
02-A-0755
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. Evans:

I have received your letter in which you complained that the Orange County District Attorney's Office denied your request for "everything in the District Attorney's file" relating to your case.

In this regard, I note that in a decision concerning a request for records maintained by the office of a district attorney, the Appellate Division held that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" [Moore v. Santucci, 151AD2d 677, 678 (1989)].

With respect to your request for "detailed materials...under Vaughn", 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)].

Lastly, insofar as records were not previously disclosed, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 - 13921

41 State Street, Albany, New York 12231
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February 28, 2003

Mr. David Spickerman
02-B-0980
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. Spickerman:

I have received your letter in which you asked how you could obtain records from Wayne County Child Protective Services and from the law guardian of your children.

Since I am unfamiliar with the specific records of your interest, I cannot conjecture as to their availability. However, 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."

Based on the foregoing, in my view, a law guardian would not be an agency and, thus, would not be subject to the Freedom of Information Law.

Second, the regulations promulgated by the Committee on Open Government concerning the procedural implementation of the Freedom of Information Law require each agency to have at least one person designated as a records access officer who is responsible for coordinating agency responses to requests for access to records. A request for records should be directed to the records access officer at the agency which maintains the records of your interest.

Lastly, with respect to your ability to obtain records from Wayne County Child Protective Services, 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.

Relevant to the matter is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute of potential is §372 of the Social Services Law, which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4) of §372 states in relevant part that such records:

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

Based on the foregoing, I do not believe that records maintained by entities having duties relating to foster care can be disclosed, unless authorization to disclose is conferred by a court or by the successor to the Department of Social 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-13922

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

February 28, 2003

Mr. Ato Clyburn
93-B-2060
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.

Mr. Clyburn:

I have received your letter in which you requested assistance in obtaining forensic laboratory test results of your DNA sample. You also questioned the availability of certain records related to your arrest.

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

> "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 your DNA lab test results may be disclosed only to the extent authorized in §995-d.

With respect to your interest in obtaining "Police arresting statements", "Witnesses' Statements to Police", and "Confession tape to detectives", requests for such records should be directed to the appropriate law enforcement agency or agencies. In terms of the availability to these records, I offer the following comments.

One among several potentially relevant provisions of the Freedom of Information Law 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.

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

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13923

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

March 3, 2003

Mr. Reinaldo Colon
99-A-6096
Wallkill Correctional Facility
Route 208, Box G
Wallkill, NY 12589-0286

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

Dear Mr. Colon:

I have received your letter in which you complained that you have not received a response to your request for "copies of legal documents pertaining to your current incarceration" from the Rockland County Public Defender's Office.

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

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

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

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.

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-13924

41 State Street, Albany, New York 12231
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March 3, 2003

Mr. Marlon Peterson
02-A-3172
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582

Dear Mr. Peterson:

I have received your letter of February 18, which reached this office on February 28. You have requested a variety of records from this office relating to your arrest, which apparently occurred in the 5th precinct in New York City.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions pertaining to rights of access to government information, primarily under the state's Freedom of Information Law. The Committee does not have custody or control of records generally, and it is not empowered to compel an agency to grant or deny access to records or to acquire records on behalf of an applicant for records. In short, I cannot provide access to the records sought, because this office does not possess them.

Second, a request should generally 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 duty of coordinating the agency's response to requests for records. I note that records access officers have not been designated by police precinct in New York City; rather, there is one records access officer, and it is suggested that you address a request to him at the New York City Police Department, One Police Plaza, Room 110C, New York, NY 10038.

Lastly, since you requested that the fee for copies be waived, I point out that the New York Freedom of Information Law, unlike the federal Freedom of Information Act, does not contain any provision concerning the waiver of fees. Moreover, it has been held that an agency may charge its established fee, even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

March 4, 2003

Mr. Tom Kackmeister
[redacted]

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

Dear Mr. Kackmeister:

I have received your letter of February 7 in which you complained with respect to delays in response to your requests for records of the Greece Central School District.

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

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

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

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, some elements of your requests involve records that must be prepared and made available. In those instances, I do not believe that any significant delay in disclosure can be justified. For example, each year with its proposed budget, which is characterized in §1716 of the Education Law as "Estimated expenses for ensuing year", subdivision (5) requires that:

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

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-13925A

41 State Street, Albany, New York 12231
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March 4, 2003

Ms. Mary Neagle Smith
[redacted]

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

Dear Ms. Smith:

I have received your letter and the correspondence attached to it, as well as a copy of a determination of your appeal rendered by Paul R. Kietzman, General Counsel at the Office of Mental Retardation and Developmental Disabilities (OMRDD).

By way of background, you requested a "quality assurance report" that was submitted to OMRDD by the director of an entity that provides recreational programs for persons with disabilities following "an incident of criminal sexual abuse" by an employee of that entity. It is your view that the report does not include "medical files" and that its substance should be disclosed following the deletion of personally identifying details. Mr. Kietzman, however, sustained the initial denial of the request, indicating that the records sought involve "the care and treatment of a consumer and constitute clinical records" that are exempt from disclosure pursuant to §33.13 of the Mental Hygiene Law.

In this regard, first, since your request referred to the federal Freedom of Information Act, I note that the federal Act pertains only to records maintained by federal agencies. It is inapplicable in this circumstance.

Second, the statute that generally governs rights of access to records of units of state and local government in New York is this state's Freedom of Information Law. That law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial of access, the provision cited by Mr. Kietzman, §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 indicates in subdivision (a) that:

> "A clinical record for each patient shall be maintained at each facility licensed or operated by the office of mental health or the office mental retardation and developmental disabilities, hereinafter referred to 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."

Subdivision (c) states in relevant part that, unless otherwise expressly provided:

> "Such information about patients or clients reported to the offices, including the identification of patients or clients, 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 offices or its facilities to any person or agency outside of the offices..."

Assuming that the report in question falls within the scope of the provisions quoted above, I believe that OMRDD is prohibited from disclosing the report. Further, if that is so, the report would be exempt from disclosure in its entirety; OMRDD could not delete identifying details and thereafter provide access to the remainder of the document.

The deletion of personally identifying details is required in situations in which the Freedom of Information Law determines rights of access and disclosure of those details would constitute "an unwarranted invasion of personal privacy" [see §89(2)]. However, if a different statute governs and makes records confidential, it has been held that there is no authority to delete personally identifiable details. In a case involving certain medical records maintained by public hospital, it was contended that the records should be disclosed following the deletion of personally identifying details. The Court of Appeals, the state's highest court, however, held that:

> "The statutory authority to delete identifying details as a means to remove records from what would otherwise be an exception to the disclosure mandated by the Freedom of Information Law extends only to records whose disclosure 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. Nassau County Medical Center, 57 NY2d 399, 401 (1982)].

I note that the same conclusion was reached by the Court of Appeals recently concerning a different statute, §50-b of the Civil Rights Law. That provision exempts from disclosure records that tend to identify the victim of a sex offense, and the Court found that a police department was "not obligated 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 the foregoing serves to clarify your understanding of the matter and regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul R. Kietzman
John F. Shave

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13926

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March 5, 2003

Mr. Neil Torczyner
Friedman, Harfenist & Lander
3000 Marcus Ave., Suite 2E1
Lake Success, NY 11042

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

Dear Mr. Torczyner:

I have received your letter and the materials attached to it. You have sought an advisory opinion "as to how long a state agency may delay a response" to a request for records.

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

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

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

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: Christine Tomczak

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13927

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March 7, 2003

Mr. William Margrabe
[redacted]

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

Dear Mr. Margrabe:

I have received three sets of correspondence from you, and in the following paragraphs, I will attempt to respond to the issues that you raised.

It is noted at the outset that the title of the Freedom of Information Law may be somewhat misleading, for it does not deal with information *per se*. On the contrary, 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. Similarly, while public officials may answer questions, the Freedom of Information Law does not require that they do so.

In this regard, the focus of one set of correspondence involves a failure on the part of the Pelham Union Free School District to respond to an inquiry. Specifically, you referred to "NY state rules", described your perception of the rules and asked the District to "let [you] know if [you] misunderstand this point." In my view, that is not a request for a record, and the Freedom of Information Law would not have been implicated.

A request in another set of correspondence pertained to your ability to inspect "all documents related to the educational objectives of PUFSD courses, guidance counseling, physical education, and any other elements of instruction in PUFSD." You added that "Educational objectives might include the delivery of tools (e.g., the ability to solve a linear equation for one unknown, ability to use a search engine to search the Internet), facts (e.g., memorization of a Shakespearean sonnet), certification (e.g., preparation to pass the Regents examination in earth science)."

Once again, the key provision in my opinion is §89(3), which provides that an applicant must "reasonably describe" the records sought. I point out that it has been held by the state's highest court, the Court of Appeals, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the recordkeeping systems of the District, to 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 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. With respect to your request in this instance, in consideration of the nature of a school district and its functions, it is likely that nearly all records, certainly many thousands, maintained by the District and its staff, other than personnel or student records, might fall within the scope of the request. That being so, I do not believe that the request met the standard of reasonably describing the records.

A complaint repeated in your correspondence relates to the functions of the records access and appeals officers. Based on the regulations promulgated by the Committee on Open Government, the primary function of the records access officer involves the duty to coordinate the agency's response to requests [21 NYCRR §1401.2(a)]. Further, §1401.7 of the regulations indicates that the records access officer shall not be the appeals officer. That provision is, in my opinion, intended to ensure that an appeal following a denial of access is meaningful and that the appeals officer should not be directly involved in determining rights of access in response to an initial request. There is no rule or judicial decision of which I am aware that establishes a line that might be drawn between consultation and the equivalent of decision making by the appeals officer. However, the appeals officer in my opinion should not carry out a decision making function concerning an initial response to a request for records.

Another issue relates to the requirement that you seek records only by signing and submitting the District's form. In this regard, I do not believe that an agency can require that a request be made

on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. 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.

A standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, 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.

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 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: Charles Wilson
Stephanie A. Pollock

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 7, 2003

Hon. Charlotte R. Richmond
Town Clerk
Town of Henderson
P.O. Box 259
Henderson, NY 13650

Mr. Gary Leland Rhodes
P.O. Box 220
Belleville, NY 13611

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

Dear Ms. Richmond and Mr. Rhodes:

I have received correspondence from both of you concerning Mr. Rhodes' efforts to obtain information from the Town of Henderson. Having reviewed the materials, I offer the following remarks for the purpose of providing clarification regarding the application of and responsibilities imposed by the Freedom of Information Law.

First and perhaps most importantly, based on a review of a variety of correspondence sent to the Town by Mr. Rhodes, he has in many instances sought answers to questions or explanations relating to certain issues. In those instances, I do not believe that the Freedom of Information Law is applicable. That 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. It has been advised frequently that the Freedom of Information Law is not a vehicle that provides the public with the right to cross-examine government officials or employees or demand or expect answers to their questions. While government officials and employees *may* provide information in response to questions or offer explanations relating to their functions, they are not required to do by the Freedom of Information Law. Again, that law deals with requests for existing records.

Second, in situations in which a member of the public repeatedly seeks information by asking questions, it has been suggested that the appropriate agency official inform that person that the Freedom of Information Law pertains to existing records, that it does not require the preparation of records or the rendering of answers to questions, and that unless a request is made for a record or records, no response will be given.

In a related vein, there appears to be a dispute concerning the payment of a fee for copies of records. From my perspective, when a unit of government receives a request for copies of records, it is required to honor the request insofar as the records are accessible under the law. Concurrent with the government's obligation is the responsibility of the person seeking records to pay the requisite fee. When the government has done what it is required to do by making copies in response to a request for copies, but the applicant has failed to pay the proper fee, it has been suggested that the applicant be informed that future requests for records will not be honored until the proper fee is paid. If the fee has been paid, the government agency is, in my opinion, required to respond to an appropriate request for records in a manner consistent with the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401).

I hope that the foregoing serves to provide clarification and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-13929

From: Robert Freeman
To: [redacted]
Date: 3/7/03 3:01PM
Subject: Dear Cheryl:

Dear Cheryl:

I have received your inquiry concerning unanswered requests for records made to a member of the Assembly.

In this regard, each entity subject to the FOIL is required to designate one or more persons as "records access officer." That person has the duty of coordinating the entity's response to requests for records. While 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, it is suggested that you renew the request and send it to Sharon Walsh, Records Access Officer, Assembly, Room 202 Legislative Office Building, Albany, NY 12248. Ms. Walsh can be reached by phone at (518)455-4218.

This offices publishes "Your Right to Know", which summarizes the FOIL and the Open Meetings Law and includes a sample request letter. It is available on our website by clicking on to "publications."

As you may be aware, §89(3) of the FOIL requires that an entity in receipt of request respond within five business days by granting access, denying access in writing and informing the applicant of the right to appeal, or acknowledging receipt of the request with an estimate of the date when the request will be granted or denied.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3600
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March 10, 2003

Mr. William Hanson
[redacted]

The staff of the Committee 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. Hanson:

I have received several letters from you directly, and the Office of the State Comptroller also recently forwarded correspondence from you to this office. You complained that Mr. Leon Campo, Assistant Superintendent and Records Access Officer for the East Meadow Union Free School District, has failed to comply with the Freedom of Information Law. In brief, you sought the "attendance records" of members of the Board of Education concerning meetings and work sessions held by the Board from September, 2001 to January of this year.

In this regard, first, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) states in relevant part that an agency, such as a school district, is not required to create or prepare a record in response to a request.

In my experience, it would be unusual for a school district to maintain what might be characterized as attendance records pertaining to school board members' presence at meetings. However, a source of equivalent information typically would be minutes of meetings. Minutes generally identify board members in attendance and must include the manner in which members voted in each instance in which action is taken [see Freedom of Information Law, §87(3)(a); Open Meetings Law, §106]. As such, a review of minutes would indicate which members of the board attended meetings. I note, too, that it was established nearly twenty-five years ago that a "work session" constitutes a meeting that falls within the coverage of the Open Meetings Law [Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

To learn more of the matter, I contacted Mr. Campo. As I surmised, the District does not maintain separate attendance records relating to Board members' presence at meetings. Minutes of meetings, however, include the information of your interest. He also indicated that he attempted to contact you to inform you of the District's practice and the availability of the minutes, and that

copies of the minutes have been sent to you. Based on the information that he provided, I believe that the District has complied with law, that the matter has been resolved and that it has, therefore, become moot.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Leon Campo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1393

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March 10, 2003

Hon. Mary D. Natalizio
Town Clerk
Town of Greenville
1537 US Highway 6
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 Ms. Natalizio:

I have received your letter, which reached this office on February 18.

You have sought an opinion concerning a request for "copies of an application that was presented to the Greenville Planning Board by SBA Greenville Wireless Communications Facility" (SBA). SBA is apparently a subsidiary of SBA Towers, Inc. and applied for a special use permit to construct a wireless communications facility. Although the application was withdrawn, copies remain in the Planning Board's possession. The application, according to your letter, consists of "approximately 100 pages and includes several reports such as: Radio Frequency Engineering, RF Emission and Airspace Safety and Visual Impact Assessment report."

The report includes a statement that "the findings opinions and recommendations expressed herein are intended for the exclusive use of SBA Towers, Inc. in making appropriate regulatory filings and may not be reproduced by other parties in any form or manner." The issue involves the effect of that statement. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records, such as those of a town, 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, the application, as well as any accompanying materials, constitute agency records that fall within the coverage of the Freedom of Information Law.

Second, the statement on the document that you forwarded indicating that the report and associated materials may not be reproduced is, in my view, of no significance in terms of the law. The only instances in which records or portions of records may not be available for inspection or copying would involve those in which they may be withheld in accordance with one or more of the grounds for denial appearing in §87(2).

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available for inspection and copying except to the 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, §89(3) requires that an agency make copies of records accessible to the public upon payment of the requisite fee.

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 [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).

Third, 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 or prohibiting the reproduction of accessible records.

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).

If the application and the materials were submitted to the Planning Board and were seen or inspected by the public, or if they were intended to be available for public review, even though the application was later withdrawn, I do not believe that there would be any basis for denying access or the ability to obtain a copy. If on the other hand, the documentation was neither reviewed nor intended to be reviewed by the public, of potential significance would be §87(2)(d), which authorizes an agency to withhold records or portions of records that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;"

Since I am unfamiliar with the contents of the records, I cannot conjecture as to the extent, if any, to which the Town might properly withhold them in accordance with the exception cited above.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13932

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March 11, 2003

Mr. Stephen R. Balcom
[redacted]

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

Dear Mr. Balcom:

I have received your letter and the materials attached to it. You referred to a request for records involving participation in health insurance plans by Oswego County legislators. Although the County disclosed the names of legislators participating in health insurance plans and a breakdown of the number of legislators who chose family or single coverage, including the monthly expenditure for each such plan, the County did not indicate which plans individual legislators chose. You stressed that the information sought was disclosed in the past, and it is your view that it must be disclosed in this instance as well.

In this regard, while there is no judicial decision concerning rights of access to the information of your interest, the County's response to your request is consistent with the advice offered in the past by this office.

As you may be aware, 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 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Oswego County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 11, 2003

Mr. Nicholas Ippolito
92-A-7377
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. Ippolito:

I have received your letter and the attached materials in which you complained that "DOCS is not complying with FOIL." You asked for assistance in relation to your request for a "medical program contract from Hepatitis C."

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.

A review of the materials indicates that you were granted access to the requested record following Mr. Anthony Annucci's response to your appeal. The November 22, 2002 memorandum from Upstate Correctional Facility states that "if you signed it", the records of your interest "should be in your guidance folder at Southport." The memorandum further indicates "that you refused to sign it."

In consideration of the foregoing, in my opinion, Upstate Correctional Facility appears to have satisfied its obligation under the Freedom of Information Law by providing you with the ability to gain access to the requested records. It is suggested that you sign the document as requested in the memorandum.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 11, 2003

Mr. Philip De Carlo
[redacted]

The staff of the Committee 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. De Carlo:

I have received your letter and the correspondence attached to it. You referred to your requests for "contract close out documentation" associated with a certain contract into which the Department of Transportation entered. The Department's records access officer, Mr. John B. Dearstyne, responded by indicating that "[a] diligent search of the files failed to reveal any records relative to your request." Since he did not refer to a right to appeal, you asked that your letter to this office serve as an appeal.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. If no records falling within the scope of your request exist, the Department could neither grant nor deny access. From my perspective, since the Department did not deny access to existing records, there would have been no right to appeal. 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.

In an effort to learn more of the matter, I contacted Mr. Dearstyne. He indicated that when the obligations imposed by a contract have been satisfied, "close out documentation" is generally prepared. He informed me, however, there has been no "close out" yet, and no such documentation has been prepared as yet in relation to the contract to which you referred.

Second, the primary function of the Committee on Open Government involves providing advice and opinions concerning public access to government information in New York. The Committee does not have custody or control of records, nor is it empowered to determine appeals or otherwise compel an agency to grant or deny access to records. When an agency denies access to records, pursuant to §89(4)(a) of the Freedom of Information Law, the person denied access may appeal to the head or governing body of an agency, or to a person designated to determine appeals by the head or governing body.

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: John B. Dearstyne

STATE OF NEW YORK
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March 11, 2003

Mr. Paul Linnertz
[redacted]

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

Dear Mr. Linnertz:

I have received your letter and the materials attached to it. In brief, you requested a variety of records from the Village of North Syracuse on November 17. The Village Clerk acknowledged the receipt of your request on November 22 and indicated that she would gather the records within thirty days. However, as of the date of your letter to this office, you had not yet received the records sought.

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 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3603
FOIL-AO-13936

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March 12, 2003

Ms. Vonnie Kessler
[redacted]

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

Dear Ms. Kessler:

I have received your letter in which you raised a variety of questions relating to the implementation of the Open Meetings and Freedom of Information Laws by the Elmira City School District and its Board of Education.

The first area of inquiry concerns a gathering of a public body that has been characterized as a "presentation practice", rather than a meeting, and that, therefore, it falls outside the coverage of the Open Meetings Law. Without more specific information pertaining to the event, I cannot provide a precise response. However, in an effort to offer guidance, it is noted 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)].

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 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. However, if there is no intent that a majority of public body will gather for purpose of conducting public business, collectively, as a body, but rather for the purpose of gaining education, training, or to listen to speakers as part of an audience or group, I do not believe that the Open Meetings Law would be applicable.

I point out that questions have arisen at workshops and seminars during which I have spoken and which were attended by many, including perhaps a majority of the membership of several public

bodies. Some of those persons have asked whether their presence at those gatherings fell within the scope of the Open Meetings Law. In brief, I have responded that, since the members of those entities did not attend for the purpose of conducting public business as a body, the Open Meetings Law, in my opinion, did not apply.

Second, you asked whether the Superintendent may "call for an unscheduled executive session during a school board meeting to 'get legal advice' concerning the issue of discussion and then come out session 20 minutes later and announce board action that was decided on the issue behind closed doors." In this regard, 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, and §105(1) requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. In short, prior to conducting an executive session, a motion must be made that includes reference to the subject or subjects to be discussed, and it must be carried by majority vote of a public body's membership. That being so, an executive session, in my view, cannot be scheduled, for it cannot be known in advance that motion to enter into executive will be approved.

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 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.

Relevant to the situation 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.

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.

Although it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies; in the case of the latter, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. It is suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to an executive session.

Since you referred to action taken in private, I point out that a board of education may do so only in rare instances. 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 taken in public could identify a student. When information derived from a record 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.

The remaining question relating to the Open Meetings Law involves "the legal definition" of "consensus." I know of no "legal definition." However, the notion of a consensus reached at a meeting of a public body was considered in Previdi v. Hirsch [524 NYS 2d 643 (1988)], which 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 session was properly held, it was found that "this was not a 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).

If a public body, such as a board of education, reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted [see Freedom of Information Law, §87(3)(a); Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987)]. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous ratification does not indicate how the members actually voted behind closed doors, the public may not be aware of the members' views on a given issue. If indeed a consensus represents action upon which the Board relies in carrying out its duties, or when the Board, in effect, reaches agreement on a particular subject, I believe that the minutes should reflect the actual votes of the members.

In contrast, a so-called "straw vote", which is not binding and does not represent members' action that could be construed as final, could in my view be taken in executive session when it represents a means of ascertaining whether additional discussion is warranted or necessary. If a "straw vote" does not represent a final action or final determination of the Board, I do not believe that minutes including the votes of the members would be required to be prepared.

Next, if a request is denied under the Freedom of Information Law, and the denial is sustained following an appeal, the person denied access has the right to seek judicial review of the determination by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. In the alternative, any person may seek an opinion concerning the propriety of the denial of access from this office. While the opinions rendered by this office are not binding, it is our hope that they are educational and persuasive. Further, the courts in many instances have cited and relied upon the Committee's opinions as the basis for their decisions.

Lastly, when seeking records under the Freedom of Information Law, §89(3) requires that an applicant must "reasonably describe" the records sought. Therefore, a person requesting records should provide sufficient detail to enable the staff of an agency to locate and identify the records. Often names, dates, time periods, locations, file designations and similar identifiers can be useful in reasonably describing the records.

As you requested, and in an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings 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:tt

cc: Board of Education

FOIL-AO-13937

From: Robert Freeman
To: tclingan@albanycounty.com
Date: 3/13/03 8:01AM
Subject: Hi Tom - -

Hi Tom - -

I have received your inquiry concerning access to the addresses of notaries public. Although I do not recall having written any opinion on the subject, as you may be aware, the Department of State licenses notaries. Consequently, the issue has arisen here, and it has been advised and it is the practice to disclose the addresses.

In some circumstances, a licensing agency may have two addresses, the business address and the residence address. In those instances, it has been advised that the business address must be disclosed, but that the home address may be withheld to protect privacy. The general notion is that the public has the right to know of the location where the licensed activity is being carried out. It is my understanding that the Department maintains only one address pertaining to notaries, the address given by applicants for licenses when they apply, and that address is routinely 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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

March 13, 2003

Mr. Demaine Jackson
02-B-0887
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

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

Dear Mr Jackson:

I have received your letters and attached materials in which you complained that the Office of the Genesee County District Attorney and the Batavia Police Department have not responded to your requests for a "list" of everything in their files related to your arrest and indictment.

In this regard, I offer the following comments.

First, it is noted 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 indeed neither the Office of the District Attorney nor the Police Department maintains the lists that you requested, the Freedom of Information Law would not apply.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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-13939

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

March 13, 2003

Mr. Edwin Colon
00-R-5409
Groveland Correctional Facility
P.O. Box 50
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. Colon:

I have received your letter and attached material in which you complained that the records access officer at your facility responded to your request for a "quarterly review" pertaining to [your] counselor interview by directing you to "see your counselor."

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), an agency's records access officer has the duty of coordinating an agency's response to requests.

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

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

Again, the records access officer has the authority and duty to "coordinate" an agency's response to requests under the Freedom of Information Law.

Since I am unfamiliar with the content of the requested record, I cannot conjecture as to its availability. However, 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.

Several grounds for denial may be applicable and §87(2)(g) is likely the most pertinent. That provision enables an agency to withhold records that:

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

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

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

From: Robert Freeman
To: Geof Huth
Date: 3/13/03 3:14PM
Subject: Re: Question of Precision

Hi Geof - -

I agree with you, and in fact, have prepared papers that make the kind of three category distinction that you described. The difficulty in my view relates to the use of the term "exempt."

As you are likely aware, the initial ground for denial in FOIL pertains to records that "are specifically exempted from disclosure by state or federal statute." That means that Congress or the State Legislature has enacted a statute that specifies that certain records cannot be disclosed. For instance, the Tax Law specifies that records acquired from taxpayers relating to the payment of income tax are confidential; they cannot be disclosed. The remaining exceptions, or grounds for denial, involve instances in which records or portions of records *may* be withheld, but in which there is no obligation to do so. That being so, the Court of Appeals has held that FOIL is permissive, and that the ability to deny access is optional, not mandatory, unless a different statute specifies that records cannot be disclosed.

I have tried to distinguish those two categories by suggesting that in situations in which records cannot be disclosed because a statute imposes an obligation to withhold, the records should be characterized as "exempt" from disclosure. In cases in which the records may be withheld, but in which there is no obligation to do so, they should be characterized as "deniable" (not exempt).

In sum, there are indeed three categories of records relative to access - - accessible, deniable and exempt. The first pertains to those that are clearly public and available to any person. The second concerns those that may be withheld, but which an agency may, in its discretion, choose to disclose. And the third pertains to situations in which an agency must deny access, because a statute exempts the records from disclosure.

I hope that this helps. If you would like to discuss the matter, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13941

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

March 13, 2003

Mr. Matthew Lee, Esq.
Executive Director
Inner City Press/Community on the Move
& Fair Finance Watch
1919 Washington Ave.
Bronx, NY 10457

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

Dear Mr. Lee:

As you are aware, I have received a variety of materials from you and the Banking Department concerning your request for records relating to the application by HSBC Holdings PLC to acquire Household International, Inc. Since you have received some records from other states analogous to those requested, you have questioned the Department's authority to deny access. In its responses to your request and appeal, the Department cited §36(10) of the Banking Law and §87(2)(d) of the Freedom of Information Law as the bases for its determination.

In this regard, first, two opinions, one dated March 10, 1998 and the other, November 6, 2000, were prepared at your request concerning §87(2)(d). Having reviewed them, I do not believe that I can add meaningful commentary to that previously offered. If you need copies of those opinions, I will be pleased to furnish them on request.

Second, the initial ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §36(10) of the Banking Law, which as amended in 2000, states that:

> "All reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations, including any duly authenticated copy or copies thereof in the possession of any banking organization, bank holding company or any subsidiary thereof (as such terms 'bank holding company' and 'subsidiary' are defined in article three-A of this

> chapter), any corporation affiliated with a corporate banking organization within the meaning of subdivision six of this section and any non-banking subsidiary of a corporation which is an affiliate of a corporate banking organization within the meaning of subdivision six-a of this section, foreign banking corporation, licensed lender, licensed casher of checks, licensed mortgage banker, registered mortgage broker, or the savings and loan bank of the state of New York or the banking department, shall be confidential communication, shall not be subject to subpoena and shall not be made public unless, in the judgement of the superintendent, the ends of justice and the public advantage will be subserved by the publication thereof, in which event the superintendent may publish or authorize the publication of a copy of any such report or any part thereof in such manner as may be deemed proper. For the purposes of this subdivision, 'reports of examinations and investigations, and any correspondence and memoranda concerning or arising out of such examinations and investigations', includes any such materials of a bank, insurance or securities regulatory agency of the federal government or that of any other state or that of any foreign government which are considered confidential by such agency or foreign government and which are in the possession of the department."

Based on conversations with officials of the Department and a review of §36(10), it appears that its reliance on that statute was proper. In short, many of the records sought appear to consist of materials "arising out of" an examination or investigation of a banking organization. If that is so, I believe that §36(10) would serve as a valid basis for a denial of access. Further, when that statute is applicable, disclosure of analogous materials by other jurisdictions would not in my opinion diminish the Department's ability to withhold records.

I hope that the foregoing is of value to you.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Sara A. Kelsey
Christine M. Tomczak

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13942

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

March 17, 2003

E-Mail

TO: Dinah Miller [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. Miller:

I have received your letter in which you sought assistance concerning a request made under the Freedom of Information Law to a town supervisor for the front of a check. You indicated that the photocopy of the check was too small to read its contents and that your request for a "normal size copy" was refused. You added that the account number was deleted.

In this regard, first, I believe that every law, including the Freedom of Information Law, must be implemented in a manner that gives reasonable effect to its intent. In my view, when an agency makes a photocopy in response to a request, the photocopy should be of a size and quality appropriate to enable an average person to read its contents.

Second, with respect to the account number, you did not specify the nature of that item, i.e., whether it relates to a personal account, a town or other account. If it is personal, in my opinion, the denial of access would have been 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.

Pertinent with respect to a personal account number would be §87(2)(b), which authorizes an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective, that exception could properly be asserted in that circumstance.

If the account number relates to the Town or an entity other than a person, I note that, for several years, §87(2)(i) 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.

I hope that I have been of assistance.

RJF:jm

cc: Supervisor, Town of Clinton

FOIL-AO-13943

From: Robert Freeman
To: [redacted]
Date: 3/19/03 8:58AM
Subject: Dear Mr. Oquendo:

Dear Mr. Oquendo:

I have received your inquiry concerning access to the records of not-for-profit organizations.

In this regard, the Freedom of Information Law is applicable to agency records, and section 86(3) of that law defines the term "agency" to mean, in brief, an entity of state or local government in New York. Therefore, entities that are not governmental in nature are not subject to the Freedom of Information Law, even though they may use or receive public funds.

There is no state agency that is "in charge of regulating the fair use of public funds by Not-for-Profit Organizations." However, I note that all records maintained by agencies are subject to rights of access conferred by the Freedom of Information Law. Consequently, if a private organization has a relationship of some sort with an agency, the records submitted by that organization to the agency, or the records prepared or maintained by the agency about the organization, fall within the coverage of the law. In that situation, while the private organization may not be required to disclose, the government agency would be required to do so in accordance with rights granted by 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

FOIL-AO-13944

From: Robert Freeman
To: [redacted]
Date: 3/19/03 9:43AM
Subject: Dear Mr. Blythe:

Dear Mr. Blythe:

I have received your inquiry concerning the form of a request made under the New York Freedom of Information Law.

In this regard, there is no reference to any particular form or the use of a form in the law. However, section 89(3) of the Freedom of Information Law states in part that an applicant for records may be required to seek the records in writing, and that person must "reasonably describe" the records sought. Therefore, any request made in writing that reasonably describes the records should suffice.

I note that our general guide to the Freedom of Information Law, "Your Right to Know", includes a sample letter of request. The guide is available via our website by clicking on to "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

FOIL-AO-13945

From: Robert Freeman
To: [redacted]
Date: 3/19/03 9:35AM
Subject: Dear Sillymen:

Dear Sillymen:

I have received your inquiry concerning "a suny school's policy on which fees are mandatory and voluntary and how that was determined."

In this regard, first, pursuant to regulations promulgated by this office, each agency, such as SUNY, is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests for records should ordinarily be directed to that person. I believe that each SUNY campus has its own records access officer, and it is suggested that you contact the campus director of public affairs or the office of the president to ascertain the identity of the records access officer.

Second, section 89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. I have no knowledge of the nature of the fees of your interest. While I am unfamiliar with the means by which SUNY operates, I would conjecture that some fees may be established university wide by the SUNY Board of Trustees; others might be established by campus bodies individually. In either event, I would also conjecture that action to establish fees would have been taken at meetings of those bodies, and that their actions would be reflected in minutes. In any case, when seeking records, you should provide sufficient detail to enable staff to locate and identify the records of your interest.

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13946

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

March 19, 2003

E-MAIL

TO: Dennis Wheeler [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. Wheeler:

I have received your inquiry concerning the disclosure of the names and addresses of persons seeking records under the Freedom of Information Law. You wrote that you "recall reading in [our] regulations that information...such as name and address of a person submitting a foil, is not foilable."

In this regard, first, there is nothing in the regulations promulgated by the Committee on Open Government that deals with disclosure of particular items or records; the regulations deal solely with the procedural implementation of 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. From my perspective, with the exception of portions of certain requests, those kinds of records 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 state's highest court, 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.

Lastly, in the context of your comments, there is nothing in the law that would prohibit a town board member from identifying a person who submitted requests to the town under 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: Elizabeth Gable

FOIL-AO-1394/7

From: Robert Freeman
To: [redacted]
Date: 3/19/03 4:39PM
Subject: Dear Mr. Ventre:

Dear Mr. Ventre:

I have received your inquiry concerning rights of access to a will submitted in conjunction with an application for a real property tax exemption.

In this regard, as a general matter, it has been advised that personal financial information, such as a copy of a Form 1040 that is submitted to gain a STAR exemption, may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In the context of the situation that you described, if the document in question has not been filed with the Surrogate's Court and is not available from the clerk of the Court, I believe that it may be withheld.

I note that the opinions to which you referred are old and may be out of date. Others available on our website may be useful to you. When on the site, you can go to the FOIL advisory opinions, click on to "A", and scroll down to "Assessment Information, Star Exemption." The opinions indicated there are available in full text.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13948

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

March 20, 2003

Hon. Francis C. Mullin
Town Clerk
Town of Stony Point
74 East Main Street
Stony Point, NY 10980

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

Dear Ms. Mullin:

I have received the correspondence that we discussed. As I understand the situation, the Town of Stony Point was served with a subpoena by the United States Attorney for the Southern District of New York, and a law firm representing a named Town official requested the records made available by the Town pursuant to the subpoena under the Freedom of Information Law. You indicated that the following records were made available in response to the subpoena:

"•
- Supervisor's financial disclosure statements
- Three vouchers....
- Receipt Journals - computer generated from 1998-2003 for General Fund
- Disbursement Journals - computer generated from 1998-2003 for General Fund
- Receipt & Disbursement Journals - computer generated for 2001, 2002 & 2003 for capital projects
- W-2's for S. Hurley from 1992 - 2002
- Personnel file for Steven Hurley
- 2003 Bank Depositories and Account #'s".

In this regard, I offer the following comments.

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

Although §87(2)(e) authorizes an agency to withhold records "compiled for law enforcement purposes" in certain circumstances, the records at issue would have been prepared in the ordinary course of business, and not for any law enforcement function. Consequently, I do not believe that that exception would be pertinent or applicable.

Second, many of the records in question would be accessible to any person. For instance, the journals reflective of financial transactions, grant applications, and records involving the Town's bank accounts, with one possible exception to be considered later, would be accessible to the general public.

Some aspects of some of the records may, in my view, be withheld from the general public pursuant to §§87(2)(b) and 89(2)(b), both of which indicate that an agency may deny access when disclosure would constitute "an unwarranted invasion of personal privacy." For example, portions of financial disclosure statements, i.e., those items that are found to have no material bearing on the performance of one's official duties, as well as social security numbers, net pay and similar items contained within a W-2, could be withheld. Similarly, there may be items within a personnel file, such as medical or health insurance details and other items of an intimate personal nature, which might properly be withheld. I note that §89(2)(c) provides that disclosure does not constitute an unwarranted invasion of personal privacy:

> "ii. when the person to whom a record pertains consents in writing to disclosure;
>
> iii. when upon presenting reasonable proof of identity a person seeks records pertaining to him."

Since a person cannot invade his or her own privacy, and since the law firm making the request represents the subject of many of the records, I believe that the Town must disclose those records or portions thereof to the law firm representing the subject of the records that he would have the right to obtain.

Insofar as records pertaining to the person represented by the law firm include personally identifiable to others, there may be a basis for protecting the privacy of those persons. For example, if a complaint was made concerning that person by a member of the public, the personally identifying details concerning the complainant might be withheld on the ground that disclosure would constitute an unwarranted invasion of that person's privacy.

Also relevant may be §87(2)(g), which authorizes an agency to withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. If intra-agency materials reflective of opinions, as in the case of a performance evaluation, have been made available or displayed to the subject of the records in the past, I do not believe that there would be any basis for denying access. However, if internal governmental communications had not been reviewed by the subject of the records, those portions consisting of advice, opinion, recommendation and the like could in my view be withheld.

Lastly, of possible significance with respect to bank account numbers 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.

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-13949

Committee Members

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March 20, 2003

E-MAIL

TO: Robert W. Kuiken [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. Kuiken:

As you are aware, I have received your inquiry concerning an unanswered request for records that you requested under the Freedom of Information Law from the Speculator Volunteer Fire Department. The request involves "1. Copies of all Fire Department requests to the Village Board to hold fund raising activities for the years 2000, 2001, and 2002. And total of monies raised each year. 2. Full Fire Department treasurer's reports showing all monies donated to Fire Department, and source of all donations which exceed 75.00 for years 2000, 2001 and 2002. "

In this regard, first, although volunteer fire companies are typically not-for-profit corporations, the state highest court, the Court of Appeals, determined in 1980 that they perform what historically has been considered an essential governmental function, that they exist by virtue of their relationships with entities of local government and that, therefore, they are "agencies" that are required to comply with the Freedom of Information Law (Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575).

Second, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) states in relevant part that an agency is not required to create a record in response to a request. If, for example, the Department has prepared a record indicating a total amount raised during the period of a year, that record would be subject to rights of access. However, if there is no such record, the Department would not be required to prepare a total or a new record containing a total on your behalf.

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

for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, with one possible exception, the information sought, to the extent that it exists in the form of a record or records, must be disclosed, for none of the grounds for denial of access would apply.

The exception deals with the source of donations. In my view, when a member of the public makes a charitable donation, to the Department, for instance, identifying details pertaining to that person may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §§87(2)(b) and 89(2)(b)]. If, however, a donation is made by an entity, such as a business enterprise, there would be nothing personal in the record, and I believe that it would be available in that circumstance.

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

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

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

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

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

I hope that I have been of assistance.

cc: Speculator Volunteer Fire Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13950

41 State Street, Albany, New York 12231
(518) 474-2518
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March 21, 2003

Hon. Martha S. Offerman
Town Clerk
Town of Oyster Bay
Town Hall
54 Audrey Avenue
Oyster Bay, NY 11771-1592

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

Dear Ms. Offerman:

I have received your letter, which you wrote on behalf of a resident of the Town of Oyster Bay. Although that person has on several occasions gone before the Town Board to request "a list of the vehicles assigned to employees of the Town", he has been unable to obtain the information at issue. You have sought my "intervention" to expedite disclosure of the information.

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

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

In short, I believe that the Town Board has the overall responsibility of ensuring compliance with the Freedom of Information Law and that the records access officer has the duty of coordinating responses to requests.

Section 1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

Based on the foregoing, again, the records access officer must "coordinate" an agency's response to requests. If you have been designated records access officer, I believe that you have the authority to direct Town officers or employees to disclose records to the extent required by law or, in the alternative, to acquire the records so that you can determine the extent to which records sought must be disclosed.

Second, in a related vein and as you are aware, §30(1) of the Town Law specifies that the town clerk is the custodian of all town records. Therefore, even though records may not be in your physical custody, I believe that they are in your legal custody.

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 a list or other records identifying Town officers or employees to whom vehicles have been assigned must be disclosed, for none of the grounds for denial of access would apply.

Since vehicles are apparently assigned to certain persons, of potential significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g.,

Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, 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 my view, the assignment of a Town vehicle to a Town officer or employee clearly relates to the performance of that person's duties. Consequently, a record reflective of such an assignment must, in my opinion, be disclosed, for release of the record would result in a permissible rather than an unwarranted invasion of privacy. In short, there would be nothing "personal" about the record.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13951

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March 21, 2003

Ms. Teri Weaver
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 facts presented in your correspondence.

Dear Ms. Weaver:

I have received your letter and the forms attached to it. You have sought an advisory opinion concerning the deletion of certain portions of each of approximately 600 applications and "business annual reports" submitted to the City of Syracuse Office of Economic Development for participation in the Empire Zones Program.

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 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 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 Department contended that certain records could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception different from that pertinent in the context of your inquiry. In the context of the records at issue, there may be some items that may *always* be withheld; but others may be accessible or deniable, depending on individual circumstances and the effects of disclosure.

The court in Gould also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

In short, the ability to deny access to particular portions of the records in question may vary from one submission to another, again, depending largely on the effects of disclosure.

From my perspective, the only ground of denial of significance is §87(2)(d), which permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

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 the content of a 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 among the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" in Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale [87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information

Law as it pertains to §87(2)(d), and due to the analogous nature of the equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421).

In consideration of the foregoing, I believe that the Employer ID Number (EIN) may be withheld in every instance. That unique identifier might be used as a means of gaining unauthorized access to information or in other ways that could result in substantial harm to a commercial enterprise. However, that may be the only item that may justifiably be withheld from each of the submissions. Some items identified as deleted should, based on my understanding of their significance, be available in every instance. In items E and F, for example, it would seem that a disclosure of a firm's eligibility to claim wage tax credits or empire zone enterprise benefits, without more, is innocuous. As suggested earlier, the area of commerce in which an enterprise is involved, the degree of competition within that area of commerce and the effects of disclosure serve as key factors in determining rights of access or, conversely, the extent to which a denial of access may be justifiable. The same items on a form may in some cases be accessible, because the effect of disclosure on a firm's competitive position may be minimal, or deniable, because the effect of disclosure would be substantial injury to the firm's competitive position.

For example, Item C of the business annual report requires an indication of the gross payroll for an enterprise doing business in the zone. If the enterprise is multinational, or if it employs people in numerous locations, it is doubtful in my view that disclosure would cause "substantial injury" or perhaps any injury at all to the competitive position of that enterprise. On the other hand, if the only location where the enterprise does business is that location within the zone, and if the enterprise is relatively small or newly established, disclosure to a competitor could be damaging, and §87(2)(d) might properly be asserted.

In sum, it appears that some items marked as deleted likely should be disclosed, while others may be accessible or deniable in consideration of the effects of disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Office of Economic Development, City of Syracuse

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13952

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March 21, 2003

Ms. Elisa Baldwin
New York City Department of Education
Office of Legal Services
52 Chambers Street
New York, NY 10007

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

Dear Ms. Baldwin:

I appreciate having received a copy of your determination of an appeal made under the Freedom of Information Law by Mr. Jonathan R. Donnellan of the *Daily News*. In sustaining the initial denial of access, you indicated that the request involves "grade ranking by school for every elementary, middle high school and special education principal" and that the denial was proper because the information at issue "does not represent a final agency determination."

As I understand the nature of the records sought, they should be made available. In this regard, I offer the following comments.

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

Second, I agree that the provision to which you referred, §87(2)(g), governs rights of access. However, due to its structure and its interpretation by the Court of Appeals, it may require disclosure, and I believe that to be so in this instance.

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 predecisional or in you words, "does not represent a final determination", does not necessarily signify 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 statistical or factual information, which appears to be so, I believe that they must be disclosed.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jonathan R. Donnellan
Allison Gendar
Susan Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 21, 2003

Hon. Edward Densieski
Councilman
Town of Riverhead
Town Hall, 200 Howell Avenue
Riverhead, NY 11901

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

Dear Councilman Densieski:

I have received your letter and the correspondence attached to it. You have asked whether you may obtain "W2 information on town employees" and whether the Town's accountant [is] required to respond to [your] request." The Town Supervisor indicated that "it would be a violation of the Privacy Act to provide you a copy of any W-2 issued by the Town as employer". He added, however, that you were given a "list of federal wages" that "essentially includes all forms of compensation, or income."

From my perspective, although the Privacy Act is a federal statute (5 USC 552a) that pertains to records maintained by federal agencies and does not apply to the Town, it appears that the information given to you is equivalent to portions of W-2 form that, in my opinion, should be disclosed 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 intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body, i.e., a town board, involves acting collectively, as an entity. A town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41; also Town Law, §63). In my view, in most instances, a board, member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

Second, with respect to the duty of the financial administrator to respond to your request, 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 officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public form continuing from doing so."

As such, the Town Board has the duty to promulgate rules and ensure compliance. Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. As you may be aware, because town clerks are both the legal custodians of town records under §30 of the Town Law and the records management officer, they are in most circumstances also designated as records access officer.

In my view, if a town employee other than the records access officer receives a request for records, that person, in my opinion, should either respond directly in a manner consistent with law if he or she is authorized to do so, or forward the request to the records access officer.

Third, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, the issue involves the extent to which W-2 forms may be withheld pursuant to §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. 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].

Insofar as a W-2 includes an employee's home address, social security number, net pay, deductions and other items irrelevant to an employee's duties, I believe that those portions may be withheld. What is relevant to the employee's duties is that person's income, the box indicating gross wages.

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)]. As stated even 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 the 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, it is reiterated that portions of W-2 forms may be withheld that are 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. I note that 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).

In consideration of the foregoing, the prior disclosure to you of employees' names and gross wages in my opinion involved a release of items equivalent to the accessible portions of W-2 forms.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Robert F. Kozakiewicz
Jack Hansen

FOIL-AO-13954

From: Robert Freeman
To: [redacted]
Date: 3/24/03 9:46AM
Subject: Dear Ms. Parrino:

Dear Ms. Parrino:

I have received your inquiry concerning access to a probated will.

In this regard, I note that the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, excludes the courts from its coverage. However, court records are often available under other provisions of law.

Pertinent to your inquiry is section 2501(8) of the Surrogate's Court Procedure Act, which states that "All books and records [of the Surrogate's Court] other than those sealed are open to inspection of any person at reasonable times." Based on that provision, it is suggested that you seek the records of your interest from the clerk of the Surrogate's Court in which the will was probated.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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(518) 474-2518 - Phone
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Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FPPA-AO-305
FOIL-AO-13955

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March 24, 2003

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. and Ms. Schwab:

Your inquiry addressed to the State Department of Health has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer advice and opinions pertaining to the state's Freedom of Information and Personal Privacy Protection Laws.

You wrote that a state agency that employs one of you "requires that each employee's Social Security Number be written on each four week time card although the SS numbers of each employee are already on file with the Agency." You added that the "time cards are routinely viewed by several people as they are processed and the Agency has a record of disclosing medical records and other documentation containing employees' SS numbers thru [sic] group e-mailings." You have asked whether "anything can be done to stop these practices."

In this regard, the authority of this office is advisory, and neither myself nor the Committee is empowered to compel an agency to stop or initiate its practices. However, it is our hope that advisory opinions, such as this, are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with law. If you see fit to do so, you may share this opinion with your agency, and with that, I offer the following comments.

From my perspective, two statutes are pertinent to the matter.

First, although the federal Privacy Act (5 USC 552a) generally applies to federal agencies, one aspect of the Act pertains to entities of state and local government, and it relates to the ability to require that individuals provide their social security numbers. Section 7 of the Privacy Act states that:

> "(a)(1) [I]t shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security number.
>
> (2) the provision of paragraph (a) of this subsection shall not apply with respect to --
>
> (A) any disclosure which is required by Federal Statute, or
>
> (B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual
>
> (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it."

The quoted provision places limitations upon the collection and use of social security numbers by government, and unless "grandfathered in" under the Privacy Act, agencies cannot require the submission of social security numbers, except in conjunction with social security or other statutorily authorized purposes. As you have described the situation, the agency that employs you cannot require you or other employees to include your social security numbers on your time cards.

Second, the state's Personal Privacy Protection Law deals in part with the authority of state agencies to collect personal information. Section 94(1) of that statute states that, unless a person, a "data subject", provides an agency with "unsolicited personal information", the agency shall "maintain in its records only such personal information which is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order, or to implement a program specifically authorized by law..." While you may be required to supply certain information on a time card, I do not believe that a social security number is "relevant and necessary" to the agency to carry out its functions relating to attendance. If that is so, the agency's practice would be inconsistent with the Personal Privacy Protection Law.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13956

Committee Members

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March 24, 2003

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, once again, you complained that your request for records of the Town of Southampton has not been processed in a timely manner. According to the materials attached to your letter, a request was made on December 31. Its receipt was acknowledged on January 14, at which time you were informed that "it will take one (1) month to process your request." Nevertheless, as of the date of your letter to this office, you had received no further response.

In this regard, as indicated in my letter to you of December 26, §89(3) of the Freedom of Information Law states in part that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Celia Gilvary
William H. Masterson, Jr.
Marietta Seaman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13957

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March 24, 2003

E-MAIL

TO: Janusz Muszak [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. Muszak:

I have received your letter concerning a request directed to the Monroe County Water Authority in which you sought documents "explaining for what service the MCWA paid over the years to the law firm Harter, Secrest & Emery LLP..." In response to the request, you were informed that "many of these records contain attorney/client privilege communications and that the Monroe County Water Authority will be redacting this information from these records." You wrote that you are "puzzled with public entity claiming attorney/client privilege thus apparently conducting such business that might not be disclosed to the public" and asked whether the records in question can be "edited."

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 entities of state and local government. The definition makes specific reference to public authorities. Therefore, I believe that the Monroe County Water Authority is an agency required to comply with the Freedom of Information Law.

Second, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 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 an attorney for a government agency to his or her clients 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 may engage in a privileged relationship with his or her government 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 and 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(c) 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, a description of litigation strategy or legal advice, 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", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

I hope that I have been of assistance.

cc: Monroe County Water Authority

FOIL-AO - 13958

From: Robert Freeman
To: [redacted]
Date: 3/24/03 3:56PM
Subject: Dear Latwin:

Dear Latwin:

I have received your inquiry concerning a request for "an old zoning map" made pursuant to the FOIL. You indicated that the person requesting the map has had the opportunity to inspect the map, but that he/she would like to have a copy. The difficulty is that the map is brittle and cannot be photocopied without damaging it. You added that the municipality that you serve "tried to take a digital picture of the map but that was not satisfactory to the requesting party."

In this regard, on one hand, the FOIL requires that accessible records, those that cannot be withheld based a ground for denial of access appearing in section 87(2), are available for inspection and copying. Further, section 89(3) states that an agency must must prepare a copy of an accessible record upon payment of the requisite fee. On the other hand, the Arts and Cultural Affairs Law, section 57.25, requires municipalities to "protect" their records and to preserve those of "enduring value."

From my perspective, the course of action that you described was appropriate, and it has been suggested that old records and those too large to be photocopied may be photographed, either by the person seeking the record, or by the agency having custody of the record. If the detail in a photograph can reasonably be seen or discerned, I believe that making the photograph available in lieu of a photocopy would be reasonable and consistent with the intent of the law. If a particular photograph cannot reasonably be used, it is suggested perhaps another be made or that the negative be made available to the applicant so that he/she may enlarge the photo.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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(518) 474-2518 - Phone
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Website - www.dos.state.ny.us/coog/coogwww.html

CC: Inetcorp

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13959

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March 25, 2003

Angelos Peter Romas, 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. Romas:

I have received your letter and the materials attached to it. You have sought an advisory opinion pertaining to rights of access to "communications concerning the terms of employment between Mayor Collela" of the Village of Endicott and an attorney retained to serve the Village Planning Board and Zoning Board of Appeals. You wrote that, as a taxpayer of the Village, you "would like to know where [your] money is being on and for what". In response to your request for the names of attorneys "proposed as appointees", you were informed that the records are of "a personal nature" and "are not recoverable". With respect to the portion of the request for a record indicating "the terms of employment and scope of employment", you were informed that such record is "not available."

In this regard, I offer the following comments.

First, it is unclear on the basis of your letter whether the attorney retained by the Village is an "employee" on the Village payroll. In many instances, that is not so; attorneys retained by municipalities are frequently more akin to private contractors. The distinction may be significant, for §89(7) of the Freedom of Information Law indicates that the names of applicants for appointment to public employment need not be disclosed. Therefore, if the position is that of employee, the names of those proposed for or who applied for the position could be withheld. On the other hand, if the attorney is not an employee of the Village, the remaining provisions of the Freedom of Information Law would be applicable.

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

Assuming that the attorney position is not that of employee, I believe that the identities of those proposed would be public. One of the grounds for denial, §87(2)(b), authorizes an agency to deny access insofar as disclosure would constitute "an unwarranted invasion of personal privacy." However, there are several judicial decisions, both New York state and federal, that pertain to records about individuals in their business or professional capacities and which indicate that the records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

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

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

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

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d

> at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

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

Lastly, if the attorney is an employee of the village, a record indicating a description of the duties inherent in the position would, in my view, clearly be public. Section 87(2)(g)(ii) and (iii) respectively require the disclosure of internal governmental records that consist of instructions to staff that affect the public and final agency policies or determinations. If the attorney is not employee, a retainer agreement or contract between that person and the Village would be accessible, for none of the grounds for denial of access would be applicable in relation to a record of that nature.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce W. Myers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AV-13960

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

March 25, 2003

Mr. Richard G. Long
Cortland County Correctional Facility
59 Greenbush Street
Cortland, NY 13045

Dear Mr. Long:

The Secretary of State has asked me to review and respond to your letter of March 19 addressed to him and Lieutenant Governor Donohue. Your letter appears to be an appeal made under the Freedom of Information Law following a denial of access to records by the records access officer for the Cortland County Sheriff's Department.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel a government agency to grant or deny access to records.

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

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

Having contacted the Sheriff's Department on your behalf, I have been informed that the person to whom an appeal may be made is:

Mr. Larry Knickerbocker
Cortland County Attorney
County Office Building
Central Avenue
Cortland, NY 13054

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-13961

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

March 25, 2003

Mr. Daniel H. Stuart
[redacted]

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

Dear Mr. Stuart:

I have received your letter concerning a request for certain records of the Department of Correctional Services. In brief, you asked whether it was appropriate for the Department's records access officer to direct you to the "FOIL Office" at each of the facilities that maintains the records of your interest. He specified in his response that the Department's central office in Albany does not possess the records in question and that the information sought is available on the Department's website.

It is my understanding that the regulations promulgated by the Department pursuant to the Freedom of Information Law indicate that requests for records kept at correctional facilities may be made to the facility superintendent or a designee of the Commissioner, the records access officer or the superintendent. If that is so, and if the records sought are not maintained at the Department's central office, I do not believe that the response by the records access officer could be characterized as improper.

Additionally, his suggestion that the materials of your interest are available online was, in my view, positive and helpful as an alternative to having to pay more than one hundred dollars to have the records photocopied by Department staff.

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-13962

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

March 25, 2003

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 February 3, which reached this office on February 28. It is noted that the address for this office on your letter is inaccurate.

You complained that the Hyde Park School District failed to respond to a request in which you asked that the freedom of information officer "articulate the district policy" relating to a variety of matters.

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) provides in part that an agency, such as a school district, is not required to create a record in response to a request. Similarly, while agency officials may answer questions, or "articulate" or perhaps explain their actions or policies, there is no obligation to do so imposed by the Freedom of Information Law. Again, that statute pertains to existing records.

In the context of your request, if, for example, there is no written policy "about returning phone calls" or "about presenting information at school board meetings by projection that is readable with normal eyesight by the audience", the Freedom of Information Law would not apply.

I note, too, that there need not be a "policy about responding to FOILs within the legal 5 days" because the law itself includes direction to that effect. However, within sixty days after the effective date of the current version of the Freedom of Information Law (January 2, 1978), the Board of Education was required to have adopted procedural rules regarding the implementation of that law. As such, rules or a policy must exist concerning the implementation of the Freedom of Information Law.

Lastly, whether the District maintains records or otherwise, I believe that it is required to respond to requests in the manner described in previous correspondence.

I hope that I have offered worthwhile clarification and been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3605
FOIL-AO-13963

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March 25, 2003

E-Mail

TO: Allegra Dengler [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Trustee Dengler:

I have received your letter of March 3 in which you raised a variety of questions, several of which concern the Open Meetings and Freedom of Information Laws as they relate to certain activities of the Village of Dobbs Ferry.

In this regard, it is emphasized at the outset that the advisory jurisdiction of this office is limited to matters involving the two statutes referenced above. I have neither the authority nor the expertise to respond to your questions concerning the expenditure of public money without public notice. As your questions pertain to those statutes, I offer the following comments.

First, as a general matter, when a public body has properly entered into executive session, it may vote during the executive session, unless the vote is to appropriate public moneys. Section 106(2) of the Open Meetings Law pertains specifically to minutes of executive sessions and states that:

> "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."

Subdivision (3) of §106 requires that minutes of executive session must be prepared and made available, to the extent required by the Freedom of Information Law, within one week of the executive session during which the action was taken.

Second, with respect to the map to which you referred, the Freedom of Information Law is expansive in its coverage, for it pertains to all agency records and 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, Village records include not only those kept in Village Hall, but also those prepared or kept *for* the Village as well. Therefore, if, for example, the Village retains a consultant and the consultant prepares or maintains records for the Village, those records, in my view, fall within the coverage of the Freedom of Information Law. If a request has been made for records in that circumstance, it has been advised that the designated records access officer direct the consultant to disclose the records in a manner consistent with law, or acquire the records to determine the extent to which they must be disclosed.

Lastly, if an agency "does not release records", the person denied access has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 25, 2003

Mr. Joseph P. Novek
[redacted]

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

Dear Mr. Novek:

I have received your note and the materials attached to it. In brief, you referred to an unanswered request for records made to the director of the Syracuse regional office of the Department of Environmental Conservation.

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 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)].

For your information, I believe that the person designated to determine appeals at the Department of Environmental Conservation is Molly T. McBride, Administrative Law Judge. The address of the Department's headquarters is 625 Broadway, Albany, NY 12233-1016.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth Lynch
Ruth Earl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 25, 2003

Mr. Nelson Pendergast
[redacted]

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

Dear Mr. Pendergast:

I have received your letter and the correspondence attached to it. According to the materials, you are attempting to obtain information from the Town of North Greenbush concerning the Town Engineer and the costs associated with the operation of Water District 13 and obtaining water.

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. Section 89(3) of that law indicates that an agency, such as a town, is not required to create a record in response to a request for information. Similarly, while agency officials may answer questions, they are not required to do so to comply with the Freedom of Information Law.

In the context of your request, one aspect involves a "total break down cost" for certain parts and supplies. If no record exists that contains a total or breakdown, the Town would not be required to prepare a new record containing a total or breakdown on your behalf. In the same vein, another aspect of the request involves a "copy of any information as to why the Town of North Greenbush is paying for two town engineers at the same time and what is the Town Board going to do to stop double paying for the same engineers job." Again, the Town is not required to supply information by answering questions.

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

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

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

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

Based upon the foregoing, it is clear in my view that records reflective of salaries of public employees must be prepared and made available. Similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records in my view would be relevant to the performance of one's official duties. It is noted that one of the decisions cited above, Capital Newspapers v. Burns, supra, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer. The Appellate Division found that those records must be disclosed, and the Court of Appeals affirmed. The decision indicates that the public has both economic and safety reasons for knowing whether public employees perform their duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of payment of overtime must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties. It has also been held that the portion of a W-2 form or equivalent record indicating a public employee's gross wages must be disclosed (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Paul Tazbir
Hon. Katie Connolly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13966

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March 25, 2003

Ms. Maureen Bruning
[redacted]

The staff of the Committee on 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. Bruning:

I have reviewed your letters addressed to David Treacy, the Committee's Assistant Director.

In this regard, it is emphasized that the major functions of this office involve offering advice and guidance concerning public access to government information, primarily under the state's Freedom of Information Law. One of the letters raises an issue concerning an alleged conflict of interest. Since it pertains to a matter outside our jurisdiction, I have neither the authority nor the expertise to address it. Your other letter, however, pertains to a request for the titles and salaries of employees in the North Bellmore School District, and in this regard, I offer the following comments.

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

With 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) 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 on an ongoing basis and made available.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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: Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13967

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March 26, 2003

Mr. Kevin B. Barry
[redacted]

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

Dear Mr. Barry:

I have received your most recent correspondence, which pertains, once again, to your efforts in obtaining records pursuant to the Freedom of Information Law from the Freeport Public School District. You referred specifically to an appeal sent on November 13 that had not been answered and asked whether the District forwarded the appeal or any determination thereon to this office.

In this regard, §89(4)(a) of the Freedom of Information Law deals with the right to appeal a denial 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."

Based on a search of our files, the District has not sent the records to this office as required by the provision quoted above.

I note that it has been held that a failure on the part of an agency to determine an appeal within the statutory period of ten business days may be deemed a denial of the appeal, and that the person denied access has exhausted his or her administrative remedies and may seek judicial review of the denial access 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eric L. Eversley
Mary R. Bediako

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 26, 2003

Ms. Beverly M. Strehle
[redacted]

The staff of the Committee on 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. Strehle:

I have received your letter and twelve requests made this year under the Freedom of Information Law for records of the Greece Central School District. The records sought generally involve salaries of and contracts between various employees and the District. As of the date of your letter to this office, none of the requests had been honored, and in each instance, the receipt of your requests was acknowledged with the following statement: "Once we have had an opportunity to review your request with our attorney, we will contact you with the approximate response date."

From my perspective, the District's action, or lack thereof, represents a failure to comply with law. In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that, with certain exceptions, an agency, such as a school district, is not required to create a record in response to a request. Therefore, if, for example, there is no "list of all district employees who qualify as Greece Central School District Exempt Support Staff", the District would not be obliged to create a list on your behalf. In the future, rather than requesting a list, unless you know that a list exists, it is suggested that you request records containing certain items.

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

Pertinent in the context of your requests is §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)].

(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 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, the kinds of records that you requested, those that include the names of public employees, their titles and their salaries, have long been accessible to the public.

Second, in two instances relevant to your requests, the District is required by law to maintain certain records. Again, 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, for the reasons discussed earlier, the payroll record required to be "maintained" by every agency must be disclosed.

Additionally, each year with the District's proposed budget, which is characterized in §1716 of the Education Law as "Estimated expenses for ensuing year", subdivision (5) requires that:

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

Lastly, the response to your requests indicating the need to review them and then contact you with "an approximate response date", adds a step and, therefore, a delay that is, in my view, inconsistent with law. Section 89(3) of the Freedom of Information Law states in part that:

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

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."

As indicated earlier, the substance of the information sought is included in records that must be maintained by the District. That being so, there is no justification, in my opinion, for delaying disclosure. Further, while I would agree that it may be prudent to consult with an attorney before determining to grant or deny access in situations in which rights of access may be unclear, because the records are and have for years been unquestionably public, the need to consult with an attorney seems unnecessary and merely serves as a means of delaying disclosure. It may also be that each consultation with an attorney results in an expenditure of taxpayers' money, which should often be unnecessary in view of the free services provided by this office and the array of information that is readily accessible on our website.

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, as in this instance, 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 forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Ruth Ranzenbach
Donald Nadolinski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 26, 2003

E-MAIL

TO: Margaret Phillips <[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. Phillips:

As you are aware, I have received your letter of March 5. You wrote that you are a public school teacher and that you "would like to obtain from [your] employer copies of all material in [your] personnel file or files." You added that your supervisor "keeps a separate file" concerning employees she oversees, and you questioned whether those records may also be available to you under the Freedom of Information Law.

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 school district. Section 86(4) defines the term "record" expansively to mean:

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

Based on the foregoing, whether documentary materials are maintained in an "official" personnel file or elsewhere, i.e., in the files kept solely by your supervisor, they constitute "records" that fall within the coverage of the Freedom of Information Law.

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

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

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

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 109 AD 2d 292 (1985) aff'd 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In consideration of the foregoing, some aspects of personnel records are accessible to any member of the public; others may be withheld to protect against an unwarranted invasion of privacy. However, when a person seeks records pertaining to herself, she cannot invade her own privacy. That being so, the only instance in which records or portions of the records in question could be withheld pursuant to the exception pertaining to privacy would involve the situation in which a person other than yourself is identified in a record. In that case, personally identifying details pertaining to that person could be withheld to protect his or her privacy.

The other provision of potential significance, §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. Unless they have been shown to you previously, evaluative materials and similar subjective commentary or opinions pertaining to you may, in my view, be withheld.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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March 27, 2003

Ms. Mary Bard
[redacted]

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

Dear Ms. Bard:

I have received your letter and the materials attached to it. You referred to a meeting of the Jordan Elbridge Central School District Board of Education during which the Superintendent, in your words, "read from a three to four page document." The news article relating to her remarks indicate that she offered a "prepared response" concerning a letter received from a resident and remarks that I made. However, when you requested a copy of the record containing her remarks, the form used to respond indicates that "Record is not Maintained by This Agency." You wrote that you are "trying to understand why the district would say there is no document when there were 20 or so people present at this board meeting and everyone witnessed her read a prepared statement."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records maintained by or *for* an agency. Section 86(4) of that statute defines the term "record" expansively to include:

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

Based on the foregoing, if a record is prepared by or for an agency, irrespective of its physical location, it would constitute an agency record that falls within the coverage of the Freedom of Information Law. For instance, if members of the Board of Education communicate in writing with District officials or one another from their homes, the records kept at their homes relating to their functions as Board members would be agency records, even though those records are not physically maintained in District offices.

In the context of the situation that you described, if the Superintendent merely spoke and did not use a "prepared response" in writing, there would be no record, and the Freedom of Information Law would not apply. On the other hand, if a written response was prepared, I believe that it would fall within the scope of that statute.

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.

Lastly, 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Marilyn Dominick
Nelson L. Wellspeak

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13971

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March 27, 2003

Mr. Christopher Michael Ferrara
[redacted]

Dear Mr. Ferrara:

I have received your letter in which you referred to requests for two incident reports prepared by your local police department in which you were the subject of the complaints. Although the substance of the reports was disclosed, the name of the complainant was deleted with no reference to any exception to rights of access. You added, however, that the name of the complainant appearing in the first report was verbally disclosed. Your question is whether you have a right to obtain the entirety of a police report "made against" you.

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 and in the context of the information that you provided, two of the grounds for denial are pertinent.

First, 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 pursuant to §§87(2) and 89(2)(b). I point out that the latter 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, although §87(2)(b) may be applicable, also potentially relevant with respect to complaints made to a law enforcement agency is §87(2)(e)(iii). That provision permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed would...identify a confidential source or disclose confidential information relating to a criminal investigation."

The provision quoted above or the provisions dealing with unwarranted invasions of personal privacy might also serve as a means of withholding portions of records that identify witnesses or perhaps bystanders familiar with an event.

In short, I do not believe that the subject of a complaint necessarily enjoys a right to gain access to the entirety of a complaint or incident report.

Lastly, if indeed a police officer or other official knowingly and purposely orally disclosed the identity of the complainant to you, I believe that the disclosure would constitute a waiver of the ability to deny access to that portion of the record when the record is sought under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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March 27, 2003

Mr. Warren H. Gemmill
Superintendent
The Bronxville School
177 Pondfield Road
Bronxville, NY 10708

Dear Mr. Gemmill:

I appreciate having received a copy of your determination of an appeal rendered under the Freedom of Information Law regarding a request by Ms. Deborah Rice Noble. In short, certain "construction, finance and legal reports" relating to a construction project were withheld on the ground that they consist of "inter/intra office communications."

While I agree that the records at issue fall within the exception in the Freedom of Information Law pertaining to "inter-agency or intra-agency materials", the provision dealing with them, due to its structure, often requires the disclosure of portions of those records. In consideration of the nature of the reports, particularly those involving construction and finance, it is likely in my view that portions of them should be disclosed.

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

With respect to the provision at issue, §87(2)(g) enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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.).

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 predecisional 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, while the records at issue constitute intra-agency material, I believe that those portions consisting of statistical or factual information must be disclosed, unless a separate ground for denial may properly be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Deborah Rice Noble

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 27, 2003

Joseph J. Cerbone
Town Justice
Village/Town of Mount Kisco
40 Green Street
Mount Kisco, NY 10549

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

Dear Mr. Cerbone:

I have received your letter and related materials concerning a request made to the Village/Town of Mount Kisco regarding a report and investigation concerning a lawsuit. You wrote that your request was denied and that you have been advised that, in your words, you "will not be receiving a written or verbal reply." You referred to an opinion rendered by this office concerning a separate matter that you believe confirms that the records sought must be disclosed and asked whether you "have any recourse but to file a lawsuit against the Village/Town...."

Since I am unfamiliar with the records at issue, I contacted the Town Attorney to learn more of the matter. Based on her description of the matter, the opinions to which you referred are inapposite.

As you are aware, disclosure may occur through a variety of means. Discovery in the context of litigation generally involves records made available to the adversary in litigation pursuant to §3101 of the CPLR when the records are material and necessary to the proceeding. In that instance, the disclosure is made solely to the litigant, not to the public at large. Disclosure in that circumstance has no significance when the same records are sought under the Freedom of Information Law. When records are accessible under the Freedom of Information Law, materiality or relevance are not considerations; they would be accessible to any person due to the nature of the records and the absence of any ground for denial of access appearing in §87(2) of that statute. That a person seeking records under the Freedom of Information Law is a litigant neither enhances nor diminishes his or her rights of access as a member of the public under that law [see Farbman v. New York City, 62 NY2d 75 (1984)]. Another instance in which records are disclosed involves the situation in which they are introduced into evidence or otherwise made available during a public judicial or administrative proceeding. In that case, which is distinguishable from the disclosure made to a litigant via discovery, it has been held that the records, by virtue disclosure in a public

proceeding, are accessible from an agency when sought under the Freedom of Information Law [Moore v. Santucci, 151 AD2d 677 (1989)].

Having discussed the matter with the Town Attorney, there has been no public disclosure of the records in question. Further, it is her belief that, because the records at issue involve unsubstantiated allegations made against public employees, they may be withheld. If her description of the matter is accurate, I would agree with her view. In this regard, I offer the following comments.

First, insofar as the records pertain to a police officer or officers, §87(2)(a) would be relevant, for it deals with records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, in reviewing the legislative history leading to its enactment, has held that §50-a is not a statute that exempts records from disclosure when a request is made under the Freedom of Information Law in a context unrelated to litigation. More specifically, in a case brought by a newspaper, it was found that:

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

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

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

Also relevant to an analysis of the ability to withhold 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, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The remaining ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

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

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

In terms of the judicial interpretation of the Freedom of Information Law, in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings or admissions that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In contrast, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marianne Stecich

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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March 28, 2003

Mr. Paul M. Fitzsimmons
[redacted]

The staff of the Committee on Open 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 communication in which you questioned whether a newspaper is required to disclose certain records pursuant to the Freedom of Information Law.

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

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

Based on the foregoing, the Freedom of Information Law generally pertains to entities of state and local government; it does not apply to private organizations. That being so, a newspaper would not be required to comply with or otherwise disclose its records in response to a request made under that law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 28, 2003

Mr. Christopher R. Duritza
[redacted]

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

Dear Mr. Duritza:

I have received your letter and the correspondence attached to it. You referred to a response to a request indicating that the fee for a copy of payroll data imposed by the Fairport Central District would include the "hourly rate for payroll clerk." You have asked whether a fee of that nature is permissible "since the employee is not doing more than his/her job."

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, charging more than twenty-five cents per photocopy for records up to nine by fourteen inches or more than the actual cost of records that are not photocopied, no such fees may be assessed. In this instance, I know of no statute that would authorize the District to do so.

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

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

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

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

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

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

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

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

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)]. Since the employee would be paid even if no request is ever made under the Freedom of Information Law, giving effect to that statute would not add to an agency's personnel expenditure or its actual cost of reproducing records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: William C. Cala

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 28, 2003

Ms. Elaine P. Schneider
[redacted]

The staff of the Committee on 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. Schneider:

I have received your letter, which again pertains to your efforts in obtaining records under the Freedom of Information Law from the Jordan Elbridge Central School District.

You asked first whether "if it is typical for school districts to make inquiries to [this] office regarding FOIL document requests anonymously." I am not entirely sure what you mean. However, in most instances, government agency employees who contact this office identify themselves as employees of those agencies. On occasion, an attorney for a school district does not, for reasons unknown to me, identify the district that he or she represents. Additionally, in many instances, we receive telephone inquiries, and although callers identify themselves by name, they do not indicate the nature of their association, if any. From my perspective, whether a person indicates his or her association with an agency, a private corporation or is merely acting on his or her own, does not significantly matter. In short, our only goal when we receive an inquiry is to offer a response that is legally accurate, irrespective of who makes the inquiry.

Secondly, you referred to request in which you were informed that the records could not be provided "within the next few weeks" and that you would be informed "when we have been able to complete this project." In my view, that response is inconsistent with the requirements imposed by the Freedom Information Law.

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

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

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

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

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, as in this instance, 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: Board of Education
Marilyn Dominick
Nelson L. Wellspeak

STATE OF NEW YORK
DEPARTMENT OF STATE
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March 31, 2003

Mr. James McCauley
[redacted]

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

Dear Mr. McCauley:

As you are aware, I have received your letter and a variety of material relating to it. The matter focuses on a complaint that you made to the Town of Babylon concerning your contention that an unsafe condition exists on your street, and your request for a report or reports made by the zoning inspector following your complaint.

The most recent correspondence from the Town regarding the matter, a letter of January 3 addressed to you by Frank J. Alberti, Senior Assistant Town Attorney, indicates that the Town "has no documentation responsive" to your request. Nevertheless, when you went to the office of the zoning inspector some three months prior thereto to request the findings of her inspection, she informed you, in your words, that "she does not give any written information of her inspections findings". You then went to another office and again were told that "the Town does not give out that information". You were also asked why you want the information and advised that lawyer should request it. At that point, you submitted a request under the Freedom of Information Law. The date of your request was September 26.

In this regard, I offer the following comments.

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

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

Based on the foregoing, information in any physical form maintained by or for the Town, including notes or similar documentation prepared during or following an inspection, would constitute a "record" that falls within the coverage of the Freedom of Information Law.

Second, in consideration of the latest response, 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.

Third, as you suggested in your correspondence, 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)]. That being so, there would be no reason for an attorney to seek records under the Freedom of Information Law on your behalf. The status of an attorney seeking records under that statute is no different from that of any other person.

Next, when 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.

If notes of an inspection or similar records are prepared, they would fall within §87(2)(g). While that provision potentially serves as a ground for a denial of access, due to its structure, it often requires disclosure. Specifically, that exception authorizes an agency to withhold:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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, in relation to the kinds of records that might be prepared during or following an

inspection, the inspector's observations would consist of factual information that must be disclosed (i.e., "the vehicle was parked ten inches from the end of the driveway"). However, the opinions or recommendations of the inspector may be withheld (i.e., "a 'no parking' area should be designated across the street").

Lastly, in consideration of the delays in response that you encountered, 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 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.

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.

A relatively 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."

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.

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)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frank J. Alberti
Janice Stamm
Norma Varley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13978

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March 31, 2003

Mr. John M. Donoghue
Donoghue, Thomas, Auslander & Drohan
Attorneys & Counselors at Law
2517 Route 52
Hopewell Junction, NY 12533

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

Dear Mr. Donoghue:

I have received your letter in which you questioned whether certain records must be disclosed pursuant to the Freedom of Information Law.

In your capacity as attorney for the Enlarged City School District of Middletown, you wrote that the request involves "counseling memos" pertaining to the District's Superintendent, Robert Sigler. You added that the President of the Board of Education informed the public that two counseling memos had been prepared last year, but that Mr. Sigler has not been reprimanded, nor is he the subject of any final determination indicating misconduct. Mr. Sigler was arrested in January of this year and charged with sexual abuse of a student, and you expressed the belief that the request involves an effort to ascertain the extent to which information may have been in the Board's possession prior to the arrest. Since the matter is under investigation by the Police Department and the District Attorney, you wrote that District officials are concerned with respect to the effect of release of the memos on their investigation.

In this regard, as I understand the general sense of the phrase, a "counseling memo" does not represent or serve as a determination to the effect that an employee has been found to have engaged in misconduct; rather, a counseling memo is essentially a warning, an admonition, or advice offered to an employee. If my interpretation of the nature of the records at issue is accurate, based on the ensuing analysis, the counseling memos 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.

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.

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 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, 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. 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, according to judicial pronouncement, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

The other 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.

Counseling memos in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they may be withheld. However, factual information would be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

In sum, if indeed a counseling memo is essentially a warning rather than a conclusion reflective of a finding of misconduct, it would not constitute a final agency determination, and I believe that it could be withheld under §87(2)(g).

With respect to the impact on the investigation by law enforcement authorities, I do not believe that the exception typically relevant in that context would be applicable. Section 87(2)(e) permits an agency to withhold records "compiled for law enforcement purposes" when, for example, disclosure would interfere with an investigation. From my perspective, the records in question, although perhaps pertinent to an investigation, would not have been "compiled for law enforcement purposes."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13979

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March 31, 2003

Ms. Lynn Pincomb
Village Administrator
Village of Huntington Bay
P.O. Box 2184
Huntington, NY 11743-0873

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

Dear Ms. Pincomb:

I have received your correspondence in which you sought an opinion concerning a request made under the Freedom of Information Law. The Village of Huntington Bay received a request for records pertaining to the Huntington Yacht Club, including "any and all documentation relating to any proposal" by that entity concerning a variety of issues; permits or licenses issued by federal, state and local agencies and related documentation; and correspondence between the Village and those agencies, as well as "any person or entity" relating to the Huntington Yacht Club.

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

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

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be

> presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

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

While I am unfamiliar with the recordkeeping systems of the Village, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. Further, in the context of the request, a real question involves, very simply, where Village officials might begin to look for records.

If, for instance, there is a file that includes all documentation maintained by the Village pertaining to the Huntington Yacht Club, it is likely that the request would reasonably describe the records in relation to items 1 through 5 and 11 through 15 of the request, for each of those aspects of the request relate specifically to the Club. However, if no such file is maintained, those aspects of the request might not meet the standard required by the law. In contrast, by means of example, if the Village maintains records relating to bulkheads chronologically, not by location or the name of an entity, a search for records concerning bulkheads as the records pertain to the Club could involve a search, in essence, for the needle in the haystack. Insofar as locating the records sought would involve a search and effort of that nature, I do not believe that it would have reasonably described the records. Similar considerations may applicable in relation to items 6 through 10, particularly since the requests are open-ended in terms of time.

To the extent that the request has reasonably described 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.

Many of the communications falling within the request would appear to involve the Village and other government agencies and potentially, therefore, the application of §87(2)(g) concerning "inter-agency or intra-agency materials." I note, however, that for purposes of the Freedom of Information Law, §86(3) defines the term "agency" to mean:

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

The language quoted above indicates that an "agency" is an entity of state or local government in New York. Since the definition of "agency" does not include a federal agency, §87(2)(g) could not be cited

as a means of withholding communications with or from a federal entity. I note that there is case law involving the assertion of §87(2)(g) in relation to communications between agencies and entities other than New York state or municipal governments. In those instances, it was held that the assertion of §87(2)(g) was erroneous [see e.g., Community Board 7 of Borough of Manhattan v. Schaeffer, 570 NYS 2d 769; affirmed, 83 AD2d 422; reversed on other grounds, 84 NY2d 148 (1994); also Leeds v. Burns, Supreme Court, Queens Cty., NYLJ, July 27, 1992; aff'd 613 NYS 2d 46, 205 AD2d 540 (1994)]. Therefore, communications between the Village and a state agency or the Town of Huntington would fall within §87(2)(g); communications with the Club, a federal agency or members of the public would not.

I point out, too, that the contents of records of records falling within that exception determine the extent to which they may be withheld, for §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..."

The language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 only other provision that would appear to be of significance is §87(2)(b), which authorizes an agency to deny access insofar as disclosure would constitute "an unwarranted invasion of personal privacy." If, for example, a resident wrote to Village officials to express a point of view, those portions of the record that would, if disclosed, identify that person, could in my opinion, be withheld to protect his or her privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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March 31, 2003

Mr. Gerald Charles
97-A-6571
Bare Hill Correctional Facility
Caller Box 20, Cady Road
Malone, NY 12953

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

Dear Mr. Charles:

I have received your letter in which you requested assistance in obtaining the same records from both the "Department of Investigation Complaint Bureau of the City of New York" and the Office of the Bronx County District Attorney.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, and §86(4) defines the term "record" expansively to mean:

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

Therefore, in my view, if a record is "kept, held [or] filed" by an agency, the agency would be obliged to respond to a request for the record by granting or denying access in accordance with §87(2), even though duplicates of the same record may be maintained by another agency. Moreover, in some instances, when copies of records are maintained by two or more agencies, one might have the ability to retrieve the record quickly; another might have to engage in more significant or time consuming search techniques.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Although I am not familiar with the contents of the records which you are interested, the following paragraphs will review the grounds for denial that may be relevant.

Perhaps most important in relation to records pertinent to a law enforcement investigation is §87(2)(e) of the Freedom of Information Law. That provision permits an agency to withhold records that:

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

It is emphasized that not all records used, reviewed or relevant to an investigation might have been compiled for law enforcement purposes; some might have been prepared in the ordinary course of business, in which case, §87(2)(e) would not apply. To the extent that the records in question were compiled for law enforcement purposes, an agency may withhold them only to the extent that the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e) would arise by means of disclosure.

Also of potential significance is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Since I am unfamiliar with the contents of the records, it is unclear whether that provision may be applicable. However, where appropriate, names or other identifying details could be deleted from records that would otherwise be available to protect against unwarranted invasions of personal privacy [see Freedom of Information Law, §89(2)(a)].

Another ground for denial of possible 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.

The remaining ground for denial is §87(2)(f), which allows an agency to withhold records if disclosure "would endanger the life or safety of any person."

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 13981

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April 1, 2003

Ms. Doris Reynolds
Sole Assessor
Town of Woodstock
45 Comeau Drive
Woodstock, NY 12498

The staff of the Committee on Open 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 in which asked whether "work sheets provided to the Town of Woodstock Assessor's Office by N.Y.S. Office of Real Property Services for an anticipated 2003 revaluation project would be subject to FOIL." You added that:

> "The ORPS provided sheets (sample copy enclosed) show cost and regression estimates, as well as median, mean and weighted adjusted value estimates, and are used as a tool to estimate full market value of a subject property. The sheets were taken out in the field, reviewed, and a determination of value was made and written on the sheets. However, the Town Board made a decision to abort the revaluation project for this year, rendering any work that was done null and void."

It is your view that "since the revaluation project was aborted and any work that was performed was not finalized and will never be used, the sheets would not be subject to FOIL."

In this regard, I offer the following comments.

First, whether a project is ongoing, aborted or complete, all records maintained by or for the Town fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form

> whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, insofar as the worksheets continue to exist and kept by or for the Town, I believe that they constitute "records" subject to rights conferred by the Freedom of Information Law.

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

From my perspective, in consideration of judicial decisions and an opinion issued by the State Board of Real Property Services, the records in question may be withheld. Pertinent is §87(2)(g), which authorizes an agency, such as a town, to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 worksheets refer to particular parcels as the focus and those other parcels that an assessor or consultant believes may be comparable in value. The selection of those other parcels essentially represents the opinion of the evaluator (an assessor or appraiser), and in a decision involving a request for records identifying "properties which he or she [an appraiser], subjectively, deems similar enough to warrant analysis", the Appellate Division upheld the agency's denial of access [General Motors Corporation v. Town of Massena, 262 AD2d 1074 (1999)]. Perhaps more analogous to the issue that you raised is Gannett Satellite Information Network, Inc. v. City of Elmira, Supreme Court, Chemung County, August 26, 1994), which involved a request for "the suggested revaluation figure or property value estimate." The court sustained the denial of access, stating that:

> "...such appraisal figures are the professional opinions of...appraisers and are, therefore, not subject to disclosure....Such opinions are subjective, non-final and were prepared to assist the Assessor in her deliberative process. Although the suggested valuation figures... are expressed in numerical form, they are still professional opinions as to value and cannot be said to amount to simple statistical or factual tabulations."

Similarly, in 10 Op. Counsel SBRPS No.4 (rev.), it was advised by the State Board that "[o]pinion data (*e.g.*, a preliminary estimate of value made by an assessor or revaluation contractor) is not accessible..." until it is no longer preliminary.

Lastly, I point out that the Freedom of Information Law is permissive. While an agency may withhold records or portions or records in accordance with the grounds for denial, it is not required to do so. Therefore, even though it appears that the records in question may be withheld, the Town may choose to disclose them.

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-13982

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April 1, 2003

Mr. Keith A. Nelson
[redacted]

Dear Mr. Nelson:

I have received your letter of March 29. Based on your remarks, I believe that you continue to misunderstand the functions of this office and the operation of the Freedom of Information Law.

The Committee on Open Government is a government agency that is housed in the Department of State. Its primary function involves offering advice and opinions relating to the Freedom of Information Law. The Committee does not have possession or control of records; it does not request records on behalf of individuals or issue "releases" to persons seeking records.

I note that the Freedom of Information Law generally pertains to records maintained by agencies of state and local government in New York, but that it excludes the courts from its coverage. To seek records under that law, 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. In addition, §89(3) of the law requires that an applicant must "reasonably describe" the records sought. Therefore, when making a request, an applicant should provide sufficient detail to enable agency staff to locate and identify the records of interest.

Lastly, some of the records to which you referred are confidential and cannot be obtained without a court order. For instance, pursuant to §372 of the Social Services Law, a court order is needed to obtain records relating to foster care; similarly, records concerning child abuse are available only in limited circumstances prescribed in §422 of the Social Services 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 1, 2003

Mr. Jesse Adams
88-T-2374
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Adams:

I have received your letter in which it appears that you appealed a determination to deny access to records by the Office of Chief Medical Examiner of the City of New York.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office is not empowered to accept or determine appeals or to compel an agency to grant or deny access to records. Since you have already appealed to the Office of the Chief Medical Examiner, the only remaining avenue of review would involve the initiation of a judicial proceeding under Article 78 of the Civil Practice Law and Rules. From my perspective, in consideration of judicial decisions pertaining to the kind of record that you are seeking, an autopsy report, a judicial proceeding brought pursuant to the Freedom of Information Law would not likely be successful.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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." In this regard, 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 not subject to the Freedom of Information Law. 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 the records in question would be dependent upon your

capacity to demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

I hope that 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

FOIL-AO-13984

From: Robert Freeman
To: [redacted]
Date: 4/2/03 9:12AM
Subject: Dear Mr. Slomin:

Dear Mr. Slomin:

I have received your inquiry concerning a denial of a request for records by a school district.

In this regard, when an agency, such as a school district, denies access to records, it is required to inform the person denied access of the right to appeal within 30 days and to whom the appeal may be made. Since the district failed to do so, it is suggested that you phone the person who denied the request and ask to whom you may appeal.

The right to appeal is conferred by section 89(4)(a) of the Freedom of Information Law, which indicates that the appeal should be made to the governing body of the district, the board of education, or a person designated by the board. There is no particular form that must be used; you should merely indicate the nature of the records that were withheld, with your name and address, and that you are appealing the denial of access pursuant to the Freedom of Information Law. The section cited above requires that the appeals be determined within 10 business days of their receipt by either granting access to the records or fully explaining in writing the reasons for further denial.

There is a sample appeal letter in our guide, "Your Right to Know", which is available on our website by clicking on to "publications."

If the appeal is denied, you have the right to seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. Additionally, any person may seek an advisory opinion from this office. Thousands of such opinions are also available via our website.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13985

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April 2, 2003

Ms. Phyllis J. Clark
Special Projects Committee
Terrace Manor Civic Association
15 South Drive
Manhasset, NY 11030

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

Dear Ms. Clark:

As you are aware, I have received your letter and the materials relating to it. You have sought an opinion concerning your attempts to gain access to certain records from the Manhasset Park District.

By way of background, you requested records initially by phone, and the commissioner with whom you spoke informed you, in your words, that "it was in his prerogative as to whether or not to give it out". Following the call, in a letter of February 6, you requested records pertaining to an engineer's survey, including "any and all papers" relating to a certain project, such as "a completed report, a draft of a report, copies of all bills, invoices" and any other materials. In response, you received a letter from the District indicating that you must complete its application form to request records and you transmitted the request form on February 15. The receipt of the request was acknowledged on February 25 at which time you were informed that the documentation would be made available to you when it is "assembled." No date was given indicating when that might occur. Some of the records requested were made available with a response dated March 14. However, others, notably a draft report and correspondence from firm retained by the District as consulting engineers, were withheld on the basis of §87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, I do not believe that a commissioner has the authority or "prerogative" to withhold records as he or she sees fit. The law, in this instance, the Freedom of Information Law, governs the extent to which the District may withhold records. In brief, that law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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. 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.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

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

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

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 as in this instance, 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, even when records prepared for the District are not in its physical possession, i.e., if they are in possession of a consultant retained by the District, I believe that they fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, such as those of a special district, 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; also Encore College Bookstores, Inc. v. Auxiliary Service Corp., 87 NY 2d 410 (1995)]..

Insofar as records maintained by the consulting engineering firm are "kept, held, filed, produced or reproduced...*for* an agency", such as the District, 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 firm into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it maintains may be 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. Pursuant to regulations promulgated by the Committee (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 the consulting firm maintains records for the District, to comply with the Freedom of Information Law and the implementing regulations, the records access officer must either direct the firm to disclose the records in a manner consistent with law, or acquire the records from the firm in order that she can review the records for the purpose of determining rights of access.

Lastly, although the provision cited by the District's 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 state's highest court, 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 or communications between an agency and its consultant, 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 "not 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 records are drafts, predecisional or not 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. And again, those portions consisting of statistical or factual information must, in my opinion, be made available.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Commissioners
Jan Fama

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13986

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April 2, 2003

Mr. Augustine Papay Jr.
Inter-Pro Investigations
P.O. Box 528
Port Jervis, NY 12771

Dear Mr. Papay:

I have received your letter of March 14 and the materials attached to it. You complained that an appeal sent to the State Insurance Fund pursuant to the Freedom of Information Law was not determined within ten business days of its receipt as required by §89(4)(a) of that statute. Consequently, you asked what "the next course of action or remedy" might be in the circumstance that you described.

In this regard, two days after receipt of your letter, this office received a copy of the determination of your appeal by Kenneth J. Ross, the Fund's Executive Director. Although he did not render a determination within the statutory time, I believe that the matter has become moot. When an agency denies access to records based on its determination of an appeal, or by virtue of a failure to respond to the appeal within the statutory time, the person seeking the records may be considered to have exhausted his or her administrative remedies and 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)].

Having reviewed the responses to your request and appeal, I note that I am in general agreement with the position taken by the Fund.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth J. Ross
Jeffrey R. Ritter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13987

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April 2, 2003

E-MAIL

TO: Janusz Muszak [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Muszak:

As you are aware, I have received your correspondence concerning the status of the Committee on Professional Standards under the Freedom of Information Law. That entity investigates complaints concerning the professional conduct of attorneys pursuant to the authority conferred by the Appellate Division.

In my view, the Committee on Professional Standards is not subject to the Freedom of Information Law. In this regard, I offer the following comments.

First, 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."

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 shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Therefore, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable. I note, too, that a different entity, one that also performs a function on behalf of the Appellate Division in relation to §90 of the Judiciary Law, was found to exercise a judicial function, is part of the judiciary and, therefore, is outside the coverage of the Freedom of Information Law [see Pasik v. State Board of Law Examiners, 102 AD2d 395 (1984)].

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3614
FOIL-AO-13988

Committee Members

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April 3, 2003

Mr. H. William 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 facts presented in your correspondence.

Dear Mr. Van Allen:

As you are aware, I have received your correspondence concerning access to the meetings, records and related activities of the State Board of Elections.

In one of your letters, you referred to the "miss-use [sic] of executive sessions" by the Board. Without additional information concerning the nature of or basis for entry into the executive sessions, I cannot offer specific guidance. However, as a general matter, it is emphasized that every meeting of a public body, such as the Board, must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

Based on the foregoing, 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. Consequently, a public body may not conduct an executive session to discuss the subject of its choice.

In another letter, you referred specifically to a federal statute, the "Help America Vote Act" (HAVA). As I understand the legislation, it requires each state to designate a HAVA task force charged with duty to offer advice and recommendations designed to enhance participation in the electoral process. If my understanding of the legislation is accurate, while the HAVA task force may hold its meetings open to the public, it would not be required to do so by the Open Meetings Law. Based on a decision rendered by the State's highest court, the Court of Appeals, an entity created pursuant to federal law would not be subject to the New York Open Meetings Law. The decision dealt with a "laboratory animal use committee" (LAUC) required to be established pursuant to federal law and instituted at the State University at Stony Brook, and it was determined that the entity in question fell beyond the scope of the Open Meetings Law.

That statute pertains to meetings of public bodies, and the Court cited §102(2), which 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."

Following its reference to the definition, the Court found that:

> "It is thus evident that the Open Meetings Law excludes Federal bodies from its ambit.
>
> "The LAUC's constituency, powers and functions derive solely from Federal law and regulations. Thus, even if it could be characterized as a governmental entity, it is at most a *Federal* body that is not covered under the Open Meetings Law" [ASPCA v. Board of Trustees of the State University of New York, 79 NY 2d 927, 929 (1992)].

Assuming that the HAVA task force is a creation of federal law, again, it would not constitute a "public body" required to comply with the Open Meetings Law. This not to suggest that it cannot hold open meetings, but rather that it is not required by the Open Meetings Law to do so.

Since you referred to the Freedom of Information Law as well, I note that it has been held that its scope is more expansive than the Open Meetings Law. The former is applicable to all agency records, for §86(4) defines the term "record" to include:

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

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

In another decision rendered by the Court of Appeals, Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of the State University of New York [92 NY2d 357, October 22, (1998)], even though records were kept pursuant to federal law by a state agency, the Court determined that the records fell within the coverage of the New York Freedom of Information Law and were subject to rights conferred by that statute. In short, the fact that records are kept or held by an agency brings them within the coverage of the Freedom of Information Law, irrespective of "the function or purpose for which an agency's documents are generated or held." The Court held further that "FOIL's scope...'is not to be limited based on the [Federal] purpose' for which the certifications were kept 'or the function to which [they] relate [],' i.e., serving to comply with a Federal mandate..." (id., 361).

As in the case of your contentions concerning executive sessions in which no specific allegation was offered, you have not referred to any particular instance in which you believe that the Board has failed to comply with the Freedom of Information Law. That being so, I can only advise that the law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I note that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, 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 NY 2d 267, 275 (1996)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Tom Wilkey
Lee Daghlian

STATE OF NEW YORK
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FOIL-AO-13989

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April 3, 2003

James T. Crean
[redacted]

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

Dear Mr. Crean:

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

According to the materials that you enclosed, you serve as a member of the Orchard Park Central School District Board of Education, and you indicated that "[t]here is e-mail traffic that indicates that some board members receive e-mails concerning official school business when other board members do not." By means of example, you referred to a situation in which a Board member transmitted a draft of a letter he planned to send to an Assemblyman relating to state funding for the School District to all but two members of the Board.

From my perspective, the issues arising from the facts as you described them potentially involve both the Open Meetings and Freedom of Information Laws. In this regard, I offer the following comments.

First, 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. With specific respect to email, I believe that it must be considered in terms of two kinds of communications.

By way of background, 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."

Further, §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 provisions in the Open Meetings Law concerning videoconferencing are newly enacted (Chapter 289 of the Laws of 2000), and in my view, those amendments 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 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 found that action taken by means of a series of telephone calls was invalid, for there was "no physical gathering", but rather a circumvention of the Open Meetings Law.

As the foregoing relates to email among the members, one kind of email involves the transmission of information from one member to another. In my view, the Open Meetings Law is not implicated by that kind of communication. Similar is the transmission of information to several people, as in the use of a listserve, where each recipient opens the email transmission at a different time. One person might be in front of the monitor constantly and may receive the transmission instantly; another might review his or her email at the end of the day or in the evening at home; a third might not check his or her email for days at a time. In those instances, the transmissions are, in my view, equivalent to the distribution of traditional mail. Each recipient opens and reads the contents at a different time. There is no instantaneous communication, and I do not believe that the Open Meetings Law in that situation is implicated in any way.

The other kind of email involves the use of a chat room or instant messaging. If a majority of the Board communicates instantaneously via a chat room or instant messaging, I believe that it would be conducting, in essence, a virtual meeting that would be inconsistent with the Open Meetings Law. The legislative declaration appearing in §100 of that statute provides 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. If a majority gathers and communicates instaneously by holding a meeting through the use of email, the public would have no notice of the gathering, nor would the public have the right to observe the performance of public officials or the deliberative process.

As the Freedom of Information Law relates to your concerns, I note that that statute pertains to all agency records, and that §86(4) of that statute defines the term "record" expansively to include:

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

Based on the foregoing, I believe that e-mail communications between Board members or to any person when a member is acting in his or her capacity as a Board member would constitute "records" that fall within the coverage of the Freedom of Information Law. Whether those communications come into the physical possession of the District at its offices is, according to case law, irrelevant. So long as the communications exist in some physical form (i.e., if they are stored in a computer and may be transmitted or printed), I believe that they are subject to rights conferred by the Freedom of Information Law. 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; also Encore College Bookstores, Inc. v. Auxiliary Service Corp., 87 NY 2d 410 (1995)]..

This is not to suggest that email is necessarily accessible in its entirety to the public. As in the case of paper records, the nature and content of an email communication are the factors that determine public 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.

Perhaps most pertinent in the context of your comments 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, for instance, Board members exchange their opinions regarding an issue via email, those kinds of communications could be withheld. On the other hand, insofar as their exchanges include statistical or factual information, those portions of the communications would ordinarily be accessible to the public under §87(2)(g)(i).

Also potentially relevant is §87(2)(b), which authorizes an agency to deny access to records insofar as disclosure would result in "an unwarranted invasion of personal privacy." That provision might be asserted to withhold identifying details in correspondence between Board members and residents of the District. Similarly, the Family Educational Rights and Privacy Act (20 USC §1232g) may prohibit the disclosure of information identifiable to a student that would make the student's identity easily traceable.

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

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A board of education, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

I hope that the foregoing serves to clarify your understanding of the scope of open government laws and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Mary Pasciak

From: Robert Freeman
To: [redacted]
Date: 4/3/03 12:39PM
Subject: Dear Ms. Caraberis:

Dear Ms. Caraberis:

I have received your inquiry in which you asked whether, in my view, "it is necessary for the Pittsford School District to make [you] FOIL for budget information which should be readily available to any tax payer who might want to see it."

In this regard, it is not "necessary" that the District require the public to request records pursuant to the FOIL; clearly, it has the authority to accept oral or informal requests, without any reference or citation to the FOIL. However, since that law pertains to all government agency records, and since section 89(3) indicates that an agency may require that a request be made in writing, I believe that an agency, such as a school district, may generally do so. The same provision states that an agency has up to five business days to respond. That is not to suggest that the five day limitation should be used as a means of delaying disclosure; on the contrary, if records are clearly public and readily retrievable, I do not believe that there would be valid basis for delaying disclosure.

Notwithstanding the foregoing, there are instances in which the District is required by other provisions of law to disclose certain records. In those situations, the Freedom of Information Law, in my view, would not apply. For example, a key provision in the budget process is § 1716 of the Education Law, which in subdivision (1) requires the preparation of "a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, specifying the several purposes and the amount for each". Subdivision (2) states in relevant part that the statement must be completed at least seven days befor the budget hearing and that "copies thereof shall be prepared and made available, upon request, to residents within the district...." Due to the specific direction offered in the Education Law regarding a particular record, I believe that §1716 essentially supersedes the Freedom of Information Law and that a request need not be made under or refer to the latter for the proposed budget or the other items described in ensuing provisions in §1716.

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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13991

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April 3, 2003

Mr. Gerard McCarthy
c/o Columbia County Jail
85 Industrial Tract
Hudson, NY 12534

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

Dear Mr. McCarthy:

I have received your letter in which you sought guidance with respect to obtaining a variety of records from several entities.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by a county jail. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

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, NY 12180

In regard to records you seek to obtain from the Hudson City Police Department, several of the grounds for denial may be relevant in determining rights of access.

Of likely 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.

Another provision 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 3, 2003

Mr. Ethan Emery
[redacted]

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

Dear Mr. Emery:

I have received your letter in which you explained your difficulty in obtaining a detective's "rank, shield number and full name" from the Greenburgh Police Department.

In this regard, I offer the following comments.

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

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

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

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

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

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 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.

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

Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)].

In consideration of the foregoing, I believe that a record indicating a police officer's rank, shield number and full name would be available because disclosure would constitute a permissible, not an unwarranted invasion of personal privacy. Those items relate to the official duties of a public employee and, in my view, none of the grounds for denial would be applicable.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

FOIL-AO-13993

From: Robert Freeman
To: [redacted]
Date: 4/4/03 11:13AM
Subject: Dear Ms. Goutremout:

Dear Ms. Goutremout:

I have received your inquiry in which you asked whether a list of parents and taxpayers in the Copenhagen School District must be disclosed to a candidate for the Board of Education.

In this regard, assuming that the list does not include information identifiable to students (i.e., by identifying persons on the list as parents of children in an elementary school), but rather is merely a district wide mailing list of residents or taxpayers, and if the list would not be used for commercial or fund-raising purposes, I believe that it must be disclosed. I note that there is a judicial decision requiring the disclosure of a district wide mailing list of residents that was requested by a taxpayer who opposed the District's proposed budget and wanted to express his point of view to the voters.

It is also noted that the Freedom of Information Law indicates that an unwarranted invasion of personal privacy includes the sale or release of a list of names and addresses if the list would be "used for commercial or fund-raising purposes."

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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April 4, 2003

Ms. Debra S. Cohen
McLaughlin, Gouldborne & Cohen, P.C.
959 East 233rd Street
Bronx, NY 10466

The staff of the Committee 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. Cohen:

I have received your letter of March 24, as well as a variety of related correspondence. You have sought an advisory opinion pertaining to the Freedom of Information Law in relation to requests made to the City of Yonkers and the Yonkers Industrial Development Agency (YIDA).

By way of background, you wrote that:

> "On April 25, 2002, the YIDA passed a resolution ratifying the formation of Yonkers Baseball Inc., a.k.a. Yonkers Baseball Development Inc. At all relevant times, Yonkers Mayor John Spencer has served as Chairman of the YIDA and Deputy Mayor Phil Amicone as a voting member of the YIDA board of directors.
>
> "Yonkers Baseball Inc. was created as a for-profit subsidiary public benefit corporation of the YIDA. The YIDA is the sole shareholder of the corporation. The resolution ratifying its formation also appointed Deputy Mayor Amicone as one of the three voting directors and President. Upon information and belief, the officers of the corporation were subsequently amended with Mayor Spencer appointed as Chairman and Deputy Mayor Amicone as a member of the board of Yonkers Baseball Inc./Yonkers Baseball Development Inc."

You requested records October 3 from the City of Yonkers concerning the proposed baseball stadium and retail development complex. More than six weeks later, you were advised that "the request had been sent to the wrong entity" and that it should be made to YIDA. A request was subsequently made on November 27 to YIDA, which granted access many of the records of your

interest. As you are aware, Philip G. Spellane, whose firm represents YIDA, wrote to me recently, indicating that YIDA has not denied access to records and has "produced initial responsive documents" to you. You later wrote that some of the documents have not been disclosed.

While I cannot know which among the records of your interest might not have been disclosed, the questions that you raised relate to more general concerns. Specifically, you seek an opinion concerning the following:

> "1) Is the for-profit public benefit corporation created by the YIDA subject to FOIL?
>
> "2) If the Mayor serves as Chairman of the for-profit public benefit corporation and the Deputy Mayor is a member of the Board, does FOIL require production of documents of the corporation in response to a FOIL requested directed to them even if the documents are not in their physical possession?"

It is your understanding that the Mayor of the City of Yonkers also serves as Chairman of the YIDA and the its subsidiary, Yonkers Baseball, Inc./Yonkers Baseball Development, Inc. and that the Deputy Mayor also serves on the boards of those entities. If that is so, you asked whether your request of November 27 to the YIDA, "identifying them as individuals who may have possession of the documents", would "create an obligation on each of them to produce the documents."

In this regard, I offer the following comments.

First, whether the public benefit corporation created by the YIDA is "for-profit" or otherwise is not, in my view, determinative of its status under the Freedom of Information Law. From my perspective, based on judicial decisions, the key factor involves the extent to which there is governmental control over the entity.

A resolution adopted by the YIDA created Yonkers Baseball, Inc. and it states that the YIDA "desires to act as sole shareholder thereof." The resolution also authorizes its Chairman, Vice-Chairman or Executive Director to appoint the officers of Yonkers Baseball, Inc. Those three persons in other roles are, respectively, the Mayor, Deputy Mayor and Vice Chairman of the YIDA. Additionally, a document prepared by the Department of State characterized as "Entity Information", indicates that the mailing address for service of process on Yonkers Baseball, Inc. is the YIDA. Those factors, in my opinion, indicate that Yonkers Baseball, Inc. is an agency required to comply with the Freedom of Information Law.

Section 86(3) of that statute defines the term "agency" to mean:

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

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 for profit and not-for-profit corporations typically are not governmental entities and, therefore, fall beyond the scope of the Freedom of Information Law, the courts have found that the corporate status of those entities is, alone, not determinative of their status under that statute. 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)], which involved facts somewhat analogous to the instant situation, 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 just over a year ago [292 AD2d 835 (2002)].

In view of the means by which Yonkers Baseball, Inc. was created and the extent to which government officials have control over that entity, which appears to be total, and in consideration of judicial precedent, I believe that the entity is clearly an "agency" required to comply with the Freedom of Information Law.

Secondly, I believe that its records would fall within the coverage of the Freedom of Information Law when the issue is approached from a different vantage point. That statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

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

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

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In sum, insofar as records sought are maintained for the City or the YIDA, i.e., as the parent of a subsidiary corporation, I believe that those agencies would be required to direct the custodian of records sought that are maintained apart from the City or YIDA records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

Also pertinent is an element of the decision cited earlier involving a finding by the Court of Appeals that certain entities that are not clearly governmental are, in consideration of their function and relationship with government, subject to the Freedom of Information Law. Specifically, in Westchester-Rockland Newspapers, supra, the Court considered the definition of "record" and 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).

Even if the functions of Yonkers Baseball, Inc. might be viewed as non-governmental, they are implemented by government officials. Further, City and YIDA officials were designated to serve Yonkers Baseball, Inc. not as private citizens, but in their capacities as government officials. As in the case cited above, there is clearly "considerable crossover" in the activities of officials of the City and the YIDA and the activities of those persons in connection with Yonkers Baseball, Inc. That being so, I believe that the records maintained by Yonkers Baseball, Inc. are, irrespective of their physical location, kept or produced for the City and/or the YIDA and, from that approach as well, are subject to the Freedom of Information Law.

Lastly, even when an entity is not subject to the Freedom of Information Law, records pertaining to that entity that come into the possession of a member of its board who serves on a corporate board, *ex officio*, due to his or her government position, would constitute agency records that fall within the coverage of that statute. If, for example, the Mayor receives records in his office from the YIDA or Yonkers Baseball, Inc., I believe that they would be City of Yonkers records, and that the City would be obliged to respond to a request for those records in accordance with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. John Spencer
Ed Sheeran
Philip G. Spellane

FOIL-AO-13995

From: Robert Freeman
To: Dallen@ci.new-rochelle.ny.us
Date: 4/7/03 3:37PM
Subject: Dear Ms. Allen:

Dear Ms. Allen:

While I believe that the public has the right to know who applied to cast absentee ballots, other information to which you referred, such as the manner in which a person voted, may be withheld, in my opinion, on the basis of §87(2)(b) concerning unwarranted invasions of personal privacy. It has also been advised that the exception concerning privacy may be asserted to withhold information concerning the reason for seeking an absentee ballot.

I hope that I have been of assistance.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
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April 7, 2003

Mr. Martin O. Cohen
President
Genesis Computer Consultants, Inc.
32 Morris Road
Tappan, NY 10983-1604

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

Dear Mr. Cohen:

I have received your letter in which you sought my views concerning a request made to the Village of Cedarhurst for "an electronic copy of the town's [sic] latest assessment roll." The request was denied by the Village Attorney, who, according to your letter, "claimed that such a release would violate the 'no commercial' usage of such data."

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

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

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

The only aspect of the Freedom of Information Law that involves the ability to deny access based on the intended use of the records, 89(2)(b)(iii), represents what might be viewed as an internal conflict in the law. As indicated above, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. The cited provision states that an agency may withhold records when disclosure would constitute an "unwarranted invasion of personal privacy", and that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." Due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)]. However, for reasons to be considered in detail, §89(2)(b)(iii) is, according to judicial decisions, inapplicable with respect to a request for an assessment roll.

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), including assessment rolls. Moreover, even though the Freedom of Information Law authorizes an agency to withhold a list of names and addresses if the list is requested for commercial or fund-raising purposes, in a decision rendered more than twenty years ago, it was held that assessment rolls are accessible even though the request was made for a commercial purpose.

Section 89(6) of the Freedom of Information Law provides that records available under a different provision of law remain available, notwithstanding the grounds for denial of access appearing in the Freedom of Information Law. In Szikszay v. Buelow [436 NYS 2d 558 (1981)],the court found that assessment rolls or equivalent records are public records and were public before the enactment of the Freedom of Information Law. Specifically, it was found that:

> "An assessment roll is a public record (Real Property Tax Law [section] 516 subd. 2; General Municipal Law [section] 51; County Law [section] 208 subd. 4). It must contain the name and mailing or billing address of the owner of the parcel (Real Property Tax Law [sections] 502, 504, 9 NYCRR [section] 190-1(6)(1)). Such records are open to public inspection and copying except as otherwise provided by law (General Municipal Law [section] 51; County Law

> [section] 208 subd. 4). Even prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law [section] 66, repealed L.1974, c. 578, assessment rolls and related records were treated as public records, open to public inspection and copying (Sanchez v. Papontas, 32 A.D.2d 948, 303 N.Y.S.2d 711, Sears Roebuck & Co. v. Hoyt, 202 Misc. 43, 107 N.Y.S.2d 756; Ops. State Comptroller 1967, p. 596)" (id. at 562, 563).

In consideration of the issue of privacy and citing the provision dealing with lists of names and addresses, it was held that:

> "The Freedom of Information Law limits access to records where disclosure would constitute 'an unwarranted invasion of personal privacy' (Public Officers Law [section] 87 subd. 2(b), [section] 89 subd. 2(b)iii). In view of the history of public access to assessment records, and the continued availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.R.L.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted' (cf. Advisory Opns. of Committee on Public Access to Records, June 12, 1979, FOIL-AO-1164). In addition, considering the legislative purpose behind the Freedom of Information Law, it would be anomalous to permit the statute to be used as a shield by government to prevent disclosure. In this regard, Public Officers Law [section] 89 subd. 5 specifically provides: 'Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.'" [id. at 563; now section 89(6)].

The court stated further that:

> "...the records in question can be viewed by any person and presumably copies of portions obtained, simply by walking into the appropriate county, city, or town office. It appears that petitioner could obtain the information he seeks if he wanted to spend the time to go through the records manually and copy the necessary information. Therefore, the balancing of interests, otherwise required, between the right of individual privacy on the one hand and the public interest in dissemination of information on the other...need not be undertaken...
>
> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner' s purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy" (id.).

Based upon the foregoing, I believe that an assessment roll or its equivalent must be disclosed, irrespective of the intended use of that record. I point out that the same conclusion was reached by Supreme Court in Nassau County in an unreported decision [Real Estate Data, Inc. v. County of Nassau, Supreme Court, Nassau County, September 18, 1981].

Lastly, §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

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

When information is maintained electronically, in a computer, for example, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk.

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

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

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

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

In Szikszay, the decision discussed earlier, the request was for an assessment roll on computer tape, and, as indicated earlier, the court determined that the record is available, regardless of the format in which it is maintained or can be reproduced.

In sum, I believe that an assessment roll is accessible to the public, irrespective of its intended use, and that an agency must make a copy available in an electronic form when it has the ability to do so.

In an effort to enhance compliance with and understanding of applicable 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, Village of Cedarhurst
Jerome J. Levenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 8, 2003

Mr. Peter Bauer
Executive Director
Resident's Committee
to Protect the Adirondacks
P.O. Box 27, 7 Ordway Lane
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 facts presented in your correspondence.

Dear Mr. Bauer:

As you are aware, I have received your letter and the correspondence attached to it. The matter involves a request by the Residents' Committee to Protect the Adirondacks (RCPA) for certain records sent to the Department of Environmental Conservation in November of 2001. The receipt of the request was acknowledged on December 12, and the request was denied in writing on May 6, 2002. You appealed on May 10, and its receipt was acknowledged on May 17, at which time you were informed that the Department was "in the process of identifying the documents identified in your appeal" and that a response would be given "as quickly as possible." As of the date of your letter, there had been no determination of our appeal, and you have sought assistance in the matter.

In this regard, first, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and states in relevant part that:

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

Based on the foregoing, I believe that the Department was required within ten business days of the receipt of your appeal either to grant access to the records sought or fully explain in writing the reasons for further denial. When an agency fails to determine an appeal within the statutory time,

it has been held that the person seeking the records has exhausted his or her administrative remedies, that the appeal has been constructively denied, and that he or she may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules (CPLR) [Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)].

Second, with respect to rights of access, RCPA's request involved:

> "1) List of all roads or trails on the Forest Preserve in DEC Region 6 that have been signed open under the Vehicle and Traffic Law by the DEC for All Terrain Vehicle Use.
>
> 2) Documentation, press releases, public hearing records for all roads or trails on the Forest Preserve in DEC Region 6 that have been signed open under the Vehicle and Traffic Law by the DEC for All Terrain Vehicle Use."

The list of trails was withheld on the grounds that "it is an intra-agency document" and consists of "material prepared in anticipation of litigation" that is exempt from disclosure pursuant to §3101(d) of the CPLR. Although a blank permit was sent to you, none of the material described in item 2 of your request was made available.

From my perspective, it is likely that the list of roads must be disclosed. Although the provision dealing with "intra-agency documents" potentially serves as a basis for denial access, due to its structure, it often requires disclosure. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

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

information accessible under subparagraph (i) of §87(2)(g), unless a different provision authorizes the Department to deny access.

One such provision, §3101(d) of the CPLR, authorizes an agency to withhold material prepared for litigation. It is noted, however, that it has been held that a record prepared for multiple purposes, one of which might involve eventual use in litigation, is not exempt from disclosure; only when a record is prepared *solely* for litigation can §3101(d) serve as a basis for a denial of access [Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD2d 234 (1977)]. Therefore, unless the list at issue was prepared solely for litigation, I believe that it must be disclosed.

With respect to the remaining records that you requested, I am unaware of the nature of materials that may exist that fall within the scope of your request. However, insofar as press releases, public hearing records and similar documentation exist, there would appear to be no basis for a denial of access.

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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Molly McBride
Ruth Earl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-190-3619
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April 8, 2003

Mr. George Yourke
[redacted]

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

Dear Mr. Yourke:

I have received your letter in which you raised a variety of questions concerning public access to information relating primarily to municipal boards and similar entities.

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information and Open Meetings Laws. The former, as you are likely aware, pertains to access to government records; latter pertains to meetings of public bodies, such as town boards, planning boards, city councils and the like.

In consideration of your question, I point out that there is a difference between a "meeting" and a "hearing." A meeting typically involves a situation in which a majority of a public body gathers for the purpose of discussing public business and perhaps taking action. A hearing is typically held to enable the public to speak and to express views in relation to a particular matter, such as an application for a variance, a proposed local law, or a municipality's budget. The Open Meetings Law is a general law, in that it pertains to all public bodies in the state; the notice requirements imposed by that statute generally relate to all meetings of all public bodies. In contrast, numerous statutes involve public hearings and notice requirements associated with those hearings. Unlike the Open Meetings Law and its applicability to meetings of public bodies, there is no general statute dealing with hearings or notice of hearings. For example, provisions relating to a hearing concerning a town's budget are found in the town law, but different provisions appear in the Village Law and the Education Law concerning hearings and notices relating to village and school district budgets. In short, while I can offer advice and guidance relating to the Open Meetings Law, your questions concerning hearings are, in many instances, beyond the scope of the jurisdiction or expertise of this office. That being so, the following remarks will focus on matters involving the Freedom of Information and Open Meetings Laws.

Your first area of inquiry is "whether there are any specific regulations concerning the public being able to obtain information from various local Town Boards, Planning Boards, Wetlands

Commissions, etc." The statute that generally deals with public access to government records is the Freedom of Information Law. That law applies to agency records, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law pertains to records of entities of state and local government in New York.

In addition, §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..."

In short, the records access officer must "coordinate" an agency's response to requests, and again, the functions of the records access officer are separate and distinct from those of the records management officer.

Second, there is nothing in the Open Meetings Law or any other law of which I am aware that deals specifically with agendas. While many public bodies prepare agendas, the Open Meetings Law does not require that they do so. Similarly, the Open Meetings Law does not require that a prepared agenda be followed. However, a public body on its own initiative may adopt rules or procedures concerning the preparation and use of agendas.

Similarly, I know of no law that requires that a public body or a member answer questions raised during a meeting or hearing. Certainly they may choose to do so, but there is no obligation to do so, again, unless a policy or rule imposes such a requirement.

Third, with respect to "obtaining an answer requested through FOIL", I note that the title of that law may be somewhat misleading. It does not deal with information *per se*; rather it is a vehicle under which any person may seek records. It is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of the law states in part that an agency is not required to create or prepare a record in response to a request. In the same vein, the Freedom of Information Law does not require that agency staff or officials provide information by responding to questions. Their duty under the law is to respond to requests for and provide access to records in accordance with its provisions.

When a request is made for existing records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

Next, you raised several issues relating to recordings of meetings. Provisions concerning the retention and disposal of records are found in Article 57-A of the Arts and Cultural Affairs Law. In brief, under those provisions, the Commissioner of Education, through the State Archives, establishes schedules indicating minimum retention periods for various kinds of records, and I believe that the retention period applicable to tape recordings of meetings is four months.

You wrote that if a member of the public tape records a meeting, he or she is required to provide the board being recorded with a copy of the tape. I do not believe that there is any such requirement; on the contrary, the tape recording in that circumstance is private property and need not be shared or duplicated. You also asked whether "advance notice" must be given prior to recording a meeting. I point out in this regard neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. There are, however, several judicial decisions concerning the use of those devices at open meetings. In my view, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the tape recorders at meetings of public bodies, such as town boards. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, the Committee on Open Government advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division, Second Department, unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell.

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their

> words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

With respect to advance notice, I note that the Court in Mitchell referred to "the unsupervised recording of public comment" (id.). In my view, the term "unsupervised" indicates that no permission or advance notice is required in order to record a meeting. Again, so long as a recording device is used in an unobtrusive manner, a public body cannot prohibit its use by means of policy or rule. Moreover, situations may arise in which prior notice or permission to record would represent an unreasonable impediment. For instance, since any member of the public has the right to attend an open meeting of a public body (see Open Meetings Law, §100), a reporter from a local radio or television station might simply "show up", unannounced, in the middle of a meeting for the purpose of observing the discussion of a particular issue and recording the discussion. In my opinion, as long as the use of the recording device is not disruptive, there would be no rational basis for prohibiting the recording of the meeting, even though prior notice would not have been given. Similarly, often issues arise at meetings that were not scheduled to have been considered or which do not appear on an agenda. If an item of importance or newsworthiness arises in that manner, what reasonable basis would there be for prohibiting a person in attendance, whether an employee, a member of the public or a member of the news media representing the public, from recording that portion of the meeting so long as the recording is carried out unobtrusively? In my view, there would be none.

Lastly, as you suggested, the Open Meetings Law applies when a quorum, a majority of the total membership of a public body, gathers for the purpose of conducting public business. If a gathering includes less than a quorum, that law does not apply. Further, there is no provision in the Open Meetings Law that requires that a gathering of less than a quorum of a public body prepare a record of or otherwise describe its discussions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13999

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

April 8, 2003

Ms. Cynthia Theodore, President
Sullivan County Assessor's Association
Town of Rockland
95 Main Street, P.O. Box 885
Livingston Manor, NY 12758

The staff of the Committee on 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. Theodore:

I have been asked to contact you in your capacity as President of the Sullivan County Assessor's Association. The issue involves a request by a forester who indicated that he would like to "develop a listing of residents in [the] town with more than 50 acres of land." He indicated that he "would contact these landowners with a flyer outlining good forest management practices and timber sale services."

In this regard, first, I note that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency, such as a town, is not required to create a record in response to a request. Therefore, if, for example, there is no list of landowners owning more than fifty acres, a town would not be required to prepare a list or a new record on behalf of an applicant.

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

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

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not

> confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

The only exception to the principles described above involves one provision pertaining to the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant and the purposes for which a request is made are irrelevant to rights of access, and an agency cannot ordinarily inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an assurance that a list of names and addresses will not be used for commercial or fund-raising purposes. In that decision, it was stated that:

> "The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

In addition, it was held that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a

> certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgement for that of the respondents" (id.).

Based on the foregoing, since it appears that the records at issue are requested for commercial purposes, I believe that a town could deny the request.

Lastly, it is emphasized that the Freedom of Information Law is permissive. Although an agency may withhold records or portions of records in appropriate circumstances, it is not required to do so. As stated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling which the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, while I believe that a list of names and addresses or equivalent records may be withheld if the request is made for a commercial purpose, a town would not be prohibited from disclosing the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-13999A

From: Robert Freeman
To: twilber@ci.elmira.ny.us
Date: 4/11/03 5:16PM
Subject: Dear Ms. Wilber:

Dear Ms. Wilber:

I have received your inquiry concerning a person's rights of access to "his school records."

In this regard, most relevant is the federal Family Educational Rights and Privacy Act (20 USC §1232g, "FERPA"). FERPA applies to educational agencies and institutions that participate in any federal funding or loan program. Therefore, it includes all public schools and public institutions of higher education, as well as many private colleges and universities. In brief, FERPA grants rights of access to "education records", records identifiable to a student, to parents of students under the age of eighteen and to the students themselves when they reach that age.

Assuming that the records are maintained by an educational institution subject to FERPA, the person in question should have the ability to assert rights of access under that statute.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14000

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

April 15, 2003

Mr. George T. Ostrowski, Jr.
Cartier, Hogan, Bernstein & Auerbach, PC
P.O. Box 919
Patchogue, NY 11722-0919

Dear Mr. Ostrowski:

I have received your letter of April 10 in which you requested construction information concerning a particular location under the Freedom of Information Law.

In this regard, please be advised that the Committee on Open Government is authorized to provide advice and opinions concerning rights of access to government information. The Committee does not have possession or control of records generally, and we do not maintain the information of your interest.

When seeking records, a request should be made to the "records access officer" at the agency that you believe maintains the records sought. The records access officer has the duty of coordinating the agency's response to requests. In addition, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

It appears that the records in which you are interested would be maintained by the State Department of Transportation, and it is suggested that you contact the Department's regional office in Hauppauge to ascertain whether that is so and to obtain the name of the records access officer. The phone number for that office is 952-6632.

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-14001

41 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, 2003

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, unless otherwise indicated.

Dear Mr. Cannella:

As you are aware, I have received a variety of material from you concerning your efforts in obtaining information from the Liverpool Public Library. Based on a review of the correspondence, it appears that you misunderstand the Freedom of Information Law and the responsibilities imposed upon the Library by that law.

It is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for that statute does not deal with information *per se*, but rather with records. In short, 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. By means of example, one of your requests referred to "12 items listed for Clough, Harbour, & Assoc." and that you "want detailed information for each of the 12 items listed, not lump sum amounts" and "exactly what the taxpayers got" for the money paid to Clough, Harbour. If the Library does not maintain records containing the "detailed information" of your interest or an indication of "exactly what the taxpayers got", there would be no obligation to prepare records containing the information sought.

Similarly, while government officers and employees may respond to questions and often do so, they are not required to do so by the Freedom of Information Law. In several of your requests, you sought information by raising questions. For instance, in one item of correspondence you referred to renovations and whether a particular document is " a statement for many invoices" and "[i]f so what do each one [sic] represent. In other words what did the library get for this? Was it a drawing(s)?" In my view, seeking information by raising questions does not constitute a valid request for records under the Freedom of Information Law, and the Library would not be required to supply answers to those questions to comply with that law. Again, the Freedom of Information Law involves requests for existing records and a government agency's responsibility to disclose those records to the extent required by law.

Lastly, having discussed your correspondence with Elizabeth Dailey, Director of the Library, I was informed that the Library has disclosed all of the records that it maintains that fall within the scope of your requests.

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: Elizabeth Dailey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14002

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

April 17, 2003

E-Mail

TO: Karen Wofford [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. Wofford:

As you are aware, I have received your letter in which you raised a series of questions relating to the deaths of your great grandparents.

In this regard, I note that the statute that is the focus of the advisory functions of this office, the Freedom of Information Law, does not apply with respect to the records of your interest. Rather, provisions of the Public Health Law and perhaps the New York City Charter, govern access to the records. In brief, death records are generally confidential under §4174 of the Public Health Law and analogous provisions of the New York City Charter. However, when death records have been on file for at least fifty years, the records are available for the purpose of genealogical searches.

With respect to deaths that occur outside of New York City, the repository of death records is the New York State Department of Health, Bureau of Vital Records, Corning Tower, Empire State Plaza, Albany, NY 12237. Since you referred to a death at the Greenpoint Hospital, it is assumed that the death occurred in Brooklyn. If that is so, or if any death occurred in New York City, the repository of death records is the New York City Department of Health, 125 Worth Street, New York, NY 10013.

When seeking the records, it is suggested that you indicate your relationship to the deceased. By providing information of that nature, you may be able to expedite the process.

I hope that I have been of assistance.

RJF:jm

From: Robert Freeman
To: ltras@dmv.state.ny.us
Date: 4/21/2003 11:10:25 AM
Subject: Hi - -

Hi - -

Although federal courts construing the federal FOI Act have determined that a "Vaughn Index" must be prepared on request that identifies each document withheld and the justification for the denial of access to each, no similar requirement has been established in any decision rendered under the NY FOIL. For a more detailed consideration of the issue, you can go to the FOIL opinions on our website, click on to "V" and scroll down to "Vaughn Index Requirement."

If you need additional information, please let me know.

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

14004

From: Robert Freeman
To: [redacted]
Date: 4/21/2003 12:26:22 PM
Subject: Dear Mr. Sloves:

Dear Mr. Sloves:

I am not sure that I understand your comments concerning the YIDA's response to your request for transcripts of public hearings.

It is noted, however, 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 a transcript has not been prepared, the Freedom of Information Law would not apply. If a transcript exists, it would constitute a "record" that falls within the coverage of that law. Further, since such a record would reflect comments made during a public proceeding, I believe that it would clearly be accessible.

With respect to the delay to which you referred, that issue was considered in opinions addressed to you on November 25 and and July 19 of last year.

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: [redacted]
Date: 4/22/2003 7:58:37 AM
Subject: RE: REQUESTED TRANSCRIPTS OF PUBLIC HEARINGS

Dear Mr. Sloves:

I would like to offer the following remarks regarding the situation that you described. First, there is no requirement that a transcript of a hearing be prepared. Second, typically, a transcript is simply a verbatim account of what is said; it likely would identify those who spoke, but it would not necessarily indicate the identities of those present. And third, I do not know how long it would take a private service to prepare a transcript. However, as soon as it is completed for the YIDA, I believe that it constitutes a YIDA record [see FOIL, §8694)] that falls within the coverage of the Freedom of Information Law. Further, since the transcript memorializes information expressed at a hearing during which any person could have been present, there would be no basis for a denial of access.

In short, once the transcript exists, I believe that it would be accessible. Moreover, since it is clearly public and readily retrievable, I do not believe that there would be any rational basis for delaying disclosure.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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(518) 474-1927 - Fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14006

41 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, 2003

Mr. Daniel Karlin
93-B-2986
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Dear Mr. Karlin:

I have received your letter concerning an appeal that you made to the Division of Parole pursuant to the Freedom of Information Law.

Having searched our records, this office has received no documentation relating to your appeal from the Division. Since January 1, 2002, we have received fifty-six determinations of appeals rendered by the Division.

You indicated that your appeal pertained to a request for the Division's "master subject matter list", and that you were informed that no such record is maintained by that agency. In this regard, as a general matter, the Freedom of Information Law includes existing records within its scope, and §89(3) states in part that an agency is not required to prepare a record to comply with that law, "except the records specified in subdivision three of section eighty-seven." One such record appears to be the record of your interest.

I note that reference to a "master index"appears in the Department of Correctional Services' regulations. That reference is based upon §87(3)(c) of the Freedom of Information Law, which requires that each agency maintain:

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

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14007

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

April 22, 2003

E-MAIL

TO: Pat Cardenia [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. Cardenia:

With respect to your question concerning a 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) states in part that:

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

I hope that I have been of assistance.

RJF:tt

cc: John Shave

From: Robert Freeman
To: [redacted]
Date: 4/22/2003 4:48:24 PM
Subject: Dear Ms. Schwartzberg:

Dear Ms. Schwartzberg:

I have received your inquiry concerning the status of drafts, particularly draft resolutions.

Since you are somewhat familiar with the Freedom of Information Law, my comments will be brief. If you need additional detail, please let me know.

First, a draft prepared by or for a town officer or employee constitutes a "record" that falls within the coverage of the Freedom of Information Law as soon as it exists. Second, the characterization of a record as a "draft" is not determinative of rights of access; on the contrary, the contents of the record determine the extent to which it may be withheld, or conversely, must be disclosed.

Third, in the context of your inquiry, drafts would likely constitute "intra-agency materials" that fall within §87(2)(g). Under that provision, opinions, advice, recommendations and the like may be withheld. Therefore, in a technical sense, a draft resolution, in my view, may be withheld, for it is a proposal that has not yet been adopted or approved.

It is emphasized that there is no obligation to withhold a draft resolution, and documents of that nature are routinely disclosed, as a matter of practice or rule.
Often it may make little sense to withhold a draft resolution because the resolution will be discussed and essentially disclosed by means of discussion and deliberation at open meetings.

I note that there is what may be viewed as an inconsistency between the Freedom of Information Law and the Open Meetings Law. Again, the former permits (but does not require) a denial of access to a draft resolution; under the latter, however, there would be no basis for entry into executive session to discuss the draft resolution. That being so, while a draft resolution may be withheld, there may be little reason to do so because of its inevitable disclosure at an upcoming meeting.

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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13999

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

April 8, 2003

Ms. Cynthia Theodore, President
Sullivan County Assessor's Association
Town of Rockland
95 Main Street, P.O. Box 885
Livingston Manor, NY 12758

The staff of the Committee on 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. Theodore:

I have been asked to contact you in your capacity as President of the Sullivan County Assessor's Association. The issue involves a request by a forester who indicated that he would like to "develop a listing of residents in [the] town with more than 50 acres of land." He indicated that he "would contact these landowners with a flyer outlining good forest management practices and timber sale services."

In this regard, first, I note that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency, such as a town, is not required to create a record in response to a request. Therefore, if, for example, there is no list of landowners owning more than fifty acres, a town would not be required to prepare a list or a new record on behalf of an applicant.

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

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

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not

> confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

The only exception to the principles described above involves one provision pertaining to the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant and the purposes for which a request is made are irrelevant to rights of access, and an agency cannot ordinarily inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an assurance that a list of names and addresses will not be used for commercial or fund-raising purposes. In that decision, it was stated that:

> "The Court agrees with petitioner's attorney that nowhere in the record does it appear that petitioner intends to use the information sought for commercial or fund-raising purposes. However, the reason for that deficiency in the record is that all efforts by respondents to receive petitioner's assurance that the information sought would not be so used apparently were unsuccessful. Without that assurance the respondents could reasonably infer that petitioner did want to use the information for commercial or fund-raising purposes."

In addition, it was held that:

> "[U]nder the circumstances, the Court finds that it was not unreasonable for respondents to require petitioner to submit a

> certification that the information sought would not be used for commercial purposes. Petitioner has failed to establish that the respondents denial or petitioner's request for information constituted an abuse of discretion as a matter of law, and the Court declines to substitute its judgement for that of the respondents" (id.).

Based on the foregoing, since it appears that the records at issue are requested for commercial purposes, I believe that a town could deny the request.

Lastly, it is emphasized that the Freedom of Information Law is permissive. Although an agency may withhold records or portions of records in appropriate circumstances, it is not required to do so. As stated by the Court of Appeals:

> "while an agency is permitted to restrict access to those records falling which the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, while I believe that a list of names and addresses or equivalent records may be withheld if the request is made for a commercial purpose, a town would not be prohibited from disclosing the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-13999A

From: Robert Freeman
To: twilber@ci.elmira.ny.us
Date: 4/11/03 5:16PM
Subject: Dear Ms. Wilber:

Dear Ms. Wilber:

I have received your inquiry concerning a person's rights of access to "his school records."

In this regard, most relevant is the federal Family Educational Rights and Privacy Act (20 USC §1232g, "FERPA"). FERPA applies to educational agencies and institutions that participate in any federal funding or loan program. Therefore, it includes all public schools and public institutions of higher education, as well as many private colleges and universities. In brief, FERPA grants rights of access to "education records", records identifiable to a student, to parents of students under the age of eighteen and to the students themselves when they reach that age.

Assuming that the records are maintained by an educational institution subject to FERPA, the person in question should have the ability to assert rights of access under that statute.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14000

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

April 15, 2003

Mr. George T. Ostrowski, Jr.
Cartier, Hogan, Bernstein & Auerbach, PC
P.O. Box 919
Patchogue, NY 11722-0919

Dear Mr. Ostrowski:

I have received your letter of April 10 in which you requested construction information concerning a particular location under the Freedom of Information Law.

In this regard, please be advised that the Committee on Open Government is authorized to provide advice and opinions concerning rights of access to government information. The Committee does not have possession or control of records generally, and we do not maintain the information of your interest.

When seeking records, a request should be made to the "records access officer" at the agency that you believe maintains the records sought. The records access officer has the duty of coordinating the agency's response to requests. In addition, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

It appears that the records in which you are interested would be maintained by the State Department of Transportation, and it is suggested that you contact the Department's regional office in Hauppauge to ascertain whether that is so and to obtain the name of the records access officer. The phone number for that office is 952-6632.

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-14001

41 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, 2003

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, unless otherwise indicated.

Dear Mr. Cannella:

As you are aware, I have received a variety of material from you concerning your efforts in obtaining information from the Liverpool Public Library. Based on a review of the correspondence, it appears that you misunderstand the Freedom of Information Law and the responsibilities imposed upon the Library by that law.

It is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for that statute does not deal with information *per se*, but rather with records. In short, 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. By means of example, one of your requests referred to "12 items listed for Clough, Harbour, & Assoc." and that you "want detailed information for each of the 12 items listed, not lump sum amounts" and "exactly what the taxpayers got" for the money paid to Clough, Harbour. If the Library does not maintain records containing the "detailed information" of your interest or an indication of "exactly what the taxpayers got", there would be no obligation to prepare records containing the information sought.

Similarly, while government officers and employees may respond to questions and often do so, they are not required to do so by the Freedom of Information Law. In several of your requests, you sought information by raising questions. For instance, in one item of correspondence you referred to renovations and whether a particular document is " a statement for many invoices" and "[i]f so what do each one [sic] represent. In other words what did the library get for this? Was it a drawing(s)?" In my view, seeking information by raising questions does not constitute a valid request for records under the Freedom of Information Law, and the Library would not be required to supply answers to those questions to comply with that law. Again, the Freedom of Information Law involves requests for existing records and a government agency's responsibility to disclose those records to the extent required by law.

Lastly, having discussed your correspondence with Elizabeth Dailey, Director of the Library, I was informed that the Library has disclosed all of the records that it maintains that fall within the scope of your requests.

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: Elizabeth Dailey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14002

41 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, 2003

E-Mail

TO: Karen Wofford [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. Wofford:

As you are aware, I have received your letter in which you raised a series of questions relating to the deaths of your great grandparents.

In this regard, I note that the statute that is the focus of the advisory functions of this office, the Freedom of Information Law, does not apply with respect to the records of your interest. Rather, provisions of the Public Health Law and perhaps the New York City Charter, govern access to the records. In brief, death records are generally confidential under §4174 of the Public Health Law and analogous provisions of the New York City Charter. However, when death records have been on file for at least fifty years, the records are available for the purpose of genealogical searches.

With respect to deaths that occur outside of New York City, the repository of death records is the New York State Department of Health, Bureau of Vital Records, Corning Tower, Empire State Plaza, Albany, NY 12237. Since you referred to a death at the Greenpoint Hospital, it is assumed that the death occurred in Brooklyn. If that is so, or if any death occurred in New York City, the repository of death records is the New York City Department of Health, 125 Worth Street, New York, NY 10013.

When seeking the records, it is suggested that you indicate your relationship to the deceased. By providing information of that nature, you may be able to expedite the process.

I hope that I have been of assistance.

RJF:jm

From: Robert Freeman
To: ltras@dmv.state.ny.us
Date: 4/21/2003 11:10:25 AM
Subject: Hi - -

Hi - -

Although federal courts construing the federal FOI Act have determined that a "Vaughn Index" must be prepared on request that identifies each document withheld and the justification for the denial of access to each, no similar requirement has been established in any decision rendered under the NY FOIL. For a more detailed consideration of the issue, you can go to the FOIL opinions on our website, click on to "V" and scroll down to "Vaughn Index Requirement."

If you need additional information, please let me know.

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

14004

From: Robert Freeman
To: [redacted]
Date: 4/21/2003 12:26:22 PM
Subject: Dear Mr. Sloves:

Dear Mr. Sloves:

I am not sure that I understand your comments concerning the YIDA's response to your request for transcripts of public hearings.

It is noted, however, 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 a transcript has not been prepared, the Freedom of Information Law would not apply. If a transcript exists, it would constitute a "record" that falls within the coverage of that law. Further, since such a record would reflect comments made during a public proceeding, I believe that it would clearly be accessible.

With respect to the delay to which you referred, that issue was considered in opinions addressed to you on November 25 and and July 19 of last year.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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From: Robert Freeman
To: [redacted]
Date: 4/22/2003 7:58:37 AM
Subject: RE: REQUESTED TRANSCRIPTS OF PUBLIC HEARINGS

Dear Mr. Sloves:

I would like to offer the following remarks regarding the situation that you described. First, there is no requirement that a transcript of a hearing be prepared. Second, typically, a transcript is simply a verbatim account of what is said; it likely would identify those who spoke, but it would not necessarily indicate the identities of those present. And third, I do not know how long it would take a private service to prepare a transcript. However, as soon as it is completed for the YIDA, I believe that it constitutes a YIDA record [see FOIL, §8694)] that falls within the coverage of the Freedom of Information Law. Further, since the transcript memorializes information expressed at a hearing during which any person could have been present, there would be no basis for a denial of access.

In short, once the transcript exists, I believe that it would be accessible. Moreover, since it is clearly public and readily retrievable, I do not believe that there would be any rational basis for delaying disclosure.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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Albany, NY 12231
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(518) 474-1927 - Fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14006

41 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, 2003

Mr. Daniel Karlin
93-B-2986
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Dear Mr. Karlin:

I have received your letter concerning an appeal that you made to the Division of Parole pursuant to the Freedom of Information Law.

Having searched our records, this office has received no documentation relating to your appeal from the Division. Since January 1, 2002, we have received fifty-six determinations of appeals rendered by the Division.

You indicated that your appeal pertained to a request for the Division's "master subject matter list", and that you were informed that no such record is maintained by that agency. In this regard, as a general matter, the Freedom of Information Law includes existing records within its scope, and §89(3) states in part that an agency is not required to prepare a record to comply with that law, "except the records specified in subdivision three of section eighty-seven." One such record appears to be the record of your interest.

I note that reference to a "master index"appears in the Department of Correctional Services' regulations. That reference is based upon §87(3)(c) of the Freedom of Information Law, which requires that each agency maintain:

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

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14007

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

April 22, 2003

E-MAIL

TO: Pat Cardenia [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. Cardenia:

With respect to your question concerning a 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) states in part that:

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

I hope that I have been of assistance.

RJF:tt

cc: John Shave

From: Robert Freeman
To: [redacted]
Date: 4/22/2003 4:48:24 PM
Subject: Dear Ms. Schwartzberg:

Dear Ms. Schwartzberg:

I have received your inquiry concerning the status of drafts, particularly draft resolutions.

Since you are somewhat familiar with the Freedom of Information Law, my comments will be brief. If you need additional detail, please let me know.

First, a draft prepared by or for a town officer or employee constitutes a "record" that falls within the coverage of the Freedom of Information Law as soon as it exists. Second, the characterization of a record as a "draft" is not determinative of rights of access; on the contrary, the contents of the record determine the extent to which it may be withheld, or conversely, must be disclosed.

Third, in the context of your inquiry, drafts would likely constitute "intra-agency materials" that fall within §87(2)(g). Under that provision, opinions, advice, recommendations and the like may be withheld. Therefore, in a technical sense, a draft resolution, in my view, may be withheld, for it is a proposal that has not yet been adopted or approved.

It is emphasized that there is no obligation to withhold a draft resolution, and documents of that nature are routinely disclosed, as a matter of practice or rule.
Often it may make little sense to withhold a draft resolution because the resolution will be discussed and essentially disclosed by means of discussion and deliberation at open meetings.

I note that there is what may be viewed as an inconsistency between the Freedom of Information Law and the Open Meetings Law. Again, the former permits (but does not require) a denial of access to a draft resolution; under the latter, however, there would be no basis for entry into executive session to discuss the draft resolution. That being so, while a draft resolution may be withheld, there may be little reason to do so because of its inevitable disclosure at an upcoming meeting.

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
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(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

From: Robert Freeman
To: [redacted]
Date: 4/22/2003 4:00:29 PM
Subject: Dear Ms. Ziegler:

Dear Ms. Ziegler:

I have received your communication and hope that I can help.

It seems that the language excerpted from the Vermont legislation is derived from the Homeland Security Act. The flaw in the Act and the legislation, in my view, is that both overlook the basis of a freedom of information law: that government records should be accessible, except to the extent that disclosure would result in some sort of harm. That kind of standard is missing from the Act and the legislation. I have been attempting (even ranting) that any exception to rights of access should include some sort of a harm test or standard. The question should be: what would happen if the government disclosed? If the answer is "ouch", to that extent, the record might justifiably be withheld. But if there would be no significant harm, disclosure should be the rule. I've also tried to suggest that an foi law should not be an all or nothing proposition. Within a disaster preparedness plan, for example, it is likely that disclosure of some aspects of the document would enhance public safety and enable people to be more secure; other aspects the plan, however, could if disclosed enable bad people to do bad things. Those portions can be withheld. The point is that not every aspect of every record envisioned by the legislation would necessarily result in jeopardy if disclosed.

I'd suggest that you might want to look at our annual report, which is available via our website by clicking on to "publications." The first 8 pages deal with common sense and flexibility in the aftermath of 9/11. I think that the passage may be useful to you in attempting to make your arguments. And if you'd like to call to talk it over, I'm here most of the time (but on the road tomorrow).

Good luck.

Bob Freeman

Robert J. Freeman
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FOIL-AO-1410

From: Robert Freeman
To: [redacted]
Date: 4/24/2003 1:35:38 PM
Subject: I have received your letter in which you guidance concerning an attempt to obtain correspondence bet

I have received your letter in which you guidance concerning an attempt to obtain correspondence between the Baseball Hall of Fame and the Office of the Governor during a certain period.

In this regard, first, each agency, including the Executive Chamber, is required to designate one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests for records made under the Freedom of Information Law. In consideration of your inquiry, it is suggested that a request be addressed to Mr. Mark Ustin, Records Access Officer, Executive Chamber, The Capitol, Albany, NY 12224-0341.

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

And third, as a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, government records must be disclosed, except to the extent that one or more of the grounds for denial of access appearing in §87(2) may justifiably be asserted. Without knowledge of the nature of the records of your interest, or whether any such records exist, I cannot offer specific guidance as to rights of access. However, the grounds for denial are narrow and have been construed by the courts in a manner that encourages disclosure.

I note that our website includes a great deal of information, including the text of the Freedom of Information Law, frequently asked questions, and thousands of advisory opinions. In addition, a sample letter of request can be found in "Your Right to Know", a guide to the law accessible by clicking on to "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
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Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-1404/11

From: Robert Freeman
To: [redacted]
Date: 4/25/2003 4:55:51 PM
Subject: Dear Ms. Cale:

Dear Ms. Cale:

I have received your communication concerning your ability to obtain data concerning drug arrest rates within particular precincts of the NYC Police Department. If your commentary is accurate, the response by the Department is inconsistent with law. In short, you wrote that you were informed that "credentialed journalists could receive the information immediately without FOILing."

In this regard, journalists have no greater rights under the FOIL than the general public, and it was held more than 25 years ago that records accessible under FOIL should be made "equally available to any person, without regard to status or interest." Further, as you may be aware, when an agency receives a request, the agency has five business to grant access, deny access in writing, or if more time is needed, acknowledge the receipt of the request, in which case it is required to provide an approximation of when the request will be granted or denied. In a case involving the NYPD, Linz v. The Police Department of the City of New York (Supreme Court, New York County, NY Law Journal, December 17, 2001), it was held that the approximate date must be reasonable in consideration of the volume of the request, the need to search for the records, the time necessary to review the records to ascertain the extent to which they must be disclosed, etc. In my view, if records are clearly public and easy to locate, a delay of any significance would be unreasonable and inconsistent with law.

For a more detailed explanation of the time limits for response, go the FOIL advisory opinions on our website, click on to "T" and scroll down to "Time limits for response." Then click on to #13382. To obtain opinions concerning the status of persons seeking records, go to "I" and scroll down to "interest of applicant."

After you have acquired the requisite information to attempt to convince the PD to act more quickly, I would suggest that you telephone the Department's public information office at (646) 610-6700.

If you feel that I can offer additional guidance, please do not hesistate to contact me. I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1402

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April 28, 2003

E-MAIL

TO: Sue Ann Jenkins <[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 Sue Ann:

I have received your inquiry concerning fees for medical records. Although the HIPAA regulations are new, health care providers have been able to charge up to seventy-five cents per photocopy in New York pursuant to §18 of the Public Health Law for several years. Subdivision (2)(e) of that provision states that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the cost incurred by such provider, provided, however, that a provider may not impose a charge for copying an original mammogram when the original has been furnished to any qualified person and provided, further, that any charge for furnishing an original mammogram pursuant to this section shall not exceed the documented costs associated therewith. However, the reasonable charge for paper copies shall not exceed seventy-five cents per page. A qualified person shall not be denied access to patient information solely because of inability to pay."

The Freedom of Information Law, which pertains to government records in New York, states that a government agency may charge up to twenty-five cents per photocopy, unless a different fee is prescribed by statute. The statute that authorizes a higher fee in this instance is §18 of the Public Health Law.

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 28, 2003

Mr. Tom Kackmeister
[redacted]

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

Dear Mr. Kackmeister:

I have received your note in which you indicated that the Greece Central School District has not responded to your request for "documentation regarding employee absenteeism over the last three years."

As indicated in previous correspondence, the Freedom of Information Law pertains to existing records, and the District is not required to create records in response to a request. It is suggested that you attempt to ascertain the nature of records that exist and are maintained by the District and resubmit your request accordingly.

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.

If there is statistical data, I believe that the data would be available pursuant to §87(2)(g)(i). That provision grants access to "statistical or factual tabulations or data" found within internal agency records.

If your interest involves a particular employee or employees, judicial decisions indicate the dates and reasons for public employees' absences found within records must be disclosed. While §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", the courts have provided substantial direction regarding the privacy of public employees. According to those decisions, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a

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

Capital Newspapers v. Burns, supra, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer, and in granting access, the Court of Appeals found that those items must be disclosed, for the public has the right to know when public employees perform their duties and whether they carry out those duties when scheduled to do so. As such, attendance records indicating absences, as well as those involving overtime work, for example, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 28, 2003

E-Mail

TO: Larry Slomin [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Slomin:

As you are aware, I have received your letter in which you requested an advisory opinion. You wrote that:

> "Six students from [your] high school submitted applications to the school for the New York State Lottery Scholarship. The school then submitted the names of two of these students to the lottery, one of which will win a $4000 scholarship. [You] had requested the names of the 6 students, and the school district has refused, indicated that they are not allowed to provide the names of any students. However, the Lottery Commission does provide [you] with the names of the students that were sent to them by the school, indicating that is public information.

In this regard, I offer the following comments.

First, a school district is required to comply with the federal Family Educational Rights and Privacy Act (FERPA; 21 USC §1232g). In brief, FERPA prohibits the disclosure of information contained in records that is personally identifiable to a student under the age of eighteen without the consent of the parent of a student. Consequently, absent parental consent, I believe that your school district would be barred by federal law from disclosing the information at issue.

The Lottery is not subject to FERPA, but rather the Freedom of Information Law. Based upon a conversation with a Lottery official, the "Leaders of Tomorrow" program under which the scholarship is conferred is open to all high school seniors. It is my understanding that seniors submit applications to their high school and the school chooses two nominees. The names of the two

nominees are then sent to the Capital Area School Development Association (CASDA) which, pursuant to a contract with the Lottery, chooses the winner. I was informed that an application form indicates that the name of the winner may be made public, just as in the case of the winner of a substantial lottery prize.

Although CASDA may have directly disclosed the names to you, I was informed that, in the future, if such requests are made regarding the identity of any student other than the winner, any such request will be forwarded by CASDA to the Lottery for determination. Even though CASDA maintains the records pertaining to the scholarship program, based upon its relationship with the Lottery, the records that CASDA collects or prepares in implementing the program are in the legal custody of the Lottery.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-1401 S

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April 29, 2003

Mr. Timothy M. Dodd
[redacted]

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

Dear Mr. Dodd:

I have received your inquiry and appreciate your kind words. You have raised a series of questions relating to meetings of the Plattsburgh Town Board.

First, you wrote that the Town Board consists entirely of members of a single political party, and you asked whether the Board can "circumvent, the Open Meetings Law by calling a party Caucus." In this regard, judicial precedent indicates that when all of the members of a legislative body are the same political party, the public business of the Board must be conducted in public, and that a closed political caucus may be held only to discuss political party business.

By way of background, the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals 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 Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law. I note that if a majority is present during a social gathering or attends a conference, for example, in which those in attendance are part of a large audience, the majority would not have gathered for the purpose of conducting the business of the Town collectively, as a body, and in my view, in those situations, the presence of a majority would not constitute a "meeting" for purposes of the Open Meetings Law.

Next, the Open Meetings Law provides two vehicles under which a public body may meet in private. One is the executive session, a portion of an open meeting that may be closed to the public in accordance with §105 of the Open Meetings Law. The other arises under §108 of the Open Meetings Law, which contains three exemptions from the Law. When a discussion falls within the scope of an exemption, the provisions of the Open Meetings Law do not apply.

Since the Open Meetings Law became effective in 1977, it has contained an exemption concerning political committees, conferences and caucuses. Again, when a matter is exempted from the Open Meetings Law, the provisions of that statute do not apply. Questions concerning the scope of the so-called "political caucus" exemption have continually arisen, and until 1985, judicial decisions indicated that the exemption pertained only to discussions of political party business. Concurrently, in those decisions, it was held that when a majority of a legislative body met to discuss public business, such a gathering constituted a meeting subject to the Open Meetings Law, even if those in attendance represented a single political party [see e.g., Sciolino v. Ryan, 81 AD 2d 475 (1981)].

Those decisions, however, were essentially reversed by the enactment of an amendment to the Open Meetings Law in 1985. Section 108(2)(a) of the Law now states that exempted from its provisions are: "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

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

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

Many local legislative bodies, recognizing the potential effects of the 1985 amendment, have taken action to reject their authority to hold closed caucuses and to continue to conduct their business open to the public as they had prior to the amendment. Moreover, there have been recent developments in case law regarding political caucuses that indicate that the exemption concerning political caucuses has in some instances been asserted improperly as a means of excluding the public from gatherings that have little or no relationship to political party activities or partisan political issues.

One of the decisions, Humphrey v. Posluszny [175 AD 2d 587 (1991)], involved a private meeting held by members of a village board of trustees with representatives of the village police benevolent association. Although the board characterized the gathering as a political caucus outside the scope of the Open Meetings Law, the Appellate Division, Fourth Department, held to the contrary. In a brief discussion of the caucus exemption and its intent, the decision states that:

> "The Legislature found that the public interest was promoted by 'private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies' (Legislative Intent of L.1985,ch.136,§1). Nonetheless, what occurred at the meeting at issue went beyond a candid discussion, permissible at an exempt caucus, and amounted to the conduct of public business, in violation of Public Officers Law §103(a) (see, Public Officers Law §100. Accordingly, we declare that the aforesaid meeting was held in violation of the Open Meetings Law" (id., 588).

The Court did not expand upon when or how a line might be drawn between a "candid discussion" among political party members and "the conduct of public business." Although the decision was appealed, the appeal was withdrawn, because the membership on the board changed.

Most similar to the situation to which you referred is the case of Buffalo News v. Buffalo Common Council [585 NYS 2d 275 (1992), which involved a political caucus held by a public body consisting solely of members of one political party. As in Humphrey, the court concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, stating that:

> "In a divided legislature where a meeting is restricted to the attendance of members of one political party, regardless of quorum and majority status, perhaps by that very restriction it would be fair to assume the meeting constitutes a political caucus. However, such a conclusion cannot be drawn if the entire legislature is of one party and the stated purpose is to adopt a proposed plan to address the deficit before going public. In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless. Therefore, the meeting of February 8, 1992 was in violation of Article 7 of the Open Meetings Law...
>
> "When dealing with a Legislature comprised of only one political party, it must be left to the sound discretion of honorable legislators to clearly announce the intent and purpose of future meetings and open the same accordingly consistent with the overall intent of Public Officers Law Article 7" (id., 278).

I point out that the language of the decision in many ways is analogous to that of the Appellate Division in Orange County Publications, supra. Specifically, it was stated in Buffalo News that:

> "The Court of Appeals in *Orange County* (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction with the Declaration of Legislative Policy of Article 7 as set forth in its preamble, Section 100.
>
> > "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper

> and enable the governmental process to operate for the benefit of those who created it.

> "A literal reading of Section 108, as urged by Respondent, could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a 'political caucus' which would have no public input, and the public meetings decisions on such issues would be a mere formality. Such interpretation would negate the Legislature's declaration in Section 100. The Legislature could not have contemplated such a result by amending Section 108 and at the same time preserving Section 100" (id., 277).

Based on the foregoing, I believe that consideration of the matter must focus on the overall thrust of the decision. To reiterate a statement in the Buffalo News decision: "any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278). Since all the members of the Board are from a single political party, based on the decision cited above, I do not believe that the Board may validly conduct a closed political caucus to discuss matters of public business. However, when the members are discussing political party business (i.e., fund raising, party leadership, etc.), a closed political caucus may in my view be appropriately held.

Second, you referred to the Board's practice of holding "pre-meetings" without notice and in a "much smaller room adjacent to the main meeting room" that "discourages public participation."

For reasons offered earlier concerning the definition of "meeting", a "pre-meeting" gathering of the Board held to discuss public business would fall within the coverage of the Open Meetings Law. Further, every meeting must be preceded by notice given to the news media and by means of posting pursuant to §104 of the law.

While the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend meetings of public bodies and to observe the performance of public officials who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

The preceding paragraph appeared in an advisory opinion rendered in 1993 and was relied upon in Crain v. Reynolds (Supreme Court, New York County, NYLJ, August 12, 1998). In that decision, the Board of Trustees of the City University of New York conducted a meeting in a room that could not accommodate those interested in attending, even though other facilities were available that would have accommodated those persons. The court in Crain granted the petitioners' motion for an order precluding the Board of Trustees from implementing a resolution adopted at the meeting at issue until certain conditions were met to comply with the Open Meetings Law.

Lastly, you asked when a resolution to be considered at a meeting must be made available and whether you may submit a "standing request" for the Board's "agenda packets."

In most instances, draft or proposed resolutions are disclosed prior to or at meetings, for they are generally disclosed by means of discussion during an open meeting. However, there is nothing in either the Freedom of Information Law or the Open Meetings Law that specifies when proposed resolutions must be disclosed.

With respect to the "standing request", it has 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. In short the Town may choose to make its agenda packets available in the manner that you suggested, but I do not believe that it is required to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1016

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April 29, 2003

Hon. Robert J. Serotta
County of Schenectady. District Two
703 Bedford Road
Schenectady, NY 12308

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

Dear Legislator Serotta:

I have received your letter concerning your efforts in gaining access to the financial records of the Schenectady Metroplex Development Authority. It is your view that, as an elected official in Schenectady County, you should have the authority to review the records in question.

In this regard, I am unaware of the extent to which Schenectady County or the County Legislature may have control or oversight of the Authority. From my perspective, however, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a government official should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records when he or she does so in the performance of his or her official duties.

However, viewing the matter from a more technical point of view, one of the functions of a public body involves acting collectively, as an entity. A county legislature, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my opinion, in most instances, a legislator acting unilaterally, without the consent or approval of a majority of the total membership of the entity on which he or she serves, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a member by means of law or rule. In the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

If the County Legislature does not have control over the Authority, it does not appear that you would have special rights of access.

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 most instances, the financial records of a governmental entity must be disclosed to any person, for none 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:tt

cc: Bradley Lewis
Schenectady Metroplex Development Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 29, 2003

Mr. David Cole
[redacted]

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

Dear Mr. Cole:

I have received your letter and the materials attached to it. You have asked that I "look into" requests made under the Freedom of Information Law to the Village of Horseheads and the Elmira County Jail. Having reviewed the materials, 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 create a record in response to a request. If, for example, there is no record indicating who authorized an officer to interview you, the Village would not be required to prepare a new record containing that information. I note, too, that agency staff may choose to answer questions, but that there is no requirement that staff provide information in response to questions. Similarly, with respect to your request for a videotape, I note that municipalities are subject to Article 57-A of the Arts and Cultural Affairs Law, which pertains to the management, preservation and disposal of records. In brief, a unit of local government must retain records in accordance with schedules that indicate minimum retention periods for various categories of records. While I am unaware of the retention period applicable to videotapes relating to inmates at a county jail, the tapes and other records may have been destroyed in accordance with applicable schedules. To that extent, the Freedom of Information Law would be inapplicable.

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

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

If a list is maintained that pertains only to your visitors, I believe that it would be accessible, for 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.

With regard to the videotapes, in a case involving that kind of records, 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 agency 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.

Lastly, in one letter, you indicated that you wanted to "wait for the videotapes before [you] send payment for the copies." While an agency may charge a fee following its duplication of records, it has been held that an agency may require payment in advance of making copies available (Sambucci v. McGuire, Supreme Court, November 4, 1982).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Horseheads
Records Access Officer, Chemung County

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14018

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April 30, 2003

Mr. Robert S. Risman, Jr.
Golden Sands Resort
P.O. Box 11, Lake Shore Drive
Diamond Point, NY 12824-0011

The staff of the Committee on Open 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 of April 4, as well as the correspondence attached to it. The matter pertains to your efforts in gaining access to records pertaining to the employment of Michael E. Stafford by the Unified Court System,

Although certain information was provided by the Office of Court Administration (OCA) in response to your request, other existing records maintained by the OCA falling within the scope of the request were withheld pursuant to §§87(2)(b) and (g) and §89(2)(b) of the Freedom of Information Law. In brief, those provisions authorize an agency to deny access when disclosure would constitute "an unwarranted invasion of personal privacy" or when the records consist of "inter-agency or intra-agency materials" and reflect advice, opinion, recommendation, conjecture and the like.

Following the initial denial, you asked for "a description of the precise nature of each and every document" that was withheld, the criteria employed as a basis for denying access, and a written certification indicating whether any employee or agency of the Unified Court System "has been in contact with Mr. Stafford....and if so" their names and the subject matter of any such communication.

In this regard, as you have been advised in the past, unsubstantiated charges, complaints or allegations pertaining to a public employee may be withheld on the ground that 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, 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.

Lastly, as Mr. Eiseman suggested, 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, the Freedom of Information Law does not require an agency or its staff to supply information by answering questions. In short, OCA is not obliged by law to provide the kind of certification that you request.

I hope that the foregoing serves to clarify you understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: John Eiseman
Shawn Kerby

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 1, 2003

Mr. Brian D. Premo
Premo Law Firm, PLLC
20 Corporate Woods Blvd.
Albany, NY 12211

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

Dear Mr. Premo:

I have received your letter of April 4, as well as voluminous materials pertaining to your requests for records from the City of Rensselaer concerning Police Chief Fusco, his conduct, and ancillary matters. In consideration of the material, I will not focus on particular matters, but rather will offer commentary reflective of general principles and opinions concerning the Freedom of Information Law. It is emphasized that I have no personal knowledge or information concerning the controversy that is the focus of your efforts.

Existing records

The Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create or prepare a record in response to 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) also provides 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."

Reasonably describing records

An issue of likely significance in my view involves whether or the extent to which a request "reasonably describes" the records as required by §89(3). Several requests were made for records "reviewed, relied upon, referred to or otherwise utilized in preparing and completing" certain documents. A request of that nature may not be the kind of request envisioned by the Freedom of Information Law, for a response would involve making a series of judgments based on opinions, some of which would be subjective, mental impressions, the strength of one's memory, and perhaps legal research. For instance, in a situation in which an individual sought provisions of law that might have been "applicable" in governing certain activity, it was advised that the request was

inappropriate. Specifically, the request involved "copies of the applicable provisions and pages of the Civil Service Law and applicable rules promulgated by the Department of Civil Service which govern the creation and appointment of management confidential positions" (emphasis added). In response, it was suggested that:

> "...the foregoing is not a request for records. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions of law might be "applicable", and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 209 of the Civil Service Law", no interpretation or judgment is necessary, for sections of law appear numerically and can readily be identified. That kind of request, in my opinion, would involve a portion of a record that must be disclosed. Again, a request for laws that might be "applicable" is not, in my view, a request for a record as envisioned by the Freedom of Information Law."

In like manner, ascertaining which records might have been "relied upon...or otherwise utilized" in preparing records" might involve an attempt to render a judgment regarding the use, utility, accuracy or value of records.

There may be a variety of documentary material acquired from an array of sources used in and outside the scope of one's governmental duties that might have been utilized in developing a record, including curricular materials used in undergraduate, graduate or post graduate studies, library materials, magazine articles, documentaries, films (i.e., for training), professional journals and similar documentation read or seen over the course of years. Those kinds of materials may contribute to one's breadth of knowledge and may, consciously or otherwise, be utilized to prepare certain records. However, identifying or recalling those kinds of materials that may have resulted in the acquisition of knowledge and which even may have been utilized would in my opinion, frequently involve an impossibility. For purposes of the Freedom of Information Law, a request for such materials may not meet the standard of "reasonably describing" the records sought, for such a request might not enable agency staff to locate and identify the records in the manner envisioned by that statute [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

It is important to 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" (id., 249).

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

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

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

While I am unfamiliar with the recordkeeping systems of the City, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of a request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. For example, one request involved records "concerning or relating to the hiring or discharge of any municipal employee from January, 2000 to the present." A variety of records maintained in relation to a variety of contexts pertaining to City employees and perhaps others might fall within the request. The extent to which any such records can be located with reasonable is, in my view, conjectural.

Rights of access

Insofar as City records exist and 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.

Internal governmental communications and records prepared by consultants

Many of the records sought fall within the scope of §87(2)(g), for they reflect communications between or among City officials or with consultants retained by the City. Although 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).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

Attorney-client privilege

Among the enclosures that you sent are requests for legal advice and legal opinions offered in response to those requests. It appears that the disclosures to you reflect a waiver of the ability to deny access based on the assertion of the attorney-client privilege, and I believe that the City could have chosen to withhold those documents.

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 and 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)].

Purchase and use of Nextel mobile communication devices

Although "monthly account statements" were disclosed, you wrote that:

> "...no information concerning the assignment and usage of the mobile communication devices was provided by any City official in response to my request. In particular, the City specifically failed and refused to provide the records and itemized statements of the calls made and received with respect to each Nextel communication device and City labor attorney Stewart informed me that the City will not release the requested information except by court order."

With respect to the assignment of mobile phones, I believe that portions of records identifying the officers or employees to whom those devices are or were assigned must be disclosed. In short, none of the grounds for denial of access would, in my view be applicable.

With regard to "itemized statements of the calls made and received", assuming that such records exist and are in the custody of the City, three of the grounds for denial of access may be 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 ground for denial could appropriately be asserted. Concurrently, those 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 records are generated by the City, I believe that they could be characterized as intra-agency materials. Nevertheless, in view of their content, they would apparently consist solely of statistical or factual information accessible under §87(2)(g)(i) unless another basis for denial applies. As such, §87(2)(g) would not, in my opinion, serve as a basis for denial. If phone or usage bills are generated by Nextel, an entity outside of government that is not an agency, §87(2)(g) would not apply.

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

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

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

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

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

> "The petitioner requested that the respondents provide copies of the Town of Islip's cellular telephone bills for 1987, 1988 and 1989. The court correctly determined that the respondents complied with this request by producing the summary pages of the bills showing costs incurred on each of the cellular phones for the subject period. The petitioner never specifically requested any further or more detailed information with respect to the telephone bills. In view of the information disclosed in the summary pages, which indicated that the

> amounts were not excessive, it was fair and reasonable for the respondents to conclude that they were fully complying with the petitioner's request" [578 NYS 2d 642, 643, 179 AD 2d 763 (1992)].

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

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

This is not to suggest, however, that the numbers appearing on every phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to communicate with recipients of public assistance or persons seeking certain health services. It has been advised in the past that if a government employee communicates by phone with those classes of persons as part of the employee's primary ongoing and routine duties, there may be grounds for withholding portions of phone numbers, i.e., the last four digits, 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 last four digits of 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 or receives calls from informants or witnesses in connection with criminal investigations, disclosure of the numbers might endanger an individual's life or safety, and the last four digits might justifiably be deleted pursuant to §87(2)(f) of the Freedom of Information Law.

In the case of calls made by executives, administrators or others in similar positions, phone calls are generally made to or received by great variety of persons in a broad variety of contexts. Unlike the caseworker who routinely phones a class of persons having a particular status (i.e., recipients of public assistance), the calls made or received by an executive or administrator typically involve an assortment of issues and persons who do not fall within any special identifiable class or status. If that is so, disclosure of a phone number would not alone signify a personal detail involving the recipient of a call. Further, as suggested previously, disclosure of the number would not necessarily indicate who made or received the call, nor would it disclose details about the nature of the call of a conversation.

In sum, subject to the unusual kinds of exceptions discussed earlier, it appears that phone bills or similar should be disclosed under the Freedom of Information Law.

Lastly, in the future, rather than seeking the kind of review that has been performed, it is suggested that you specify particular records that were withheld or issues relating to an incident or controversy when seeking an opinion.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Maureen Nardacci, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 1, 2003

Mr. Robert R. Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your letter in which you indicated that you received no response from the Town of Greenburgh following an appeal made pursuant to the Freedom of Information Law. You asked that I "outline....the procedures which a Town must observe in answering a FOIL appeal."

In this regard, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and states that:

> "...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."

It is noted that it has been held that a failure to determine an appeal within ten business days constitutes a constructive denial of the appeal, that the person denied access is deemed to have exhausted his or her administrative remedies, and that he or she, therefore, may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)].

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

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May 1, 2003

E-MAIL

TO: Iris Long [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 Ms. Long:

I have received your letters of April 9 and 13 concerning the status of "district management associations" under the Freedom of Information Law. Although you serve a s a member of the board of directors of a district management association in Queens, you indicated that you have had difficulty gaining access to a variety of information, including "the District Plan, Membership in the District, and other Board records such as its policies."

While I do not believe that a district management association is subject to the Freedom of Information Law, that statute can be used to obtain much of the information of your interest from governmental sources. In this regard, I offer the following comments.

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

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

In short, the Freedom of Information Law generally applies to entities of state and local government in New York.

As you are likely aware, a district management association is created for each business improvement district established pursuant to Article 19-A of the General Municipal Law, §§980 to 980-q. Section 980-m deals directly with district management associations and specifies in

subdivision (a) that they are not-for-profit corporations, and subdivision (b) indicates that the board of directors "shall be composed of representatives of owners and tenants within the district, provided, however, that not less than a majority of its members shall represent owners..." That provision also states that:

> "The board shall include, in addition, three members, one member appointed by each of the following: the chief executive officer of the municipality, the chief financial officer of the municipality and the legislative body. Provided, that in a city having a population of one million or more, the third additional member shall be appointed by the borough president of the borough in which the district is located and a fourth additional member shall be appointed by the council member representing the council district in which the proposed district is located, or if the proposed district is located in more than one council district, the fourth additional member will be appointed by the speaker of the city council after consultation with the council members representing the council districts in which the proposed district is located. The additional three members (four in a city of one million or more) shall serve as the incorporators of the association pursuant to the not-for-profit corporation law."

Based on the foregoing, although some members of the board of directors of a district management association are designated by government, a majority represents the private sector, and again, the entity is a not-for-profit corporation. That being so, I do not believe that a district management association constitutes an "agency" subject to the Freedom of Information Law.

Second, by means of other provisions of the General Municipal Law and the functions of government officials or persons designated by government officials, much of the documentation of your interest must be disclosed by agencies required to comply with the Freedom of Information Law. That law pertains to all records of an agency, 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."

Due to the breadth of the language quoted above, when records pertaining to the district management association come into the possession of a government office or official, they are subject to rights conferred by the Freedom of Information Law. I note that §980-d(c) specifies that a draft district plan must be submitted to the City Planning Commission, which in turn must forward copies to the City Council, the Council member representing a proposed district, the appropriate community board and the borough president. Further, §980-e states that, a public hearing must be held prior to the adoption of a district plan and that copies of the proposed plan must be made available at the

office of the City Clerk and "any additional place" if "necessary or desirable." Amendments to a district plan also require a public hearing prior to adoption pursuant to §980-i. In short, the district plan must be maintained by one or more City agencies, and each would be required to disclose it in response to a request made under the Freedom of Information Law.

Similarly, when the other kinds of records to which you referred, such as policies, by-laws and the like, come into the possession of a City official due to his or her participation on the association's board of directors, they, too, fall within the coverage of the Freedom of Information Law and can be obtained by seeking them from the agencies that employ or are headed by those officials.

I hope that I have been of assistance.

RJF:tt

FOIL-AO-14022

From: Robert Freeman
To: Stephen Syzdek
Date: 5/2/2003 8:40:28 AM
Subject: Re: Niagara Frontier Transportation Authority

Good morning - -

I tried to reach you a couple of times by phone without success to discuss the NFTA proposed FOIL regulations.

In my view, the initial portions should be deleted, for they merely reiterate several aspects of the statute. There is simply no need to define "agency" or "records", to require that the final votes of members of the Board of Directors be recorded, to list the grounds for denial of access or to indicate that NFTA can delete identifying details to protect against unwarranted invasions of privacy. In each of those instances, the FOIL itself deals with those matters. Further, if the FOIL is amended, there is a likelihood that the regulations would be out of date.

The argument might be made, too, that those portions identified above are ultra vires. As you know, the authority of the Committee on Open Government to promulgate regulations involves the procedural aspects of the law; the Committee cannot issue regulations dealing with the scope of the law (i.e., by redefining "agency" or "record") or that in any way deal with what is public and what is not. Again, the statute itself deals with those issues. Since an agency's regulations, according to §87(1) of the FOIL, must be consistent with those promulgated by the Committee, I believe that the initial portions of the proposed regs. are not only unnecessary, but also of questionable validity in consideration of an agency's authority to promulgate regulations.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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(518) 474-1927 - Fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14023

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May 2, 2003

Yianni Pantis, 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, unless otherwise indicated.

Dear Mr. Pantis:

I have received your letter of April 14 and a variety of material relating to it. You have sought an advisory opinion concerning the obligation of the Richmond County Clerk to make certain records available on microfilm under the Freedom of Information Law.

Having discussed the matter with officials of the Unified Court System, it appears that you may misunderstand the nature of the relationship between that entity and Affiliated Computer Services ("ACS"), the firm that prepares records on microfilm.

As you are likely aware, the Freedom of Information Law pertains to agency records, and §86(4) defines the term "record" to mean:

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

Further, agency records are generally available for inspection and copying, and it has been held that an agency must make records available in the form, i.e., the storage medium, of an applicant's choice if the agency has the capacity to do so and if the applicant is willing and able to pay the appropriate fee [see Szikszay v. Buelow, 436 NYS2d 558, 107 Misc.2d 886 (1981); Brownstone Publishers, Inc. V. New York City Department of Buildings, 550 NYS2d 564, aff'd 166 AD2d 294 (1990); Samuel v. Mace and Penfield Central School District, Supreme Court, Monroe County, Dec. 18, 1991; New York Public Interest Research Group v. Cohen, 729 NYS2d 379, 188 Misc.2d 658 (2001)].

If ACS served as an extension of the Unified Court System by means of a contract and maintained custody of records on behalf of the Unified Court System, I would agree with your contentions. However, I do not believe that to be so. It is my understanding that ACS merely prepares records on microfilm as a service to the County. As in countless analogous situations, a commercial entity in this instance is furnishing goods or services to a government agency pursuant to a contract. A relationship of that kind does not transform the contractor into a governmental entity or bring its goods or services within the coverage of the Freedom of Information Law.

Once the microfilm records come into the possession of the County, they are available for inspection and copying, but I was informed that the County does not have the resources or equipment needed to duplicate the microfilmed records on microfilm when they come into its possession. If that is so, in my opinion, it is not required by the Freedom of Information Law to carry out a function that it is incapable of performing.

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: Shawn Kerby

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14024

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May 2, 2003

Mr. Joseph A. DiSalvo
Nobile, Magaria & DiSalvo, LLP
111 Kraft Avenue
Bronxville, NY 10708

The staff of the Committee 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. DiSalvo:

I have received your letters of April 11 and April 22 concerning your requests for records made to the Edgemont Union Free School District. Although some of the records sought have been made available, others, to date, have not yet been disclosed. As you are aware, I have received a letter from the attorney for the District, who referred to the voluminous records falling within the scope of your requests, indicating that the District "continues to work" on them, and that the requests "are not being ignored."

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

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

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: Ira M. Schulman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14025

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May 5, 2003

Mr. James D. Coleman
Schuyler County Attorney
105 Ninth Street, Unit 5
Watkins Glen, NY 14891

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

Dear Mr. Coleman:

I have received your letter in which you sought an advisory opinion regarding a request received by the Schuyler County District Attorney's Office for interviews and statements of witnesses contacted by the police during a murder investigation which resulted in a guilty plea.

You wrote that the District Attorney's Office takes the position that "these statements are not accessible because they are '...the statements of witnesses who did not testify at trial...'" In support of the position, the District Attorney cites Matter of Spencer v. New York State Police (187 AD2d 919) and Matter of Johnson v. Charles J. Hynes (264 AD2d 777). You further indicated that research conducted by your office did not "disclose any subsequent Court of Appeals cases overruling or modifying these holdings, including the Gould case cited in [my] December 27, 2002 opinion."

You questioned whether it is possible to have a blanket denial of access to statements of non-testifying witnesses. In this regard, I offer the following comments.

With due respect to the Second and Third Departments, the decisions cited by the District Attorney's Office offer no reasoning to support the holdings. The courts merely asserted conclusory statements that the records should not be available. It is important to note that the possibility of withholding only those portions of the records that would identify the witnesses was not considered in either case. It is also noted that both cases involved requests by inmates for witness statements from their murder cases.

Considering that Gould v. New York City Police Department [89 NY2d 267 (1996)] was discussed at length in my December 27, 2002 opinion, I do not believe it is necessary to reiterate the detail of the analysis related to that decision. Notwithstanding the above cited cases, in light of general guidance provided by Gould, in which the Court of Appeals determined as a general

principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (*id.*, 275), in my opinion, a blanket denial of access to statements or interviews of non-testifying witnesses would be inconsistent with the thrust of the Freedom of Information Law.

As indicated in my December 27, 2002 letter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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.

In my view, in a situation different from those presented in the cases cited by the District Attorney's Office, such as in the instant case where the requester is an author who suggested that the District Attorney's Office delete the names of witnesses prior to releasing the statements and interviews of non-testifying witnesses, a court would likely reach a different conclusion if it conducts an in depth analysis under the Freedom of Information Law.

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-1410

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May 5, 2003

E-MAIL

TO: Mary Bolt [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. Bolt:

I have received your letter in which you explained a series of difficulties in obtaining tape recordings of Town Board meetings from the Town Supervisor. Although it is your view that the tapes should be in your custody as Town Clerk, the Supervisor "is refusing to give them to [you]." You have sought assistance in the matter and, in this regard, I offer the following comments.

First, as you are aware, §30 of the Town Law states in subdivision (1) that the town clerk "Shall have custody of all the records, books and papers of the town." Therefore, I believe that the tape recordings at issue, as well as all records of the Town, are in your legal custody.

Second, 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..."

In short, while others may have physical possession of Town records, again, the Town Law indicates that as clerk, you have custody of the records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a Town clerk is the "records management officer" for a Town

Third, the failure to share the records or to inform you of their existence may effectively preclude you from carrying out your duties as records management officer, or if you are so designated, as records access officer for purposes of responding to requests under the Freedom of Information Law. If you, as records access officer, do not know of the existence or location of Town records, or cannot obtain them, you may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law.

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

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

As such, the Town Board has the duty to promulgate rules and ensure compliance. Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

"The records access officer is responsible for assuring that agency personnel...

(3) upon locating the records, take one of the following actions:
(i) make records promptly available for inspection; or
(ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
(4) Upon request for copies of records:
(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the requester to copy those records..."

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. As part of that coordination, I believe that other Town officials and employees are required to cooperate with the records access officer in an effort to enable him or her to carry out his or her official duties.

Lastly, I do not believe that the Supervisor is ordinarily authorized to make policy unilaterally. Rather, pursuant to §63 of the Town Law, in my view, only the Town Board may develop or adopt policy, and it may do so only by means of an affirmative vote of a majority of its total membership.

In an effort to clarify his understanding of the matter, a copy of this opinion will be forwarded to the Supervisor.

I hope that I have been of assistance.

RJF:tt

cc: Town Supervisor

FOIL-AO-14027

From: Robert Freeman
To: [redacted]
Date: 5/6/2003 1:05:27 PM
Subject: Dear Mr. Slomin:

Dear Mr. Slomin:

I have received your inquiry concerning future requests for the names of Lottery scholarship winners.

As indicated previously, if requests for the records in question are made directly to CASDA, the entity under contract with the Lottery, the requests will be forwarded to the Lottery. That being so, it is suggested that requests for those records may be made to the records access officer at the Lottery under the FOIL. While the records may be in the physical custody of a firm that contracts with the Lottery, I believe that they are in the legal custody of the Lottery and constitute Lottery records for the purposes of FOIL [see definition of "record", FOIL, §86(4)].

With respect to rights of access, I believe that the identity of the winner of a scholarship must be disclosed. The names of other students who applied may, however, in my view, be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see FOIL, §§87(2)(b) and 89)2)(b)].

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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May 9, 2003

Martin Heilweil, 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. Heilweil:

As you are aware, I have received your letter concerning an unanswered request for records of the State Department of Health. You indicated that a request was made late in 2002 and that its receipt was acknowledged by the Department on January 22, when you were informed that it could take thirty to sixty days to respond. Although that period has passed, you have received no further response.

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

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

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)].

From my perspective, since sixty days from the date of acknowledgment passed nearly two months ago, you may consider your request to have been denied and may appeal. However, before doing so, it is suggested that you contact the Department's records access officer to determine whether a response has been sent or is about to be sent. That person is Ms. Kathleen Sanvidge, and she can be reached at (518)486-2508. The person designated to determine appeals is Mr. John Stefani.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathleen Sanvidge

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14029

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May 12, 2003

Ms. Cheryl J. Haywood
Attorney at Law
642 Second Street
Brooklyn, NY 11215

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

Dear Ms. Haywood:

I have received your letter of April 9 and the materials attached to it. You have sought an advisory opinion relating to your requests for records of the New York City Department of Parks and Recreation. It is your belief that access to several records has been constructively denied.

By way of background, on January 16, you requested a variety of records relating to the Prospect Park Tennis Group, Inc., and the receipt of that request was acknowledged by the Department's Assistant Counsel, Amy Kleitman, on January 21, when she indicated that you would be contacted when the information sought is available, and that an attempt would be made to do so with a month of that date. On February 27, you were informed that 318 pages of material had been gathered and would be available upon payment of the requisite fee, and that the Department was "still in the process of reviewing [its] files for responsive records." The 318 pages appear to have been made available on March 4, with certain personal details deleted, and you were informed that the Department was continuing to review its files in order to respond effectively to the remainder of your request. On March 17, "in order to expedite [the] search", you identified the records initially requested that "were not included in the first batch of photocopies." In addition, you requested a variety of other records. Since you received no additional response, on April 9 you appealed with the respect to the records initially requested on January 16 and later requested again on March 17. On the same day, you also appealed separately with respect to the records sought for the first time on March 17 for which there was no acknowledgment of receipt.

I agree with your contention that your requests were constructively denied and that you had the right to appeal on that basis.

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, if it approximates the date to grant or deny access but fails to do so within a reasonable time from that date, 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 my view, your first request was constructively denied, for there are elements of the request that have not resulted in disclosure or to which access has not been denied in writing. It has been held that an agency's repeated statements indicating that the time to grant or deny access will be

extended represents the equivalent of a denial of access (see Bernstein v. City of New York, Supreme Court, New York County, NYLJ, November 7, 1990). With respect to the second request, which was made on March 17, your letter indicates that there had been no response of any sort. If that is so, again, I believe that the request would have been constructively denied and that you would have the right to appeal in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

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

I believe that two of the grounds for denial of access are pertinent to an analysis of rights of access. Section 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 provision quoted above authorizes an agency to withhold communications between or among government officers or employees, depending on the content of those communications. I am unaware of the whether the "Contracting officer" is a City officer or employee. If he or she is not

a City employee, I do not believe that §87(2)(g) would serve as a basis for a denial of access. However, if that person is a City employee, a recommendation that he or she prepared would likely be deniable. Similarly, if the a "Contract Performance Evaluation Report" was prepared by a City employee, those portions consisting of opinions, advice, recommendations and the like could be withheld. On the other hand, remaining portions of the documentation consisting of statistical or factual information would be accessible under subparagraph (i) of §87(2)(g), unless a different exception could be invoked. For instance, site inspection reports or bookkeeping statements would be accessible insofar as they include statistical or factual information. A finding of a violation would represent a final agency determination accessible under subparagraph (iii) of §87(2)(g).

Other records that had not been made available or that were requested on March 17 involve communications emanating from other than government officers or employees or are communications between government officers or employees and persons or entities outside of government. In those instances, §87(2)(g) would not constitute a ground for a denial of access. Certificates of liability insurance and "notices to cure" would likely be transmitted to the Department by a non-governmental entity; a letter from a Parks Department official to the principal of a private entity would not constitute inter-agency or intra-agency material; monthly reports submitted by a concessioner would also fall beyond the coverage of that exception.

The other ground for denial of possible significance, §87(2)(b), states that an agency may deny access to records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." One of the categories of your initial request involved complaints concerning the operation or management of a concession, and it has been advised that those portions of the records that would, if disclosed, identify a complainant may be withheld or deleted to protect that person's privacy. The other category of records in which the cited provision may be pertinent relates to names and resumes of tennis instructors. Insofar as the records include names of persons who were not hired or retained, I believe that their identities or other details that could identify those persons if disclosed may be withheld. However, the names of those hired or retained would, in my view, be public. In addition, it has been held that those portions of a resume indicating that person has met the necessary criteria or qualifications to hold the position must be disclosed [Kwasnik v. City of New York and City University of New York, 262 AD2d 171 (1999)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Allesandro G. Olivieri
Amy Kleitman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14030

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May 12, 2003

Mr. Craig Rose
95-A-7042
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-9199

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

Dear Mr. Rose:

I have received your letter and the attached materials in which you sought assistance in obtaining a document from the Wyoming Correctional Facility. You wrote that the inmate records coordinator responded that she did not have the document.

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

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1403

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May 12, 2003

Mr. Kevin Therrien
01-A-5615
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051-0975

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

Dear Mr. Therrien:

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

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 your ability to view your "prison file", as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 requested records, several grounds for denial may be applicable to an analysis of rights of access.

Section 87(2)(b) of the Freedom of Information Law provides that records may be withheld when disclosure would constitute "an unwarranted invasion of personal privacy." To the extent that disclosure of records would result in an unwarranted invasion of the personal privacy of another, in my opinion, they may be withheld.

Records could also be withheld to the extent that they are compiled for law enforcement purposes and disclosure would interfere with an investigation or reveal non-routine investigative techniques or procedures [§87(2)(e)]. Additionally, records may be withheld if disclosure would endanger the life or safety of any person [§87(2)(f)].

Additionally, §87 (2)(g) enables an agency to withhold records that:

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

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

In regard to your request to view 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.

Lastly, with respect to your request to view records related to doctor visits and bills concerning medical attention received by your ex-wife, §18 of the Public Health Law deals specifically with access to patient records. In brief, that statute prohibits disclosure of medical records to all but "qualified persons." Subdivision (1)(g) of §18 defines the phrase "qualified person" to mean:

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

If you are not a "qualified person", I believe that the medical records of your interest would be exempt from disclosure. To obtain additional information regarding access to patient information, it is suggested that you contact Mr. Peter Farr, NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 12, 2003

Mr. Mark Torra
01-A-0989
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. Torra:

I have received your letter in which you requested assistance in obtaining records from the Rotterdam Police Department. You wrote that you would like to obtain records indicating a police officer's qualification for the use of night vision goggles and the standard operating procedure for the use of such equipment.

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

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

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

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

In short, the records access officer has the authority and duty to "coordinate" an agency's response to requests. In consideration of the foregoing, it is suggested that you submit your Freedom of Information Law request directly to the records access officer for the Rotterdam Police Department.

Second, with respect to your request for an officer's qualifications to use night vision goggles, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Pertinent to an analysis of rights of access is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees, as well as those performing duties for agencies, enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of those persons are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy. In my opinion, if records are in existence which indicate an officer's qualifications for use of the equipment, the records would be available, except to the extent that such records are used to evaluate performance toward continued employment or promotion. In that event, the records would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

Lastly, regarding your request for the standard operating procedure for night vision goggles, based on a recent judicial decision, Capruso v. New York State Police (Supreme Court, New York County, NYLJ, July 11, 2001), I believe that the records in question must be disclosed in great measure, if not in their entirety.

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.

In Capruso, the request involved the "operator's manual for any radar speed detection device used" by the New York State Police and the New York City Police Department. The Division of State Police contended that disclosure would interfere with the ability to effectively enforce the law concerning speeding. Nevertheless, following an *in camera* inspection of the records, a private review by the judge, it was found that the Division could not meet it burden of proving that the harmful effects of disclosure appearing in the exceptions to rights of access would in fact arise.

In its attempt to deny access to the records, the Division relied upon §87(2)(e)(i) and (iv) of the Freedom of Information Law as a means of justifying its denial. Those provisions permit an agency to withhold records that are "compiled for law enforcement purposes" to the extent that disclosure would "i. interfere with law enforcement investigations or judicial proceedings" or "iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Even if that provision is applicable, the court in Capruso determined that a denial of access would not be sustained. The leading decision dealing with law enforcement manuals and similar records detailing investigative techniques and procedures is Fink v. Lefkowitz [47 NY2d 567 (1979)], which was cited in Gould, supra, and] involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade

> detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

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

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

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate.

In consideration the direction given by the state's highest court in Fink, the court in Capruso rejected the contentions offered by the law enforcement agencies and determined that:

> "These arguments fail to establish a casual link as to how release of the information in the manufacturers' operational manual would enable a speeding driver to avoid detection. Similarly, absent from the affidavits is an explanation as to how the knowledge of the testing procedures used by the police to ensure the device is functioning properly would enable such driver to escape detection. Furthermore, the affidavits lack proof as to how the information in the manual would enable the use of a jamming device which could not otherwise be used. Thus, the claim that the release of these manuals would result in drivers engaging in dangerous behavior solely to avoid detection is speculative.

> The State also objects to the release of the State Police Radar and Aerial Speed Enforcement Training Manuals as they contain 'operational and legal considerations.' However, as the Court of Appeals stated in Fink v. Lefkowitz, supra at 571, 'To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement.' The Court explained, the question is 'whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel,' (citations omitted) Id.
>
> Thus, after an in camera review, the City and State have failed to establish that the release of these manuals would allow motorists who are violating traffic laws to tailor their conduct to evade detection."

Based on the foregoing, I believe that the standard operating procedures in question must be disclosed in the context 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

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May 12, 2003

Mr. Mark Nonni
86-A-4888
Hudson Correctional Facility
P.O. Box 576
Hudson, NY 12534-0576

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

Dear Mr. Nonni:

I have received your letter concerning difficulties you have encountered in obtaining the NYS "Division of Parole Master Inventory List."

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

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.

Second, as a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception to that rule may relate to the subject of your inquiry. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

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

While I have no knowledge of whether the Division of Parole maintains a "master inventory list", the "subject matter list" required to be maintained under §87(3)(c) appears to be the record of your interest. I note that the subject matter list is not 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, with respect to your contention that the subject matter list should be provided at no cost, under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy. I point out that there is nothing in that statute pertains to the waiver of fees. Further, in a decision involving a request for a waiver of fees by an inmate who sought records from an office of a district attorney, it was held that an agency may assess a fee in accordance with the Freedom of Information Law, notwithstanding the inmate's status as an indigent person [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)]. Therefore, irrespective of one's status, i.e.,

as a litigant or a poor person, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with its rules promulgated under §87(1)(b)(iii) of that statute.

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

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May 13, 2003

Mr. Alfred J. Chiuchiolo
[redacted]

The staff of the Committee 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. Chiuchiolo:

As you are aware, I have received your letter of April 11, as well as a variety of material relating to it. As I understand the matter, you have attempted without success to obtain records, particularly financial information, pertaining to the Patchogue Center for the Performing Arts, Inc. ("the Center"). Requests have been made under the Freedom of Information Law to that entity, and to the Village of Patchogue.

Based on the materials that you provided and information offered by Mayor Ihne, it does not appear that the Center is subject to the Freedom of Information Law.

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

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

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

Judicial decisions indicate that not-for-profit corporations may be subject to the Freedom of Information Law if the government maintains substantial control over their operations [see e.g., Buffalo News, Inc. v. Buffalo Enterprise Development Corp., 84 NY2d 488 (1994); Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988]. Although the Village owns the theater in which the Center's performances are held, the Center's by-laws indicate that the Center

is largely independent of any Village control and that the Village does not select or oversee the selection of the members of the Center's Board of Directors. The Mayor indicated that the Board of Directors once was the Village Board of Trustees, but that that has not been so for several years, and he emphasized that the Village government does not operate or control the Center. In consideration of these facts, I do not believe that the Center may be characterized as an "agency" or, therefore, that it is subject to the Freedom of Information Law.

That statute, however, is clearly applicable to the Village and its records, and I note that §86(4) defines the term "record" expansively to include:

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

Based on the language quoted above, insofar as the Village maintains documentary materials pertaining to the Center or the Center maintains documentation for the Village, any such materials would in my view constitute Village records that are subject to rights conferred by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Edward A. Ihne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 13, 2003

Ms. Catherine Maye
[redacted]

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

Dear Ms. Maye:

I have received your letter of April 9, which reached this office on April 16.

You referred to a meeting of the Board of Education of the Sewanhaka Central High School District during which "many figures" relating to the development of the District budget "were recited to the public attending the meeting." Because it was difficult to follow the discussion without the documentation containing the figures, you requested copies of "the proposed or working budget from the Board of Education." In response to the request, you were informed by a member of the Board that those records need not be disclosed under the Freedom of Information Law, since, in your words, "the budget was not yet approved and it was therefore inter-agency or intra-agency material."

It is your view that the Board misinterpreted the Freedom of Information Law. I agree with your contention, and 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 the records at issue consist of "intra-agency" materials, due to its structure, the provision dealing with those materials frequently 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..."

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

It is noted that one of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals, the state's highest court, was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is predecisional or that it relates to a document that has not been approved would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

Moreover, 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 State Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted

[see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, §88(1)(d)]. Currently, §87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

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

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

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

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

Further, another decision highlighted that the contents of materials falling within the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, in Ingram v. Axelrod, which was cited by the Court of Appeals in Gould, supra, 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, insofar as the materials at issue consist of "figures" or other statistical or factual information, I believe that they would be available under §87(2)(g)(i) of the Freedom of Information Law. The only exception to that conclusion that would authorize a denial of access would involve the rare instance in which §87(2)(c) might apply. That provision states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." If a proposed expenditure refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, those portions of budget-related records may be withheld.

Lastly, §84 of the Freedom of Information Law contains that statute's statement of intent. That provision states in part that:

> "As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.
>
> "The people's right to know the process of governmental decision-making and to review the documents and statistics leading to

> determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality."

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

From: Robert Freeman
To: Martin Heilweil
Date: 5/14/2003 12:37:34 PM
Subject: Re: RE FOIL: New York State Dept of Health

I do not clearly understand your question. However, the FOIL and discovery under the CPLR are separate and distinct, and the extent to which records must be disclosed often will differ, depending upon which vehicle is used.

Under FOIL, when records are accessible, they are available to any person, irrespective of one's status or interest. When a litigant seeks records under FOIL, he or she has the same rights as any member of the public, and the agency has the same ability to deny access as it would if the same records were sought by any member of the public. That a person is a litigant neither enhances nor diminishes his or her rights under FOIL [see Farbman v. New York City, 62 NY2d 75 (1984)]. In contrast, when records are sought via discovery under the CPLR, disclosure is dependent on one's status as a litigant, and he or she ordinarily may obtain records that are material and necessary to the proceeding; neither rights conferred by FOIL nor the grounds for denial of access appearing in that statute are pertinent.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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May 14, 2003

E-MAIL

TO: Bill 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 facts presented in your correspondence.

Dear Mr. Hecht:

I have received your inquiry concerning an agency's obligation to provide data and the fee that it may charge when the data are made available.

Specifically, you wrote as follows:

> "If the Cayuga County Data Processing department has already compiled public data for a private company and I request the same data and format can they still charge me for the data? In past communications with your office I was always under the impression that if one asked for data in a format they usually keep it then all they could charge is the cost of the disk and not the time to compile the data. Thus can they charge for the same data and compilation over and over again?"

The County's computer systems technician indicated with respect to a particular request that you made that "[t]he data you are requesting is in a special format. There is no existing software which extracts just the specific fields you are requesting."

It appears that two issues relate to your inquiry. First, as a general matter, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency, such as the County, is not required to create a record in response to a request. The question is whether acceding to a request would involve creation of a record. And second, when records or data are generated by means of electronic information systems, the question involves the fee that may be charged. In this regard, I offer the following comments.

If indeed data has already been prepared and disclosed, an agency would not in my view be creating a new record if a request is later made for the same record. In that situation, pursuant to §87(1)(b)(iii), the "charge" for a copy of the same record, other than a photocopy, would be based on the actual cost of reproduction.

As you are aware, the Freedom of Information Law is applicable 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, for information stored electronically often 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 may be applicable with respect to information maintained electronically in the context of your requests.

In NYPIRG, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'

> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential

> information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

Assuming that your request involves similar considerations, in my opinion, responses to those requests, based on the precedent offered in NYPIRG, must involve the disclosure of data stored electronically for which there is no basis for a denial of access.

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

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

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, 226 AD 2d 339(1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations

as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...

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

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

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

(a) There shall be no fee charged for the following:
(1) inspection of records;
(2) search for records; or
(3) any certification pursuant to this Part" (21 NYCRR 1401.8)."

Based upon the foregoing, it is likely that a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or disk) to which data is transferred.

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

I hope that I have been of assistance.

RJF:tt

cc: Frederick R. Lewis

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May 15, 2003

Ms. Bronia Lewin
[redacted]

The staff of the Committee 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. Lewin:

I have received your note in which you asked that I comment with respect to a proposal to develop a new policy to be considered by the Village of Tuckahoe Board of Trustees.

In a memorandum addressed to the Board of Trustees, the Village Attorney wrote that:

> "While it has been the policy of the Village to permit open access to building department and assessment records, it has been brought to my attention that access to such records may present a danger to persons and property. Detailed construction and site plans and related information as to building systems are located in the building department and assessment files. In this era of heightened security awareness, disclosure of such information relating to the numerous manufacturing facilities, offices and residences in Tuckahoe should be limited."

In a separate memorandum sent to me, it was stated that:

> "The Village intends to evaluate its records and adopt a policy relating to access to the records. Pending a full evaluation and adoption of a new policy, the following guidelines will be in effect:
>
> "Records and files of the Building Department and Assessor will only be made available for review upon request by
>
> 1. The owner of the property. If the owner is a corporation, partnership or other legal entity, such person must show evidence of his or her status;

> 2. A person representing the written consent of the owner to access the records; and
> 3. A person including but not limited to authorized representatives of title or appraisal companies, showing evidence of consent of the owner to access the records."

From my perspective, the guidelines are inappropriate and inconsistent with law. In this regard, I offer the following comments.

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

Second, it has been held that 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)].

Third, 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).

Next, 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."

I note, too, that it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. 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.

Based on the foregoing, I believe that the "guidelines" relating to disclosure are invalid insofar as they are inconsistent with the Freedom of Information Law. This is not to suggest that

some aspects of the records at issue may not be withheld, but rather that the Freedom of Information Law and other statutes govern the ability of the Village to withhold records, not the guidelines.

For instance, the provision cited by the Village Attorney may be applicable, depending on the nature of the records and the effects of disclosure. That provision, §87(2)(f), 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.

If a person seeks the building plans concerning my house, which is not unique, I do not believe that there would be any basis for a denial of access. If, however, the plans concerning a bank include detailed information concerning its alarm or security system, disclosure could endanger life or safety and may be withheld to that extent. However, to suggest that all building plans are confidential or restricted is, in my opinion, inconsistent with law.

Assessment records have long been available, and an assessment roll indicating the location, ownership and assessed value of real property must be disclosed, not only pursuant to the Freedom of Information Law, but also §516 of the Real Property Tax Law, irrespective of its intended use. To restrict disclosure in the manner suggested by the guidelines would, in my view, be inconsistent with law. Related records, however, might justifiably be withheld. When a senior citizen seeking an exemption submits a federal tax form as a means of indicating his or her qualification for an the exemption, it has been advised that the form may be withheld pursuant to §87(2)(b) of the Freedom of Information Law on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." When a private company submits detailed financial information reflective of income and expenses relating to commercial property, §87(2)(d) might enable an agency to withhold portions of the documentation, those portions which if disclosed "would cause substantial injury to the competitive position" of the commercial enterprise. That provision might be asserted with respect to some records of that nature, but not all, and a general restriction regarding all such records would, again, be inconsistent with law.

In short, I believe that the guidelines, if enforced, would frequently result in failures to comply with law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Les Maron, Village Attorney

From: Robert Freeman
To: gordonl@co.schoharie.ny.us
Date: 5/16/2003 9:03:26 AM
Subject: Dear Ms. Gordon:

Dear Ms. Gordon:

I have received your inquiry in which you asked whether job applications "with information regarding qualifications for a position [are] accessible (assuming the personal information is withheld)."

In this regard, §89(7) of the Freedom of Information Law indicates that an agency, such as the County, is not required to disclose the name or address of an applicant for appointment to public employment; among the applicants, the only name or names that must be disclosed would be those of the person or persons who have been hired. That being so, if a request is made to gain access to applications for the purpose of comparing the qualifications of applicants, I believe that you have the authority to delete any portion of the applications which, if disclosed, would identify or tend to identify an applicant. The deletions would be made in accordance with §89(2)(b), which provides that you may do so when disclosure would constitute "an unwarranted invasion of personal privacy."

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

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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May 19, 2003

Mr. Vincent Oliveri
[redacted]

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

Dear Mr. Oliveri:

I have received your letter in which you sought assistance and an advisory opinion concerning your efforts in gaining access to information from or pertaining to the Long Island Power Authority (LIPA).

By way of background, you requested the service repair log of a named repairman "who made repairs to the electrical wire connectors servicing [your] home." When you were contacted by LIPA customer service representatives, on two occasions, they read the repair log entry to you. However, despite having requested it under the Freedom of Information Law, LIPA has not made the record containing the entry available to you. You added that you would also like to obtain "characteristic information on the electrical distribution system which services [your] home and asked for the name of the agency to which LIPA reports, as well as information concerning its public meetings.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, including those of a public authority, 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, the repair log or similar document would, in my view, clearly constitute a record that falls within the coverage of the Freedom of Information Law.

Second, 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 this instance, since the entry was read to you, I believe that LIPA would have waived its ability to deny access to that portion of a record. Even if that were not so, I believe that the entry would be accessible. Pertinent 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) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. If I understand the situation accurately, the entry in the repair would consist of factual information accessible under subparagraph (i) of §87(2)(g).

With respect to the "characteristic information on the electrical distribution system which services your home", if that information exists in the form of a record or records and was prepared by LIPA, again, it would constitute intra-agency material that would appear to be factual in nature, and, therefore, would be accessible, unless a different ground for denial could justifiably be asserted. If any such record or records were not prepared by LIPA, §87(2)(g) would not apply.

Since I am unfamiliar with the nature or content of "characteristic information", I note that in some instances, depending on the degree of detail and the effects of disclosure, §87(2)(f) may be relevant in consideration of rights of access to what has become known as "critical infrastructure information." That provision permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person."

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)].

Next, the governing body of LIPA in my view clearly constitutes a "public body" required to comply with the Open Meetings Law (Public Officers Law, §§100-111). In brief, meetings of public bodies must be preceded by notice of the time and place given to the news media and by means of posting, and they must be held open to the public, unless there is a basis for entry into a closed or "executive" session.

Lastly, I know of no agency that has general oversight concerning the operations or day to day functioning of LIPA. However, pursuant to §1020 of the Public Authorities Law, it is my understanding that the Public Authorities Control Board reviews and determines certain matters concerning the fund sufficiency of LIPA bonds and provides approval regarding other than routine projects involving a cost above one million dollars.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Stanley Klimberg

STATE OF NEW YORK
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May 19, 2003

Mr. Raymond Jones
02-A-1820
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Jones:

I have received your letter of May 14 in which you appealed a denial of access to records.

In this regard, please be advised that the Committee on Open Government is authorized to provide advice and opinions concerning public access to government information, primarily in relation to the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records.

The provision 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."

If the denial of your request was made by an officer or employee of the Department of Correctional Services, I note that the person designated by the Department to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that the foregoing clarifies 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-14042

From: Robert Freeman
To: ltras@dmv.state.ny.us
Date: 5/19/2003 4:30:00 PM
Subject: Hi Ida - -

Hi Ida - -

If you don't have the record, technically, I wouldn't consider it a denial. In my view, a denial of access occurs when an agency has the record but chooses to withhold it. In that instance, the denial of access to the record may be appealed. However, I agree with your inference - - that a response indicating that no record exists does not constitute a denial of access and, therefore, is not appealable.

Robert J. Freeman
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May 20, 2003

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 information presented in your correspondence, unless otherwise indicated.

Dear Mr. Claasen:

I have received your letter of April 22 and the correspondence attached to it. You have sought assistance in obtaining " the names and street addresses of property owners who are getting loans, grants and or mortgages from the Huntington Community Development Agency." You indicated that you are particularly interested in knowing which "real estate businesses or individuals are getting in taxpayer dollars from the Huntington Community Development Agency and for what property."

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

From my perspective, the decision rendered in Tri-State Publishing Co. v. City of Port Jervis (Supreme Court, Orange County, March 4, 1992) serves as useful precedent. The decision includes excerpts from an advisory opinion that I prepared in 1991, and I believe that the court essentially agreed with the thrust of that opinion. Because tenants in section 8 housing must meet an income qualification, it has been consistently advised that insofar as disclosure of records would identify tenants, they may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Conversely, following the deletion of identifying details pertaining to tenants, the remainder of the records, i.e., those portions indicating identities of landlords, contractors and others, as well as the amounts that are paid, must be disclosed.

On occasion, concern has been expressed 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. I note that the court wrote 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 attempting 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.

In my opinion, the identity of a landlord, a real estate professional or other person or entity acting in a business capacity must be disclosed, for payments are made by governmental entities to those persons or entities, irrespective of their income and financial standing. Other details, however, which if disclosed would make a tenant's identity reasonably ascertainable, could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce Grant

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May 22, 2003

Mr. Steven P. Breed
[redacted]

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

Dear Mr. Breed:

I have received your letter of April 28 and the materials attached to it.

The correspondence indicates that you requested "all billing invoices...sent to the Town of Cuyler between February 2, 2002 and January 31, 2003"; another request was made on March 5 for "legal billing invoices" sent by a law firm covering the same period. As of the date of your letter to this office, it appears that none of the records sought had been disclosed, and you asked that I "inform the Cuyler Town Board of what the law reads..."

In this regard, I offer the following comments.

First, in both requests, you referred to the "Freedom of Information Act, 5 U.S.C. Sec. 552." That is the federal Freedom of Information Act, which applies only to federal agencies. The pertinent statute in this instance is the New York Freedom of Information Law, which applies to entities of state and local government in New York. Further, since you referred to fees, I note that the federal Act includes provisions concerning fee waivers; the New York Freedom of Information Law contains no equivalent provisions. Under §87(1)(b)(iii) of the Freedom of Information Law, an agency, such as a town, may charge up to twenty-five cents per photocopy up to nine by fourteen inches.

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)].

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.

Invoices are typically available, for none of the grounds for denial would ordinarily apply. However, portions of equivalent records involving billing or involving an attorney or law firm might be withheld.

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.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 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.

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

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May 22, 2003

Mr. William S. Palmer, 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. Palmer:

I have received your letter April 29 and the materials attached to it. You have sought assistance concerning a denial of your request for certain audits of the Evans Mills Fire Department. The request was denied on the ground that the Department is incorporated and is " a non-profit volunteer organization." You were also informed by the President of the Department that "an outside audit" has never been prepared.

In this regard, I offer the following comments.

First, as a general matter, when the Freedom of Information Law is applicable, it pertains to existing records [see §89(3)]. Therefore, if no audits exist or are maintained by the Department, the Freedom of Information Law would not apply.

However, records that are maintained by the Department are, based on a decision rendered by the state's highest court, subject to rights of access conferred by the Freedom of Information Law.

I note that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for

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

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

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to be accountable. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court stated that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:

> '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'

> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function...

> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

In sum, based on judicial decisions cited above, I believe that Department is subject to the requirements of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Marcus Burks, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 22, 2003

Mr. John J. O'Connor
O'Connor Investigation Service, Inc.
6 Elm Tree Place
Stamford, CT 06906

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

Dear Mr. O'Connor:

I have received your letter of April 25 in which you referred to requests made under the Freedom of Information Law to the Dutchess County Sheriff on December 14 and April 3. Since neither was answered, you asked: "Who do I complain to" other than a court.

In this regard, this office was created by the enactment of the Freedom of Information Law primarily for the purpose of offering advice and opinions pertaining to that statute. While the opinions rendered by the Committee on Open Government are not binding, it is hoped that they are educational and persuasive, and that they serve to encourage compliance with law.

In consideration of the situation that you described, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency, such as a county, is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person. While I believe that the person in receipt of your requests should have responded in a manner consistent with the Freedom of Information Law or forwarded the requests to the records access officer, it is suggested that you might contact the clerk of the County Legislature to ascertain the identity of the records access officer for the purpose of determining the status of your requests or perhaps resubmitting the requests.

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

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

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

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, a police blotter or its equivalent should be disclosed [see Sheehan v. City of Binghamton, 59 AD2d 808 (1977)]. Similarly, portions of records identifying law enforcement officers who responded to an incident should, in my view, generally be accessible, unless records have been sealed pursuant to §160.50 of the Criminal Procedure Law because charges were dismissed in favor of an accused.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dutchess County Sheriff

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May 22, 2003

Mr. Chris 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.

Dear Mr. Pawelski:

I have received your letter of April 24 in which you questioned the accuracy of a contention that "Cornell University is not as a general matter subject to FOIL."

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."

In 1999, the Court of Appeals, the state's highest court, found that the records at issue in that case maintained by Cornell University were not subject to the Freedom of Information Law (Stoll v. New York State College of Veterinary Medicine at Cornell University, 94 NY2d 162). However, the Court of Appeals did not determine that all records maintained by or for Cornell fall beyond the coverage of the Freedom of Information Law.

In considering the scope of the term "agency" in relation to Cornell, the Court of Appeals in Stoll indicated that SUNY is an agency, but that "[w]hether Cornell's statutory colleges also qualify as agencies of the State for FOIL purposes is an open question" (id., 166). Although the Court stated that "the law is settled that, for a number of purposes, the statutory colleges are *not* state agencies"(id.), it was also found that "[t]he statutory colleges are, however, subject to certain oversight by the SUNY Board of Trustees" (id., 167). The Court referred to the "hybrid statutory character of the colleges", stating that "[a]t issue is the threshold question whether the statutory

colleges are subject to FOIL in the first place" and that "[t]his question cannot be answered by reference to broad classifications, but rather turns on the particular statutory character of these *sui generis* institutions" (id.).

The request in Stoll involved a disciplinary record relating to a member of the faculty of one of the statutory colleges, and the Court found that discipline of employees is a university wide function, not a function special or unique to the statutory colleges. Specifically, it was found that:

> "The principle that resolves the particular quandary here is that the Legislature has chosen to vest Cornell–the private institution–with discretion over the 'maintenance of discipline' at the four statutory colleges (*see*, Education Law § 5711[2]; § 5712[2]; § 5714[3]; § 5715[6]). In this respect, there is no statutory provision for oversight by the SUNY Trustees, or for any appeal to the SUNY Board. Consistent with that statutory mandate, Cornell has implemented a single system for administering discipline in the statutory colleges and in its private colleges. Indeed, as is manifest from petitioner's own FOIL request, there is a University-wide Campus Code of Conduct and a Judicial Administrator to whom all such complaints are directed. Thus, the disciplinary records of the statutory colleges and private colleges are all held by the same private office of the University" (id., 167-168).

It was advised in an opinion rendered in 2000 that disciplinary records maintained by Cornell are not subject to the Freedom of Information Law does not necessarily lead to the conclusion that all records of or pertaining to the statutory colleges fall beyond the scope of that statute. On the contrary, at the conclusion of its discussion, the majority wrote that:

> "...we underscore that, by this decision and analysis, we do not 'rule that the entire administration of the statutory colleges is not subject to FOIL' (dissenting opn., at 169, – N.Y.S.2d at –, 723 N.E.2d at 70). We hold only that, given the unique statutory scheme applicable here, Cornell's disciplinary records are not subject to FOIL disclosure. Other, more public aspects of the statutory colleges may well be subject to FOIL, but we need not and do not reach such issues today" (id., 168).

In so stating, I believe that the Court of Appeals left the door open to a finding that some records of or pertaining to the statutory colleges are subject to rights of access conferred by the Freedom of Information Law, particularly in those situations in which records relate to or involve "State direction or oversight" (id.,167).

"State direction and oversight" are described in §5712 of the Education Law concerning the College of Agriculture and Life Sciences. Subdivision (1) states in part that the College "shall continue to be under the supervision of the state university trustees." Additionally, subdivision (3)

provides that "[t]he state university trustees shall maintain general supervision over the requests for appropriations, budgets, estimates and expenditures of such college."

"Supervision", in my view, is the equivalent of "oversight", and based on Stoll, it appears that the Court of Appeals inferred that the functions, and therefore the records reflective of those functions, carried out by the statutory colleges under the supervision of the SUNY trustees, may be agency records subject to the Freedom of Information Law.

My opinion was later confirmed in Alderson v. New York State College of Agriculture and Life Sciences (Supreme Court, Tompkins County, May 18, 2001) and later affirmed unanimously by the Appellate Division (__ AD2d __. Third Dept., November 7, 2002). In that case, the issue involved records maintained by an agricultural experiment station operated by the College of Agriculture and Life Sciences, one of the statutory colleges. In reaching its conclusion, it was found that:

> "...in contrast to Matter of Stoll v New York State Coll. of Veterinary Medicine at Cornell Univ. (supra), where the Legislature specifically authorized Cornell to maintain discipline for the statutory colleges as part of its administration, a 'private' activity, the legislative scheme surrounding the creation of the statutory colleges involved bears significant indicia of a public function subject to state oversight through the Commissioner of Agriculture. We, therefore, conclude that the information sought by petitioner falls within the 'more public aspects of the statutory colleges' (Matter of Stoll v New York State Coll. of Veterinary Medicine at Cornell Univ., supra, which is subject to FOIL."

In short, while many records of Cornell University fall beyond the coverage of the Freedom of Information Law, others, in accordance with the preceding analysis, are subject to rights conferred by that statute.

Next, you asked whether the "wilful destruction of records [is] a violation of the Freedom of Information Law." In this regard, records are routinely and legally destroyed; in my view, a "violation" occurs when a record is destroyed that has been requested under the Freedom of Information Law in order to prevent the applicant for the records from gaining access to it.

Section 89(8) of the Freedom of Information Law and §240.65 of the Penal Law include essentially the same language. Specifically, the latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record

even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, when an agency cannot locate a record that must be maintained, or a record is destroyed prior to receipt of a request for that record under the Freedom of Information Law.

I note that the term "violation" is defined in §10.00(3) of the Penal Law to mean "an offense, other than a 'traffic infraction', for which a sentence to a term in excess of fifteen days cannot be imposed." Additionally, §80.05(4) of the Penal Law states that: "A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding two hundred fifty dollars." Based on the foregoing, it appears that a person found guilty of a violation may serve up to fifteen days in jail and/or be fined up to $250.

Lastly, the only opinion prepared by this office that is addressed to you, other than this response, is attached.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Glenn J. Applebee

STATE OF NEW YORK
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May 22, 2003

Mr. Barton D. Graham
[redacted]

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

Dear Mr. Graham:

I have received your letter April 23, as well as the materials attached to it.

You indicated that your request for the "subject matter list" referenced in §87(3)(c) of the Freedom of Information Law was received by the Elmira City School District on March 6. The receipt of your request was acknowledged, and you were informed that a further response would be given on or about May 1. In consideration of the foregoing, you raised the following questions:

> "Since this is information that is required to be maintained anyway, does this seem reasonable? What is the standard in this fact circumstance? Doesn't this raise the perception that the district has not been in compliance with the statute?"

In this regard, first as a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception that rule relates to the subject of your inquiry. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

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

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

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. It is suggested that you ask to review the retention schedule applicable to the District. 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..."

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, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, or if the estimated dated is unreasonable, which I believe to be so in the context of your inquiry, 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: Robert S. Gosden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3634
FOIL-AO-14049

Committee Members

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May 23, 2003

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 letter in which you raised a series of questions relating to open government laws and their implementation by the Kingston City School District.

First, you wrote that you appealed a denial of access to records on February 10, but that you received no response as of the date of your letter to this office. Pertinent is §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

I note that it has been held that an agency's failure to determine an appeal within the statutory time may be deemed a denial of the appeal, that the person denied access is deemed to have exhausted his or her administrative remedies, and that he or she may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)].

Second, you referred to a "'student survey' given by the district to its middle and high school students." Although the survey was apparently made available to parents and for your brief inspection, you were denied access and wrote that you were informed, in your words, that "releasing this survey would 'jeopardize its validity and reliability.'"

In this regard, the Freedom of Information Law is applicable to all records maintained by or for an agency, such as a school district, and that §86(4) defines the term "record to mean:

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

In consideration of the language quoted above, the survey would constitute a "record", irrespective of its validity or reliability, that is subject to rights of access.

So long as the survey does not identify any student, I believe that it would be accessible. From my perspective, assuming that the survey does not include information that is personally identifiable to a student, if it was made available to parents, it should be available to anyone. As early as 1976, it was held that records accessible under the Freedom of Information Law should be made equally available to any person, without regard to one's status or interest [Burke v. Yudelson, 51 AD2d 673; see also Farbman v. New York City, 62 NY2d 75 (1984)]. Further, when records are available for inspection, they are also available for copying. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available for inspection and copying, except to the 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 the survey may identify a student, relevant is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In the context of your inquiry, insofar as disclosure of the records in question would identify a student, I believe that they must be withheld. A statute that exempts records from disclosure is the Family Education Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as "FERPA." In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or
(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon direction provided by FERPA and the regulations that define "personally identifiable information", references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

On the other hand, if the survey does not identify students, it would appear to be accessible, for none of the grounds for denial access would appear to be accessible. I note that "statistical or factual tabulations or data" contained within internal governmental communications are accessible under paragraph (i) of §87(2)(g).

Third, with respect to the disclosure of information that is characterized as confidential, 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)].

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 indicated earlier, FERPA generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district

employees would be prohibited from disclosing, because a statute requires confidentiality. In other situations, even though a record *may* be withheld or information is derived from an executive session, I do not believe that there would be a prohibition regarding disclosure.

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.

Lastly, you raised questions relating to the District's proposed budget. The key provision in my view is §1716 of the Education Law, entitled "Estimated expenses for ensuing year." Subdivision (1) of that provision requires that the Board present "a detailed statement in writing", specifying the amounts needed for school purposes in the ensuing year. That statement must be made available at least fourteen days prior to the vote on the budget. However, in consideration of the definition of "record" cited earlier, I believe that the proposed budget and related records are accessible under the Freedom of Information Law as soon as they exist.

I note that subdivision (4) requires that the proposed budget "shall be presented in three components: a program component, a capital component and an administrative component which shall be separately delineated...." and states in part that:

"The program component shall include, but need not be limited to, all program expenditures of the school district, including the salaries and benefits of teachers and any school administrators or supervisors who spend a majority of their time performing teaching duties, and all transportation operating expenses. The capital component shall include, but need not be limited to, all transportation capital, debt service, and lease expenditures; costs resulting from judgements in tax certiorari proceedings or the payment of awards from court judgments, administrative orders or settled or compromised claims; and all facilities costs of the school district, including facilities lease expenditures, the annual debt service and total debt for all facilities financed by bonds and notes of the school district, and the costs of construction, acquisition, reconstruction, rehabilitation or improvement of school buildings, provided that such budget shall include a rental, operations and maintenance section that includes base rent costs, total rent costs, operation and maintenance charges, cost per square foot for each facility leased by the school district, and any and all expenditures associated with custodial salaries and benefits, service contracts, supplies, utilities, and maintenance and repairs of school facilities."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Bernard A. Feeney
Carol A. Bell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14050

41 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, 2003

Mr. Julio Arce
92-A-9982
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Arce:

I have received your letter in which you indicated that you have made requests under the Freedom of Information Law, but that no replies have been sent to you. Consequently, it appears in your letter that you have requested the records from this office.

In this regard, please note that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not maintain possession or control of records. Therefore, I cannot make the records of your interest available to you.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

Since the records are maintained at a correctional facility, I point out that the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14051

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

May 27, 2003

Mr. Joseph M. Aragon
President
ProServe Corporation
985 Tabor Street
Golden, Colorado 80401

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

Dear Mr. Aragon:

As you are aware, I have received your letter and the materials relating to it. You have sought my views concerning the accountability of the Niagara Falls Bridge Commission ("the Commission") and the status of that entity under statutes pertaining to public access to government records.

By way of background, the Commission was created by means of the approval of a Joint Resolution of Congress in 1938 and in Section 1 was conferred with the authority to " purchase, maintain, and operate all or any existing bridges across the Niagara River, subject to the conditions and limitations contained in this joint resolution and subject to the approval of the proper authorities in the Dominion of Canada." Section 4 states in part that the bridge constructed under the authority of the Joint Resolution "shall be deemed an instrumentality for international commerce authorized by the Government of the United States." Section 7 indicates that the Commission consists of eight members, four appointed by the Governor of New York, and four by "the proper authorities of the Dominion of Canada or of the Province of Ontario."

Although consent was given to the Commission by the proper Canadian authorities to carry out its duties and engage in projects, it does not appear to be an instrumentality of any Canadian government, and no legislation or action analogous to the Joint Resolution of Congress has ever been taken by a Canadian government. That being so, while the national government of Canada and the provincial government of Ontario participate in the operation of international bridges and appoint four members to the Commission, the Commission does not appear to be a Canadian governmental entity.

With respect to the disclosure of government records, the federal Freedom of Information Act (5 USC §552) pertains to records of federal agencies; the New York Freedom of Information Law

(Public Officers Law, Article 6, §§84-90) pertains to records of entities of state and local government in New York. The latter 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 my understanding that the Commission was jointly operated by New York and Ontario, it was advised approximately two years ago that it is not an "agency" required to comply with the New York Freedom of Information Law. In short, New York cannot impose its laws beyond its borders, and reference was made to a decision involving a bi-state agency, Metro-ILA Pension Fund v. Waterfront Commission of New York Harbor (Supreme Court, New York County, NYLJ, December 16, 1986), in which it was held that "[a]n interstate agency is created by interstate compact, and New York may not impose its preferences with respect to freedom of information on the other party to the compact." Therefore, it was held that "the Waterfront Commission is not an 'agency' subject to New York's Freedom of Information Law." Based on my reliance on incomplete or inaccurate information, it was suggested that the Commission and its records fall beyond the coverage of the state's Freedom of Information Law.

It is now my understanding, however, that no unit of government in Canada exercises control, other than through the designation of four members of the Commission. Further, and more importantly, I was unaware when the opinion was prepared that the Joint Resolution was amended via the enactment of the H.R. 2950, the "Intermodal Surface Transportation Efficiency Act of 1991." Section 1070 of that enactment contains modifications to the Commission's charter, including paragraph (c) of subdivision (2) of that provision, which states that:

> "The Commission shall be deemed for purposes of all Federal law to be a public agency or public authority of the State of New York, notwithstanding any other provision of Law."

If indeed the Commission can be characterized as a public authority of the State of New York, since the definition of "agency" cited above makes specific reference to public authorities, the Commission would constitute an agency required to give effect to the New York Freedom of Information Law.

Lastly, Section 5 of the Joint Resolution included a "freedom of information" provision when it was adopted in 1938, for its language includes the following requirement imposed upon the Commission:

> "An accurate record of the cost of the bridge and its approaches, the expenditures for maintaining, repairing, and operating the same, and of the daily tolls collected shall be kept and shall be available for the information of all persons interested."

Based on the foregoing, even if the Freedom of Information Law does not apply, and it appears that it does, the Commission would nonetheless be obligated by its enabling legislation to disclose records reflective of expenditures involved in the operation of its facilities.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Niagara Falls Bridge Commission
Thomas Garlock
James C. Roscetti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14052

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May 27, 2003

Ms. Martha S. Offerman
Town Clerk
Town of Oyster Bay
Town Hall
54 Audrey Avenue
Oyster Bay, NY 11771-1592

The staff of the Committee on 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. Offerman:

I have received your letter in which you indicated that "many town officials have repeatedly requested a copy of [y]our senior citizen housing list from the Department of Intergovernmental Affairs", but that the Department has not responded. You also wrote that, as Town Clerk, you "FOILed for this information and have not received a response", and you have sought guidance in the matter.

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

Second, although the Department of Intergovernmental Affairs may have physical possession of the record at issue, I do not believe that it has legal custody or control of the record. As you are likely aware, subdivision (1) of §30 of the Town Law states that the town clerk "[s]hall have the custody of all the records, books and papers of the town" (emphasis added). Therefore, irrespective of where in the Town records may be kept, I believe that they are in your legal custody as Town Clerk. Additionally, consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

Third, the failure to share the records or to inform the clerk of their existence may effectively preclude you from carrying out your duties as records management officer, as well as your responsibilities if you have been designated as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if you, as records access officer, cannot obtain Town records, you 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.

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

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

As such, the Town Board has the duty to promulgate rules and ensure compliance. Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. As part of that coordination, I believe that other Town officials and employees are required to cooperate with the records access officer in an effort to enable him or her to carry out his or her official duties.

In this instance, again, regardless of their physical location, I believe that all Town records fall within the scope of your legal custody. If the Department of Intergovernmental Affairs fails

recognize its role in the matter or cooperate with you to enable you to carry out your duties, it is suggested that you bring the matter to the Town Board.

In an effort to enhance understanding of applicable law, a copy of this opinion will be forwarded to the Department of Intergovernmental Affairs.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Department of Intergovernmental Affairs

FOIL-AO-14053

From: Robert Freeman
To: Molly English
Date: 6/3/2003 8:41:55 AM
Subject: Re: f11092

Hi - -

If five business days have passed without having received a response, it has been suggested that the applicant phone the agency to ascertain the status of the request. If the response is not in the mail or immediately forthcoming, he or she should ask for the name of the person whom an appeal of a denial of access may be made. In short, if the agency fails to respond within the statutory period of five business days, the request may be considered to have been denied, and the applicant may appeal to the head or governing body of the agency, or a person designated to determine appeals. The appeals person or body has ten business days to determine the appeal by granting access to the records or fully explaining in writing the reasons for further denial of access.

Please call if you need additional detail or information.

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-14054

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

June 3, 2003

Mr. David Cole
[redacted]

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

Dear Mr. Cole:

I have received your letter of May 5. As in the case of previous correspondence, you raised questions relating to your requests for certain records that may have been prepared when you were in custody.

Having reviewed my detailed response to you of April 29, I do not believe that I can add commentary of substance to it. In short, I am unaware of whether or the extent to which records were prepared or the means by which they are maintained. It is reiterated that the Freedom of Information Law pertains to existing records; if records no longer exist because they were legally discarded, that statute would not apply.

With respect to §89(8) of the Freedom of Information Law and §240.65 of the Penal Law which include essentially the same language, the latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, when an agency cannot locate a record that must be maintained, or when a record has legally been destroyed in accordance with their records retention schedule.

That statute indicates that unlawful prevention of public access to records is a violation. The term "violation" is defined in §10.00(3) of the Penal Law to mean "an offense, other than a 'traffic infraction', for which a sentence to a term in excess of fifteen days cannot be imposed." Additionally, §80.05(4) of the Penal Law states that: "A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding two hundred fifty dollars." Based on the foregoing, it appears that a person found guilty of a violation may serve up to fifteen days in jail and/or be fined up to $250.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1405S

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

June 3, 2003

E-Mail

TO: Julie G. Denton <jgdenton@mgglaw.com>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Denton:

As you are aware, I have received your letter of May 12.

You wrote that you serve as counsel and a member of the Board of Trustees of the Jervis Public Library in Rome ("the Library"). Because it is an association library, it has been advised that it is not subject to the Freedom of Information Law. You indicated, however, that the City of Rome funds a substantial portion of the Library's budget, and that the Library forwards financial statements to the City. The City has determined and the Committee's Assistant Director has verbally advised that those records are subject to the Freedom of Information Law. In relation to the foregoing, you wrote as follows:

> "...what, if any, effect is had by the fact that the Library stamps 'confidential' the envelope in which the statements are sent to City Hall. We thought this stamp would mean the City would have to contact Jervis if a FOIL request were received, for purposes of determining whether answering the request would violate the confidentiality of a particular document or whether Jervis was willing to waive confidentiality in that particular instance.
>
> "If the confidential stamp has no such meaning, is there any way Jervis can ensure it will be contacted when a FOIL request is made at City Hall? Is there any way to protect the information in the financial statements, short of failing to provide it in the first place?"

In this regard, first, I believe that any record maintained by or for the City falls within the coverage of the Freedom of Information Law. Section 86(4) of that statute defines the term "record" expansively to include:

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

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Second, based on several judicial decisions, an assertion, a request for or a promise of confidentiality, unless it is based upon a statute, is generally meaningless. When confidentiality is

conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion or promise of confidentiality, without more, would not in my view serve to enable an agency to withhold a record.

Lastly, while the City could agree to inform the Library when a request is made for records transmitted by the Library, I do not believe that the City would be obliged to do so.

I hope that I have been of assistance.

RJF:jm

cc: City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14056

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

June 3, 2003

Ms. Cheri Collins
[redacted]

The staff of the Committee 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. Collins:

I have received the materials that you forwarded, apparently on behalf of Ms. Sandra Keenan. As I understand the matter, an incident occurred when Ms. Keenan returned to her job with Allegany County, and she requested records from the County pertaining to the incident. The County denied access, citing §87(2)(g) of the Freedom of Information Law. You appealed the denial, and the initial determination was affirmed.

In this regard, first, when a person is denied access to records, he or she has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

If a denial of an initial request is affirmed following an appeal, or if an agency fails to determine an appeal within ten business day of the agency's receipt of the appeal, the person denied access may seek judicial review of the denial of access by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

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, I believe that they fall within the scope of §87(2)(g), the provision cited as the basis for a denial of access. While I am unfamiliar with the contents of the records, due to the structure of that provision, I emphasize that it frequently requires disclosure of portions of records. 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 sum, the contents of records falling within §87(2)(g) determine the extent to which inter-agency and intra-agency materials may be withheld. If indeed the records sought are consistent with the description of their content offered by the County's appeals officer, the denial of access would, in my view, be consistent with law. However, if portions of the records consist of statistical or factual information, I believe that they must be disclosed, unless a different exception may properly be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Daniel J. Guiney
John E. Margeson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3637
FOIL-AO-14057

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June 3, 2003

Ms. Kathy Snyder
[redacted]

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

Dear Ms. Snyder:

As you are aware, I have received your letter of May 7. You wrote that the Village of Brockport "hired a consultant for environmental matters approx one and a half years ago", but that "[t]his employment was never approved at an open meeting." Additionally, although efforts have been made to obtain the consultant's "resume and/or qualifications", the denials of those requests indicate that the Village does "not maintain such a record or that such a record does not exist."

In this regard, I offer the following comments.

First, assuming that only the Village Board of Trustees was empowered to hire, retain or enter into a contract with the consultant, I believe that it could validly have done so only at a meeting of the Board. The meeting would have been required to have involved the convening of the Board, and an affirmative vote of a majority of its total membership. When action is taken in public, the Open Meetings Law, §106, requires that minutes reflective of the nature of the action taken, the date and the vote of each member be prepared and made available to the public within two weeks. If action was taken during an executive session, minutes consisting of the same information in this instance would have been required to have been prepared and made available within one week.

If action was taken by the Board is private, in violation of the Open Meetings Law, and if no minutes reflective of this action taken were prepared, any aggrieved person would have the ability to challenge the action pursuant to §107 of the Open Meetings Law by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. In such a proceeding, a court would have discretionary authority, upon good cause shown, to nullify the action taken in contravention of the Open Meetings Law.

Second, with respect to a resume or similar or related records, I note that the Freedom of Information Law is expansive in its coverage. That statute is applicable to all agency records, such as those of a Village, regardless of the physical location of the records. Section 86(4) of 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, if a record is transmitted to a Village official in conjunction with that person's duties, I believe that it would fall within the coverage of the Freedom of Information Law, whether it is maintained in a Village office, at the home of a Village official or, for example, at the Village Attorney's private office.

It is emphasized, however, that if no resume or similar record is maintained by or for the Village, i.e., if no such record exists, the Freedom of Information Law would not apply. 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.

If a resume or similar documentation indicating the consultant's qualifications exists, it would likely be available in part.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 resumes and similar records is §87(2)(b). That provision permits an agency to withhold records or portions of records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy.

In a decision rendered by the Court of Appeals, the state's highest court, reference was made to the authority to withhold "certain personal information about private citizens" [see Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Department, 73 NY2d 92 (1989)]. In another decision rendered by the Court of Appeals and a discussion of "the essence of the exemption" concerning privacy, the Court referred to information "that would ordinarily and reasonably regarded as intimate, private information" [Hanig v. State Dept. of Motor Vehicles, 79 NY 2d 106, 112 (1992)]. In view of the direction given by the state's highest court, again, I believe that the authority to withhold the information based upon considerations of privacy is restricted to those situations in which records contain *personal* information about natural persons.

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

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

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

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

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate

> personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

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

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

It is clear in my opinion that items of a personal nature, such as a social security number, home address, marital status and the like may be withheld. Those kinds of details are irrelevant to the performance of one's duties as an employee or contractor retained by an agency. Further, §89(2)(b)(i) refers to the ability to withhold one's employment history. In my view, and based on Kwasnik v. City of New York and City University of New York [691 NYS2d 525, 262 AD2d 171 (1999)[, employment history refers to a person's private employment, and indications of the names of a person's private employers may be withheld. However, the indication of a person's prior public employment has been found to be available (see Kwasnik, supra), as has one's general educational background [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS2d 411, 218 AD2d 494 (1996)].

A license, a permit or a certification is typically conferred by a government agency, and insofar as a Village record includes reference to a license, permit or certification, I believe that the Village would be required to disclose to comply with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14058

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June 3, 2003

Mr. Howard E. Colton
Deputy Village Attorney
Village of Freeport
46 North Ocean Avenue
Freeport, NY 11520

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

Dear Mr. Colton:

I have received your letter of May 1 in which you referred to our conversation relating to public access to cell phone records.

You wrote that we agreed that:

> "...the Village may redact that portion of the cell phone bill, which would identify the actual number of the particular phone for which the bill was generated because a release of that number could tie up the phone line in the case of an emergency."

However, you added that:

> "In reviewing that theory, couldn't it be said that the Village also has the obligation to redact that portion of the cell phone bill, which would identify other non-published emergency numbers that might have been called by said Fire Department personnel. It is foreseeable that the phone bill at issue could contain numbers of other Fire Chiefs, Police Department personnel, Fire Marshals, etc. Obviously, a release of these non-published numbers could jeopardize the phone lines of these other emergency personnel. If that is the case, and considering that the Village has approximately three hundred pages of phone records, for which the Village would have to review each page, decipher the numbers and then redact same (however, with staffing constraints that could and will be difficult) must the Village supply the listing at all?"

In this regard, during our discussion, we considered the fact that certain fire and law enforcement officials perform functions related to emergency situations and that their cell phones must be free of interference to the greatest extent possible. If their cell phone numbers were to be made public, potential law breakers might call those numbers constantly, thereby precluding the effective use of the cell phones to the detriment of the public. In that kind of situation, I believe that §87(2)(f) might properly be cited. That provision authorizes an agency to deny access to records insofar as disclosure " would endanger the life or safety of any person."

Those numbers are known only to a select few, and presumably they are used for emergency use only. In contrast, the other phone numbers which you referred appear to be used for routine purposes of communication; only in rare occasions would they be used to make or receive an emergency call. Disclosure of those phone numbers "that might have been called" in relation to an emergency, must in my view be disclosed. The phone on my desk might be used on a rare occasion in relation to an emergency, but that is not the primary use or significance of the phone, and my phone number, therefore, must be disclosed. I believe that the same conclusion should be reached in the context of your inquiry.

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

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in a recent decision to which you referred in your appeal, Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case,

the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

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

In the context of the situation that you described, I do not believe that a "blanket denial" of access would be consistent with law. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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June 3, 2003

Mr. James W. Leahy
[redacted]

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

Dear Mr. Leahy:

I have received your letter of April 30 and the materials relating to it.

You indicated that you requested certain records from the Kingston City School District, but that you received no response. In addition, you referred to a new policy or procedure that was apparently adopted by the Board of Education concerning communications between and among Board members and the disclosure of those communications.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which an agency, such as a school district, 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)].

Second, the Freedom of Information Law is applicable to all agency records, and §86(4) defines the term "record" expansively to include:

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

The Court of Appeals, the state's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

More recently, the Court of Appeals found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY2d 410, 417 (1995)]. Therefore, if documents, including email communications, are kept or produced for an agency, as in the case of communications between or among District officials that relate to District business, I believe that they constitute District records subject to rights conferred by the Freedom of Information Law.

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

Since your request involved communications between District officials, they consist of "intra-agency" materials that fall within one of the exceptions, §87(2)(g). The extent which those records may be withheld, however, is dependent on their contents. 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.

While I am unaware of the contents of memoranda of your interest, based on the foregoing, it is likely that some aspects of those records must be disclosed, while others may be withheld.

Lastly, the Freedom of Information Law is permissive. Although an agency *may* deny access to records or portions of records in accordance with the exceptions to rights of access, it is not required to do so and may choose to disclose [see Capitol Newspapers v. Burns, 109 AD 2d 92, aff'd 67 NY 2d 562 (1986)].

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

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June 3, 2003

Mr. Paul R. Plante
[redacted]

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

Dear Mr. Plante:

I have received your letter of May 1 in which you raised a series of questions relating to the obligation of the Rensselaer County Department of Health to "have in place" and make accessible rules and regulations concerning the Freedom of Information Law.

In this regard, while the Department of Health is subject to rules and regulations adopted pursuant to the Freedom of Information Law, there is no requirement that regulations be promulgated that are solely applicable or unique to the Department.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, I believe that the public corporation is the County, and that the governing body would be the County Legislature. If that is so, the County Legislature was required to promulgate appropriate uniform rules and regulations applicable to entities within County government consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law within sixty days of January 1, 1978, the effective date of the law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate

> one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

When a request is denied, it may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

Further, the regulations promulgated by the Committee state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas N. Cioffe
Denise Ayers

STATE OF NEW YORK
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June 3, 2003

Mr. Robert Jaegly, 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. Jaegly:

I have received two letters from you dated May 8, as well as materials relating to them. You have asked that I review two requests made to the City of Albany pursuant to the Freedom of Information Law and the City's response to them.

One request involves the Police Department's "Booking Log", and you sought "the name of the person arrested or taken into custody, the penal code section of their offense, the arresting officer name or number, the time and date taken into custody, the time and date transferred out of police custody, and how or why transferred (released on recognizance, released on bond, to police court, to county court, to county jail, etc." You indicated that you wanted the entries made "for the period ending December 15, 2001, and going back to approximately Oct. 15, 2000 or until approximately 300 arrest records have been furnished, which ever comes first." The request was denied, and the denial was affirmed following an appeal in which the appeals officer wrote that:

> "The City of Albany does not keep separate booking logs based on sealed and unsealed records. To create the information you have requested would entail a manual search of these records and the development of a separate document. I believe this falls within the intent of subdivision 3 and would constitute the creation of a new record. Your appeal is, therefore, denied."

It is noted at the outset that when a request is denied following an appeal, the person has four months from the determination to seek judicial review of the denial of access. More than that time has passed and, therefore, judicial review would, in my view, not serve as an option. Nevertheless, from my perspective, if I accurately understand the matter, the City's determination was inconsistent 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.

I point out that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of one or more of the grounds for denial that follow. Based on the quoted language, there are situations in which a single record might be both available or deniable in part. Further, the same language, in my opinion, imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. As such, even though some aspects of a police blotter, a booking log, or other record might properly be denied, the remainder might nonetheless be available and would have to be disclosed.

In this instance, it is assumed that the reference to "sealed" records relates to §160.50 of the Criminal Procedure Law. In brief, when charges are dismissed in favor of an accused, reference to the charge or arrest ordinarily is sealed. If indeed a booking log or similar record exists, I believe that the City would be obliged to review its contents, redact or delete those portions that may properly be shielded from disclosure, and disclose the remainder. In that circumstance, an agency would not be creating or preparing a new record; on the contrary, it would be disclosing portions of an existing record. I note that a conclusion of that nature was also reached with respect to a request for a database, portions of which could be withheld. The court determined that the process of segregating the accessible from the deniable portions of the database by entering queries did not constitute the creation of a new record, but rather the generation and disclosure of data contained within an existing record [NYPIRG v. Cohen, 729 NYS2d 379; 188 Misc. 2d 658 (2001)].

With respect to the other request, it appears that the information sought, to the extent that it existed, was made available, or alternatively, that you were informed where it could be obtained.

As inferred earlier, the Freedom of Information Law pertains to existing records. If no records were prepared, or if records were properly disposed of, the Freedom of Information Law would not apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Harold Greenstein
City Clerk
Jamie Louridas

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 4, 2003

E-Mail

TO: Christine L. Ridarsky [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. Ridarsky:

I have received your letter in which you indicated that you are "confused about the status of divorce decrees." You have questioned the ability of "private companies, such as banks, etc.", to request a copy of a divorce decree or similar records.

In this regard, 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."

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

Frequently, court records are available under other provisions of law. However, in this instance, the kinds of records in which you are interested must generally be shielded from the public. Access to records relating to matrimonial proceedings is governed by §235(1) of the Domestic Relations Law, which states that:

> "An officer of the court with whom the proceedings in a matrimonial action or a written statement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of act, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination of perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court."

Based on the foregoing, as a general matter, the details of a matrimonial proceeding are considered confidential.

However, subdivision (3) of §235 states that:

> "Upon the application of any person to the county clerk or other officer in charge of public records within a county for evidence of the disposition, judgment or order with respect to a matrimonial action, the clerk or other such officer shall issue a 'certification of disposition', duly certifying the nature and effect of such disposition, judgment or order and shall in no manner evidence the subject matter of the pleadings, testimony, findings of fact, conclusions of law or judgment of dissolution derived in any such action."

While any person may request a "certification of disposition" which indicates that a divorce has been granted, I believe that other records involving separation and divorce are exempt from disclosure, except as provided in subdivision (1) of §235.

Nevertheless, there is no law of which I am aware that would preclude a private company from seeking information directly from the subject of a divorce decree or with his or her consent. In short, if you are concerned about protecting your privacy when records may be maintained by private entities, you may choose not to engage in a business relationship with those entities. I note that many private companies have adopted privacy policies that detail the extent to which they protect or perhaps share personal information. It is suggested that, before submitting intimate personal information to a private company, you might seek to ascertain the nature of the company's privacy policy if such a policy has been created.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14063

41 State Street, Albany, New York 12231
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June 5, 2003

Mr. Lloyd E. Barker
99-B-0916 SHU-1-15
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

Dear Mr. Barker:

I have received your letter in which you requested that this office "get confirmation of the "surgery"" performed at a certain hospital. It is unclear whether the procedure was carried out at a correctional facility or at Strong Memorial Hospital.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning public access to government records, primarily in relation to the Freedom of Information Law. The Committee does not have custody or control of records, and it is not empowered to obtain records on behalf of an individual. Nevertheless, in an effort to offer guidance, I offer the following comments.

First, if the hospital that maintains the record of your interest is a governmental entity, its records would be subject to the Freedom of Information Law. If Strong Memorial is the source of the record, the Freedom of Information Law would not apply, because it is a private hospital.

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

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

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records, and it applies to both government medical facilities and private facilities, such as Strong Memorial Hospital. 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 facility that maintains the records of your interest and make specific reference to §18 of the Public Health Law when seeking the record.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-305
FOIL-AO-14064

41 State Street, Albany, New York 12231
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June 9, 2003

Mr. John V. Tauriello
Deputy Commissioner and Counsel
NYS Office of Mental Health
44 Holland Avenue
Albany, NY 12229

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

Dear Mr. Tauriello:

I have received your thoughtful letter in which you raised the following question:

> "Was it appropriate for OMH to share records or personal information as defined by section 92 of the Public Officers Law with the Archdiocese of New York, when the data subject has the civil service title 'chaplain' at one of the Agency's facilities, and the Archdiocese is the official endorsing agency for the chaplain."

You indicated that the question arose in relation to an advisory opinion rendered in February by David Treacy of this office in which it was suggested that the authority of the Office of Mental Health (OMH) to share information with church officials was "questionable", and that the disclosure by OMH might have constituted "an unwarranted invasion of personal privacy."

In brief, allegations were made about a chaplain employed by OMH at an OMH psychiatric hospital concerning conduct on hospital grounds which, if proven, would be relevant to church officials in assessing the chaplain's fitness to continue in that capacity. You wrote that it is the position of OMH that

> "...disclosure of information to the Archdiocese is necessary to achieve the Agency's stated policy goal of providing freedom of choice of religion to patients; to ensure that this staff chaplain continues to meet Civil Service Law and ecclesiastic requirements; and to ensure the continued health and safety of the patients OMH serves."

You added that:

> "The job description and title of chaplain are products of the Civil Service Law and the Department of Civil Service. The Department of Civil Service promulgates classification standards which contain the qualifications for every civil service title. The qualifications for chaplain are found in the classification standard for Occupation Code 8281000, and include in part the following: 'Although competitive examinations are not held for this class [i.e. chaplains], candidates must have ecclesiastical endorsement from the official endorsing agency of the chaplain's faith or denomination.'"

You enclosed both the classification standard and the ecclesiastic endorsement.

The disclosure to the Archdiocese was made, according to your letter:

> "...pursuant to section 96(b) of the Public Officers Law, which permits disclosure of records or personal information to those who contract with the Agency, when such a disclosure is necessary to operate a program specifically authorized by law. In this case, the Archdiocese and the Agency enjoy a contractual relationship requiring the frank and confidential exchange of information which relates to the Archdiocese' role as ecclesiastical endorser, and which is necessary for the continuation of the provision of pastoral care for patients of the Catholic faith."

In consideration of the foregoing, you asked that I review and revise the advisory opinion rendered in February.

In this regard, first, I believe that it is worthwhile to reiterate general points offered in the opinion of February 13.

As you are aware, the Personal Privacy Protection Law (Public Officers Law, Article 6-A, §§91-99) 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 by state agencies, §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." 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; 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).

For reasons expressed in the February opinion, it has been advised that unsubstantiated allegations pertaining to a public employee may be withheld under the Freedom of Information Law, for disclosure of records reflective of such allegations would constitute an unwarranted invasion of personal privacy.

The issue, however, involves the relationship between OMH and the Archdiocese and whether the disclosure by OMH to the Archdiocese was permitted by §96(1)(b) of the Personal Privacy Protection Law. That provision authorizes a state agency to disclose personal information pertaining to a data subject:

> "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..."

The foregoing pertains to situations in which an agency discloses personal information to its own officers or employees who need the information in order to carry out their legal duties or to operate a program established by law, or to "those who contract with" the agency and carry out those functions on behalf of the agency.

It is my understanding that there is no written instrument or document that may be characterized as a contract into which OMH and the Archdiocese or church officials have entered. It is your contention, however, based on our conversation, that a contractual relationship has in effect been created over the course of years between OMH and the Archdiocese.

If your contention is accurate, that there is a *de facto* contract between OMH and the Archdiocese, I would agree that disclosure of personal information pertaining to the chaplain to the Archdiocese would have been permitted. On the other hand, however, if there is no contract and if it cannot be established that *de facto* contract exists, again, I believe that disclosure to a third party without consent by the data subject would be of questionable legality.

As you are aware, the advisory jurisdiction of the Committee on Open Government involves statutes pertaining to access to and the disclosure of records and information maintained by or for government agencies subject to the Freedom of Information and Personal Privacy Protection Laws. Determining or advising that a contractual relationship may exist between OMH and the Archdiocese

involves a matter beyond the jurisdiction or expertise of this office; such finding in my view must be made by an entity other than this office.

In sum, the propriety of the disclosure under §96(1)(b) of the Personal Privacy Protection Law is, in my view, dependent on the nature of the relationship between OMH and the Archdiocese, and that issue cannot be determined by the Committee.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 9, 2003

Mr. Freddie Graves
86-B-0671
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

Dear Mr. Graves:

I have received your letter in which you appealed with respect to a portion of a request made to the Department of Correctional Services.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law; the Committee is not empowered to determine appeals or compel an agency to grant or deny access to records.

For future reference, the provision concerning the right to appeal is found in §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...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 by the Department of Correctional Services is Anthony J. Annucci, Counsel to the Department.

Having reviewed the correspondence that you attached, it does not appear that the Department denied your request. It appears that the Department's central offices do not maintain the records of your interest and explained that a request should instead be made to a maximum security facility that maintains the records of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1066

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

June 9, 2003

Mr. Theodore Weber
Ms. Ruth Weber
[redacted]

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

Dear Mr. and Ms. Weber:

I have received your letter of May 12 in which you described frustration in your attempts to obtain the "itemization" of a certain escrow agreement signed by a developer and submitted to the Town of Orangetown. Since the receipt of your correspondence, a copy of a letter sent to you by the Town's Director of Building, Zoning and Planning Administration and Enforcement, Mr. John Giardiello, was sent to me. In brief, Mr. Giardiello indicated that the escrow agreement was made available to you in March.

In this regard, I offer the following comments.

First, the Freedom of Information Law is expansive in its coverage, for it pertains to all records of an agency, such as a town, and §86(4) defines the term "record" to include:

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

Based on the foregoing, if the record of your interest is maintained by or for the Town, I believe that it would fall within the scope 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. From my perspective, if the record sought is maintained by or for the Town, I believe that it would be accessible. In short, none of the grounds for denial of access would be pertinent.

Third, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create a record in response to a request. Again, if an itemization concerning the escrow agreement exists, it should be accessible. However, if no such record is maintained by or for the Town, the Town would not be required to prepare or obtain such a record on your behalf.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: John Giardiello
Dennis Michaels

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14067

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June 10, 2003

Ms. Cynthia A. Motter
Secretary
Historic Preservation Commission
Village of Owego
178 Main Street
Owego, NY 13827

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

Dear Ms. Motter:

I have received your letter concerning the application of the Freedom of Information Law. In brief, you wrote that the Village of Owego received a grant to update its information concerning homes in its historic district. Part of the grant money was used to create a compact disc that includes a map of the district and digital photographs of approximately 350 homes. You indicated that the Commission would like to sell the disc and the maps to offset the cost of keeping the information up to date, and you asked whether you may do so in consideration of the Freedom of Information Law.

From my perspective, the materials that you described fall within the coverage of that statute. In this regard, I offer the following comments.

First, the Freedom of Information Law is expansive its scope, for it applies to all records of an agency, such as the Village. Most significant in my view is that §86(4) defines the term "record" to mean:

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

Based on the foregoing, the disc and its contents, as well as the photographs, would constitute "records" that fall within the framework of the Freedom of Information Law.

Second, with respect to "selling" the disc or the photographs, §87(1)(b)(iii) of the Law limits the fees that may imposed for duplicating or reproducing records. For photocopying records up to nine by inches, an agency may charge a maximum of twenty-five cents per photocopy; for other records, i.e., those that cannot be photocopied, such as computer tapes, compact discs, etc., the fee is based on the actual cost of reproduction. Whatever it costs the Village to reproduce those kinds of records would serve as the fee that could be imposed. The only instances in which other or higher fees may be assessed would involve situations in which a statute other than the Freedom of Information Law, i.e., an act of Congress or the State Legislature, authorizes the imposition of different fees. I know of no such statute that would be applicable in the circumstance that you described.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14068

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

June 10, 2003

Ms. Carman Y. 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:

As you are aware, I have received your letter of May 13. You indicated that your requests for records of the New York City Housing Authority "have turned up as exhibits submitted by them in a pending lawsuit." You have questioned the propriety of those disclosures by the Authority.

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 in question would be accessible to the public 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, 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).

Lastly, the Freedom of Information Law is permissive; even in situations in which an agency *may* withhold records or portions of records, it is not obliged to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. Therefore, even if the Authority could withhold the records on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see §87(2)(b)], it would not be required to do so.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence Roth
Eva Lee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14069

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June 10, 2003

Mr. Warren H. Gemmill
Superintendent of Schools
The Bronxville School
177 Pondfield Road
Bronxville, NY 10708

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

Dear Mr. Gemmill:

I appreciate having received a copy of your determination of an appeal rendered under the Freedom of Information Law concerning a request for certain records by David Wilson of the *Journal News*. From my perspective, the response suggests a misinterpretation of the law.

At issue are three audits prepared by private entities retained by the Bronxville School. You sustained an initial denial of access based on a finding that the records are intra-agency materials that could be withheld based on the decision rendered in Xerox Corp. v. Town of Webster [65 NY2d 131 (1985)]. In addition, one of the reports was withheld on the ground that it falls within the attorney-client privilege.

In this regard, if indeed the attorney was retained to offer legal advice, I would agree that the report that he prepared would fall within the scope of the attorney-privilege and, therefore, would be exempt from disclosure pursuant to §§4503 of the Civil Practice Law and Rules and 87(2)(a) of the Freedom of Information Law.

However, the other two reports appear to constitute external audits, and if that is so, I believe that they must be disclosed. Pertinent, as you are aware, is §87(2)(g). That provision authorizes an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

The Xerox decision to which you referred did not pertain to external audits prepared by private entities, but rather to other records prepared by outside consultants to assist in the decision making process. By its nature, an audit consists of statistics and facts, as well as opinions and recommendations. Similarly, by its nature, an *external* audit includes the same kind of content, but is prepared by an entity outside of government. To suggest that opinions and recommendations within an external audit may be withheld would render subparagraph (iv) of §87(2)(g) meaningless, and the State Legislature could not have intended that to be so. I note, too, that §87(2)(g)(iv) was enacted initially as part of the "Governmental Accountability, audit and Internal Control Act of 1987." The provisions of that act "sunset" periodically but have been renewed several times to ensure, in part, that external audits remain accessible to the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Wilson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14070

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June 10, 2003

Mr. Elliott Markell
HVNP Box 42
Hawaii Volcanoes National Park
Hawaii Island, HI 96718

The staff of the Committee 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. Markell:

I have received your letter and the attached correspondence in which you sought an advisory opinion concerning your attempts to obtain records from the New York City Police Department. The records sought pertain to an incident in which you were involved "on or about June 6, 1996."

In addition to your correspondence, this office received copies of two additional letters from the New York City Police Department. A letter dated March 29, 2003 denied your appeal "because your original request failed to reasonably describe a record, as required by Public Officers Law §89(3)." You were also informed that additional information provided in your appeal letter was "deemed a new request and...referred to the Records Access Officer for a thorough search for any records that may satisfy the request." A letter dated April 16, 2003 from the New York City Police Department responding to the "new request" indicated that "[b]ased on the information you provided, this Unit conducted a diligent search for the following document(s) which could not be found: June 6, 1996 Assault and Detainment."

In this regard, I offer the following comments.

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

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

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

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

While I am unfamiliar with the record keeping systems of the Department, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if records cannot be found due to the nature of an agency's record keeping system or would involve a search of perhaps hundreds or thousands of records individually, the request, in my view, would not meet the requirement that it reasonably describe 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,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1410 71

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June 12, 2003

Mr. John E. Glowacki
[redacted]

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

Dear Mr. Glowacki:

I have received your letter of May 15 and the correspondence attached to it.

You have sought guidance concerning an unanswered request made under the Freedom of Information Law to the Investor Protection and Securities Bureau of the Department of Law. The records sought involve a stock purchase that you made in 1997 through the Merrill Lynch and Co.

In an effort to learn more of the matter, I have contacted several officials of the Department. Having discussed the matter with Assistant Attorney General Joseph Wilson, I was informed that the records of the Department generally relate to what he characterized as "global" matters rather than individual transactions. However, he indicated that the would be able to discuss your situation and that he can be contacted at (212) 416-8171. I also spoke with the Department's newly designated records access officer, Ms. Stacy Rowland. She said that she would determine the status of your request and contact you directly.

I note that the Freedom of Information Law pertains to existing records maintained by or for an agency. Therefore, if the Department maintains no records falling within the scope of your request, the Freedom of Information Law would not apply. Additionally, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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: Joseph Wilson
Stacy Rowland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3640
FOIL-AO-14072

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June 12, 2003

Ms. Regina Riely
United Pro-Life Committee on Gannett
9 Cedar Lane
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 Ms. Riely:

I have received your letter of May 16. You wrote that the Chairman of the Westchester Medical Center Hospital Board has failed to respond to your requests made under the Freedom of Information Law. In addition, although you offered no specifics, you contend that the Board conducts executive sessions inappropriately.

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person. While I believe that the Chairman should have responded to your requests or forwarded your requests to the records access officer, it is suggested that you might resubmit your requests to the records access officer.

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

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

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, with respect to meetings of the Board, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Gene Capello, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14073

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June 12, 2003

Ms. Julie Broyles
[redacted]

The staff of the Committee on 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. Broyles:

I have received a copy of your letter addressed to David W. Fountaine, Clerk and Records Access Officer of the Village of Hamburg. By sending a copy to this office, you wrote that you are requesting an advisory opinion concerning the issues raised therein. In brief, several provisions of the Village Code do not appear in the code book, and you focused particularly on Chapter 63 pertaining to the Police Department. The only statement in the code book concerning Chapter 63 is that "[t]he current Rules and Regulations of the Hamburg Police Department are on file in said Department." Following your request for those records, you were informed by the Chief that "The rules aren't usually public."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records, includes codes and local laws. Therefore, pursuant to §89(3), an agency may in my opinion require that a request for those records be made in writing. I note that the agency may choose to waive that requirement.

Second, the same provision requires that an applicant must "reasonably describe" the records sought. Insofar as records indicating the legislative history of Chapter 63 are located in a particular file or files and can be located with reasonable effort, I believe that a request would meet the requirement that a request reasonably describe the records. However, insofar as records are not maintained in a manner that permits Village officials to locate them with reasonable effort, the request in my view, would not meet that standard. For instance, one aspect of your request includes "The minutes of all meetings of the Board of Trustees of the Village of Hamburg at which Chapter 63 has been discussed or amended. If the minutes are indexed by subject matter or similar retrieval mechanism, it may be relatively easy to locate the minutes of your interest. However, if there is no such index or retrieval mechanism, and locating the items sought would involve a review, page by page, of years of minutes of meetings, I do not believe that Village officials would be required to engage in that degree of effort.

Third, as you may be aware, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the 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 Village 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. I do not believe that the records access officer must deal with or respond directly to every request for records. Nevertheless, he or she must ensure that agency staff carry out their duties in compliance with the Freedom of Information Law.

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

In my opinion, an ordinance or local law must be disclosed. While policies, rules and procedures ordinarily must be disclosed, when those documents involve law enforcement functions, three of the grounds for denial are pertinent to an analysis of rights of access.

In my view, records of that nature constitute intra-agency materials that fall within the scope of §87(2)(g). However, due to the structure of that provision, it frequently requires substantial disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

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

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

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

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

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

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a

> specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the techniques or procedures contained in the records sought could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

The remaining provision of possible significance 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." As suggested with respect to the other exceptions, I believe that the agency is required to review the documentation at issue to determine which portions fall within this or the other exceptions.

I hope that I have been of assistance. Copies of this opinion will be sent to Village officials.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
David W. Fountaine, Clerk and Records Access Officer
Dennis Gleason, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14074

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June 12, 2003

Reverend Ian J. L. Adkins
[redacted]

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

Dear Reverend Adkins:

I have received your letter of May 13, which reached this office on May 19. You have sought assistance.

You referred to requests made under the Freedom of Information Law to Louise Volpe, Secretary to the President of Niagara County Community College and its Board of Trustees, and business manager for the College Association. The first request involved the "total itemized budget for student activities" for seven academic years; the other involved itemized budgets for the College bookstore, a job description and date of creation of certain position, and the salary accorded that position. You wrote on both requests that you would "pick up this information from your office in 72 hours as required by the Freedom of Information Law." You were apparently told, however, that you must complete "a specific college form" to examine the records and that copies would not be provided. When you arrived three days later to obtain the records, you wrote that you were informed that they were unavailable and that copies would not be provided.

In this regard, I offer the following comments.

First, the Freedom of Information Law does not require that agencies respond to requests within seventy-two hours as you suggested. However, the law does provide direction concerning the time and manner in which an agency must respond to a request. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 on Open Government (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the records 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 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 pertains to existing records, and §89(3) provides in part that an agency is not required to prepare or obtain a record that does not exist or that is not maintained by the agency. If, for example, the College no longer maintains a "total itemized budget for student activities" for the academic year beginning in 1996, it would not be obliged to create a new record in an effort to satisfy your request.

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. To the extent that your request involves existing records, I believe that they are accessible under the law, for none of the grounds for denial would apply.

Lastly, when records are accessible in their entirety, an agency cannot charge for their inspection. When they are requested, an agency must make copies of records upon payment of the requisite fee. Pursuant to §87(1)(b)(iii), an agency may charge up to twenty-five cents per photocopy, and it has been held that an agency may require payment in advance of preparing copies [Sambucci v. McGuire, Sup., Ct., New York Cty., Nov. 4, 1982].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Louise Volpe

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 12, 2003

Ms. Camille S. Jobin-Davis
Records Access Officer
NYS Workers' Compensation Board
20 Park Street
Albany, NY 12207

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

Dear Ms. Jobin-Davis:

I have received your letter in which you sought my opinion concerning the propriety of a proposed policy of the Workers' Compensation Board ("the Board") for reporting statistical information in a manner consistent with the Freedom of Information Law, §110-a of the Workers' Compensation Law and other related statutes.

Section 110-a imposes restrictions on the disclosure of information contained in individual case files, and subdivision (4) of that statute provides that:

> "It shall be unlawful for any person who has obtained copies of board records or individually identifiable information from board records to disclose such information to any person who is not otherwise lawfully entitled to obtain those records."

Under the proposed policy, information would be described in what you characterized as "range form, so as to group data for entities which have similar statistical characteristics." You indicated that the proposed policy:

> "...represents the Board's proposed standard for determining the cut-off point for information which could be used to identify an individual claimant. In developing this policy, the committee recognized that an unusually curious and energetic reader could utilize information published in a Board report along with other public or private information to reveal the identity of a claimant; however, we felt inclined to propose a policy which is geared more towards the reasonably interested reader."

You offered examples in the proposal of the means by which data would be reported, and the proposal states that "whether the data is reported in ranges or individually, the Board should decline to report any statistical information which reflects 5 or fewer units of information."

Since I am unfamiliar with the kinds of statistical data that the Board prepares, I cannot advise as to a specific number that might be cited as a "cut-off point." Nevertheless, I believe that the principles to which you referred in developing the policy are fully appropriate.

A standard appearing in federal regulations pertaining to unrelated records has been cited frequently in an effort to offer advice regarding the protection of personally identifiable information. Specifically, 34 CFR §99.3 was promulgated to implement the Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g). In brief, FERPA focuses on records pertaining to students and prohibits the disclosure of personally identifiable information without the consent of a parent of a student under the age of eighteen or the student who has attained that age, or under other narrowly delineated circumstances. The regulations define the phrase "personally identifiable information" to include:

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

Based upon direction provided by FERPA and the regulations that define "personally identifiable information", references to students' names or other aspects of records that would make a student's identity easily traceable must be withheld in order to comply with federal law.

In my view, the proposed policy should and generally does protect against the disclosure of workers' compensation records that would render a person's identity easily traceable.

As in the care of the federal regulations and your comments regarding the proposed policy, it may not be *impossible* for an industrious or creative person to identify a claimant, particularly if that person independently possesses personal information that might be used in combination with statistical data to ascertain one's identity. However, so long as this policy reasonably serves to protect personal privacy, I believe that it would be consistent with law and particularly with the intent of §110-a.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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June 12, 2003

Mr. and Mrs. Joseph T. Fitzgerald
[redacted]

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

Dear Mr. and Mrs. Fitzgerald:

I have received your letter of May 16 and appreciate your kind words.

In brief, you referred to a judicial decision directing the Town of Woodbury Zoning Board of Appeals ("ZBA") to take certain action concerning an application for a variance. In relation to the foregoing, you asked whether the ZBA is required to consider new information that you offered at a meeting of the ZBA following the issuance of the decision by the court.

In this regard, the advisory jurisdiction of the Committee on Open Government pertains to issues involving the Freedom of Information and Open Meetings Laws. Your question does not involve the interpretation or application of those statutes, and I regret that I have neither the authority nor the expertise to offer an opinion or guidance.

The second issue that you raised, however, relates to the Freedom of Information Law. You requested from the Town "[a]ny and all communications, correspondence, notes, reports, tickets, fines, records of inspections & outcomes of Sewer Easement Violation Order number 2001-24 dtd. Aug.15/01." Although some records were made available, you wrote that no "notes, reports, records of inspections and outcomes" were included. That being so, you wrote as follows:

> "Doesn't it seem questionable that a Code Enforcement Officer or Building Inspector would not keep a record of inspections and thus, they would not be available? Are we supposed to accept the assumption that such records do not exist?"

Here I note initially that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency need not create or prepare a record in response to a request.

Second, however, the Freedom of Information Law is applicable to all agency records, and §86(4) defines the term "record" expansively to include:

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

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Perhaps most pertinent is a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he prepared the notes in part "as a private person making personal notes of observations...in the course of" meetings.

In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Based on the foregoing, insofar as notes, reports, and other documentation falling within the scope of your request exist, I believe that they constitute "records" subject to rights of access conferred by the Freedom of Information Law.

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, §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 this instance, 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 provisions cited above, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Desiree Herb
Marian Tipaldo
Code Enforcement Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMI-AO-3642
FOIL-AO-14077

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June 12, 2003

Mr. Jerome A. Mirabito, Esq.
Fulton Savings Bank
75 South First 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 facts presented in your correspondence.

Dear Mr. Mirabito:

I have received your letter of May 23 and the materials attached to it. Your inquiry involves the status of the board of directors of the Fulton Community Revitalization Corporation ("the FCRC") under the Open Meetings Law.

You wrote that the FCRC has been asked by the City of Fulton to:

> "1. Employ a person(s) who will be in charge of implementation of the comprehensive plan and report to the legislative body on a periodic basis as to the progress; and
>
> 2. Seek private funding and public funding/grants to retain personnel to implement the comprehensive plan."

You added that it is expected that the board will consist of eleven to thirteen members and include the Mayor and President of the Common Council of the City of Fulton, and perhaps the Executive Director of the City's Community Development Agency. No other members of the Board "will be voting members of the executive branch of the legislative branch of the City of Fulton."

A review of FCRC's certificate of incorporation and its by-laws indicate that it is a not-for-profit corporation and that eligibility for membership on the board is conditioned on residence in the City or "some interest in the City which relate to the purposes of the Corporation..." One-third of the directors are elected at an annual meeting by a majority of the directors then in office. There is nothing in the provisions specifying that the board must include City officials, their representatives or their designees.

In this regard, in general, the Open Meetings Law and its companion, the Freedom of Information Law, are applicable to governmental entities, including not-for-profit corporations that are, in essence, creations or extensions of government.

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 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, 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 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).

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."

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).

As I understand it by-laws, FCRC has a relationship with government, but its purposes are not exclusively governmental in nature. Further, although two and perhaps three members of the FCRC board are expected to be City officials, the by-laws do not require that any board member be a City official. Further, City government has no official role in the designation or selection of members of the board. If my understanding is accurate, the FCRC board would not constitute a "public body", and its meetings, therefore, would not be subject to the Open Meetings Law.

Similarly, I do not believe that the FCRC would constitute an "agency" that falls within the coverage of that statute. However, some of its records likely would be subject to rights of access conferred by that statute.

The Freedom of Information Law is applicable to agency records, and based on the definition of "agency" cited earlier, the City of Fulton clearly falls within the scope of that law. Significant in this instance is the definition of "record." Section 86(4) defines that term 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 has 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.

Further, due to the breadth of the definition, when records involving FCRC come into possession of City officials, I believe that they would constitute agency records that fall within the coverage of the Freedom of Information Law.

In sum, it does not appear that the FCRC is an agency for purposes of the Freedom of Information Law or a public body subject to the Open Meetings Law. Nevertheless, records maintained by the City of Fulton or for the City pursuant to its relationship with the FCRC would, in my opinion, be subject to rights of access conferred by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mayor, City of Fulton
President of the Common Council
Carol Rutledge

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14028

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June 13, 2003

Hon. Rebecca J. Moore
Town Clerk
Town of Pitcairn
802 State Highway 3
Harrisville, NY 13648

The staff of the Committee on 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. Moore:

I have received your letter in which you wrote that certain residents of the Town of Pitcairn have refused to request certain records, specifically, minutes of meetings, in writing. You indicated that you are aware that they enjoy a right of access to those records, but that you would like to have documentation concerning the records sought and require that they request records in writing.

In this regard, first, the Freedom of Information Law pertains to all records of an agency, such as a town, 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, it is clear that minutes constitute "records" that fall within the scope of the Freedom of Information Law.

Second, §89(3) of that law 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....."

In consideration of the language quoted above, it is clear in my view that an agency may require that a request be made in writing by a person seeking records under the Freedom of Information Law. While an agency may waive that requirement, there is no obligation to do so, even when the records sought are clearly available under the 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

OMI-AO-3643
FOIL-AO-14079

Committee Members

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June 16, 2003

E-MAIL

TO: Toni Delmonte [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. Delmonte:

I have received your letter in which you questioned the status of a "private, nonprofit hospital" under the Open Meetings Law.

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. That being so, based on your description of the hospital as private, it does not appear that its governing body would constitute a public body required to comply with the Open Meetings Law.

I note that the companion of the Open Meetings Law, the Freedom of Information Law, is applicable to all government agency records. While the hospital, a private entity, is not subject to that statute, records submitted by or pertaining the hospital that are maintained by a municipal or state agency fall within the coverage of the Freedom of Information Law and would be subject to rights of access.

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14080

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June 17, 2003

E-MAIL

TO: Niki Cervantes <ncervantes@buffalonews.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. Cervantes:

As you are aware, I have received your letter concerning a denial of a request for certain records maintained by the Erie County Department of Emergency Services. Specifically, you sought records indicating the "training levels" of volunteer firefighters in the County, but the Commissioner of the Department has, in your words, "deemed the information not available through the F.O.I.L process."

From my perspective, the records at issue must be disclosed either by the County or by volunteer fire companies. In this regard, I offer the following comments.

First, the Freedom of Information Law is expansive in its coverage, for it pertains to all agency records. 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, the kinds of materials that you requested that are maintained by or for an agency, irrespective of their origin or function, in my view, clearly constitute "records" that fall within the coverage of the Freedom of Information Law.

Section 86(3) states that an "agency" is:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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 language quoted above, an agency generally is an entity of state or local government, such as Erie County. 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)].

Again, due to the determination that volunteer fire companies are subject to the Freedom of Information Law and the broad definition of the term "record", the materials of your interest would be subject to rights of access, whether they are maintained by the County, by a volunteer fire company, or both.

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.

While volunteer firefighters are not public employees *per se*, based on the thrust of the decision rendered by the Court of Appeals, it is clear in my view that the Court determined that they and the organizations they serve must be as accountable to the public as governmental entities. That being so, I believe that records indicating the nature or level or training attained by a volunteer firefighter must be disclosed.

In brief, the courts have found in a variety of contexts that records that are relevant to the performance of the official duties of a public officer or employee, or in this instance, firefighters on whom the public depends, 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 those persons are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

In conjunction with the foregoing, I note that it has been held by the Appellate Division that disclosure of one's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

Additionally, in the lower court decision rendered in Kwasnik v. City of New York, [Supreme Court, New York County, September 26, 1997; affirmed , 262 AD 2d 171 (1997)], the court cited and relied upon an opinion rendered by this office and held that those portions of applications or resumes, including information detailing one's prior public employment, must be disclosed. The Court quoted from the Committee's opinion, which stated that:

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

Based on the thrust of the judicial decisions cited above, disclosure of records or portions of records indicating the training levels of volunteer firefighters would constitute a permissible rather than an unwarranted invasion of personal privacy. That being so, I believe that they must be disclosed to comply with the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

cc: Commissioner Walters

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14081

Committee Members

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June 17, 2003

Ms. Dora Eccleston
[redacted]

The staff of the Committee on 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. Eccleston:

I have received your letter in which you referred to frustration relating to the operation of the Town of Tuscarora.

Having reviewed your remarks, I emphasize that the Committee on Open Government is authorized to provide advice and opinions concerning public access to government information, primarily in relation to the Freedom of Information and Open Meetings Laws. Much of your commentary pertains to the manner in which Town government functions and is, therefore, tangential to the duties of this office. It is noted, however, that the coverage of the Freedom of Information Law is expansive, for it includes all agency records, such as those of a town, within its scope. 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."

Based on the foregoing, all records maintained by or for the Town are subject to rights of access.

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

Of possible significance in the context of you comments is §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, since some of your concerns relate to the manner in which public monies are expended, it is suggested that you might contact the office of the State Comptroller, which maintains a regional office in Binghamton. That office can be reached at (607)847-7122.

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-14082

Committee Members

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June 18, 2003

E-MAIL

TO: Marcel Rosenfeld <[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. Rosenfeld:

As you are aware, I have received your letter of May 30. You wrote that you are a member of a volunteer fire company and submitted "a personal factual statement" to the chief's office concerning a certain incident. The statement was brought to the fire district and disclosed by the board of fire commissioners to the person that it was "made against." You asked whether the document would fall within the coverage of the Freedom of Information Law.

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

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

A board of fire commissioners is the governing body of a fire district, which is a public corporation [see General Construction Law, §66 and Town Law, §174(7). Therefore, a fire district is subject to the Freedom of Information Law.

As a general matter, an agency generally is an entity of state or local government, such as a fire district. 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].

Based on the decision cited above, a volunteer fire company, despite its status as a not-for-profit corporation, also is an agency required to comply with the Freedom of Information Law.

Second, that law is applicable to all agency records, and §86(4) defines the term "record" to include:

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

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

Due to the breadth of the language quoted above, the "personal factual statement" would constitute a "record" that falls within the scope of 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.

Since I am unaware of the contents of the statement, I cannot offer specific guidance concerning whether or the extent to which any of the grounds for denial of access would apply. Nevertheless, I point out that the Freedom of Information Law is permissive. In other words, even when a record *may* be withheld in accordance with one or more of the grounds for denial, there is generally no requirement that an agency *must* withhold the record [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. That being so, I do not believe that the fire district or the volunteer fire company would have been prohibited from disclosing the statement.

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1408 3

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June 18, 2003

Mr. George Yourke
[redacted]

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

Dear Mr. Yourke:

I have received your letter of May 22 and the correspondence attached to it. As I understand the matter, you have questioned the propriety of a response to your request for records by the Town of Southeast Planning Department Chairman. Having requested records pertaining to a certain development since its approval on June 10, 2002, the Chairman asked that you "be more specific in any FOIL requests you make...."

In this regard, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a)

> (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

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

While I am unfamiliar with the record keeping systems of the Town, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if there are voluminous records pertaining to the development, if they involve a lengthy period of time (perhaps years), and if the records at issue are not filed chronologically, it is possible that the request, at least in part, might not have met the standard of reasonably describing the records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: George J. Rohrman
Hon. Ruth Mazzei

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3644
FOIL-AO-14084

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June 18, 2003

Ms. Stephanie Kushner
[redacted]

The staff of the Committee on 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. Kushner:

I have received our letter in which you questioned the propriety of a response to your request for records of the East Williston School District.

According to your letter, your challenge to the nomination of a candidate for the Board of Education was denied by the "nominating petition Review Board and the School Board." Although you obtained the Review Board's written decision and were permitted to inspect minutes of the Board of Education meeting during which Board rendered its decision, your were not permitted to obtain a copy of the minutes, for they had not been "accepted" by the Board. Further, you wrote that "the portion of the written decision of the Review Board given to [you] did not contain the basis on which they made their decision, which, subsequently, the School Board cited as what they used to make their decision." That portion of the record was withheld on that ground that it is "intra-agency information not foilable."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law is expansive in its scope, for it pertains to all agency records, such as those of a school district, and defines the term record expansively in §86(4) to mean:

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

Based on the foregoing, once information exists in some physical form, i.e., a draft, or "unaccepted" minutes, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

Second, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, again, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Third, returning to the Freedom of Information Law, when records are available under that law, they are available for inspection and copying. Further, §89(3) states that an agency must make a copy of an accessible record upon payment of or offer to pay the requisite fee, which cannot exceed twenty-five cents per photocopy. In short, the minutes, irrespective of whether they were "accepted" or approved should, in my opinion, have been copied upon request.

With respect to the portion of the record that indicated the basis of the decision, I agree that it may be characterized as "intra-agency material." However, due to the structure of the provision pertaining to intra-agency materials, it often requires disclosure. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

With respect to the substance of §87(2)(g) and the capacity to withhold records similar to that at issue, it has been held that:

> "There is no exemption for final opinions which embody an agency's effective law and policy, but protection by exemption is afforded for all papers which reflect the agency's group thinking in the process of working out that policy and determining what its law ought to be. Thus, an agency may refuse to produce material integral to the agency's deliberative process and which contains opinions, advice, evaluations, deliberations, policy formulations, proposals, conclusions, recommendations or other subjective matter (National Labor Relations Bd. v. Sears, Roebuck & Co., supra, pp 150-153; Wu v. National Endowment for Humanities, 460 F2d 1030, 1032-1033, cert den 410 US 926). The exemption is intended to protect the deliberative process of government, but not purely factual deliberative material (Mead Data Cent. v United States Dept. of Air Force, 566 F2d 242, 256, supra). While the purpose of the exemption is to encourage the free exchange of ideas among government policy-makers, it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memo (Wu v. National Endowment for Humanities, supra, p1033). The question in each case is whether production of the contested document would be injurious to the consultative functions of government that the privilege of nondisclosure protects..." [Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 182-183; motion for leave to appeal denied, 48 NY 2d 706 (1979)].

Insofar as intra-agency materials in which members of the Board of Education, the Review Board or staff expressed their opinions in relation to Board's final decision, I believe that those records ordinarily may be withheld. However, insofar as the document in question includes opinions or

recommendations adopted by the Board and reflective of the Board's collective determination, it would, in my view, be available.

A decision rendered in Nassau County indicates that a record adopted by a decision-maker as the agency's determination is accessible under §87(2)(g)(iii). In Miller v. Hewlett-Woodmere Union Free School District #14 [Supreme Court, Nassau County, NYLJ, May 16, 1990], the court wrote that:

> "On the totality of circumstances surrounding the Superintendent's decision, as present in the record before the Court, the Court finds that petitioner is entitled to disclosure. It is apparent that the Superintendent unreservedly endorsed the recommendation of the Term [sic; published as is], adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting 'the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers' (Matter of Sea Crest Construction Corp. v. Stubing, 82 A.D. 2d 546, 549 [2d Dept. 1981], but the Court bears equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intraagency views, when deliberation has ceased and the consensus arrived it represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of governmental decision making. The Team's decision no longer need be protected from the chilling effect that public exposure may have on principled decisions, but must be disclosed as the agency must be prepared, if called upon, to defend it."

In sum, I do not believe that §87(2)(g) may serve as a basis for withholding to the extent that the documentation in question represents a final agency determination. If that is the case, I believe that it would be accessible under §87(2)(g)(iii).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
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FOIL-AO-14085

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June 18, 2003

Ms. Jody Adams
[redacted]

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

Dear Ms. Adams:

I have received your letter concerning the procedural implementation of the Freedom of Information Law by the Town of Riverhead. You expressed the belief that Town officials may "feel that they had close to unlimited time 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO - 14086

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June 18, 2003

Mr. Michael A. Kless
[redacted]

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

Dear Mr. Kless:

I have received your letter of May 30 in which you asked whether a newly created control board in the City of Buffalo will be subject to "any special rules" or whether "the normal rules relating to freedom of information and open meetings apply."

In this regard, 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."

If the control board in Buffalo is typical of others, it would constitute an agency and would, therefore, but subject to the Freedom of Information Law.

The Open Meetings Law applies 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."

In my view, the control board would constitute a public body required to comply with the Open Meetings Law.

In short, in both instances, the control board would be subject to the same rules as other agencies and public bodies, unless there is statutory direction to the contrary.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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June 19, 2003

E-MAIL

TO: Lynn Crabtree [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. Crabtree:

As you are aware, I have received your letter of June 5 in which you raised questions concerning rights of access to a revised code or proposed policy.

You wrote that it is the policy of your board of education to present proposed revisions of its code of conduct "at a public meeting before adoption." However, you indicated that a recent proposal was not available at a meeting during which the matter was on the agenda, and you were informed that it would be available only by making a request under the Freedom of Information Law after the proposal is approved. You have asked:

> "1. What sense does it make to require a public reading, but not let the public know what the proposed policy says?
>
> 2. How can a FOIL request be required for something that is, by law, required to be accessible to the school community?"

In this regard, I note that it is not my intent to be overtechnical and offer the following comments.

First, the Freedom of Information Law pertains to all records of an agency, such as a school district, 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."

Consequently, even if a document is unquestionably public and readily accessible, it constitutes a "record" that falls within the coverage of the Freedom of Information Law. That being so, although an agency may accept an oral request or disclose records on its own initiative, pursuant to §89(3), an agency may require that a request be made in writing.

Second, if the Board's policy requires that a proposed code revision must be presented at an open meeting prior to its adoption, I would conjecture that the intent of such a policy is to enable the public to know of and become familiar with the proposal before action is taken by the board. If that is so, a failure to make proposal accessible would appear to involve a violation by the board of its own policy.

Third, if there was no such policy or if my interpretation of the intent of the policy is inaccurate, a proposed revision of the code could be withheld. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

One of the grounds for denial of access of access records, §87(2)(g), pertains to internal governmental communications and states that an agency may withhold records that:

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

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

Since a proposal is, in essence, a recommendation, it may be withheld; whether it is sensible or proper to do so is questionable. If, for example, the contents of a proposal are read aloud at an open meeting, there would be no basis for denying access to that record. By reading it aloud, the district, in my view, would have waived the ability to deny access. Moreover, any person present

could have recorded the meeting, so long as the use of the recording device was not disruptive or obtrusive. Often, too, proposals are the subject of discussion and debate. When that occurs, the content is effectively disclosed, and in that circumstance, again, I do not believe that there would be a basis for a denial of access.

Lastly, the Freedom of Information Law is permissive. While an agency *may* withhold records or portions of records in accordance with the grounds for denial of access, there is no obligation to do so, and it may choose to disclose.

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

RJF:jm

From: Robert Freeman
To: [redacted]
Date: 6/19/2003 3:52:04 PM
Subject: Dear Ms. Dalton:

Dear Ms. Dalton:

I have received your inquiry concerning a denial of access to to "intra-agency" correspondence.

Based on the language of the §87(2)(g) of the Freedom of Information Law, some aspects of intra-agency materials may be withheld; others must be disclosed. In brief, communications between or among government officers or employees that consist of advice, opinions, recommendations and the like may be withheld under that provision. However, it also specifies that other portions consisting of statistical or factual information, instructions to staff that affect the public or which reflect final agency policies or determinations must ordinarily be disclosed. In short, the content of intra-agency materials determine which portions may be withheld and which must be disclosed.

Email communications are, in my view, records that fall within the coverage of the Freedom of Information Law, and as suggested above, their contents determine the extent to which they must be disclosed.

To obtain more detailed information regarding the foregoing, it is suggested that you connect to our website (identified below), then to advisory opinions under the Freedom of Information Law, click on to "I" and scroll down to "inter-agency and intra-agency materials" (there are several categories) and then to "E" and scroll down to "email".

I hope that I have been of assistance.

cc: Records Access Officer

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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June 20, 2003

Mr. Thomas Kaminski
00-B-0517
Mohawk Correctional Facility
6100 School Road
Rome, NY 13442

Dear Mr. Kaminski:

I have received your letter of June 18 in which you appealed an alleged denial of access to records by the Division of Parole to this office.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records.

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

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

For your information, I believe that the person designated to determine appeals at the Division of Parole is Terrence X. Tracy, Counsel to 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
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June 20, 2003

Mr. Ian Shiroma
[redacted]

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

Dear Mr. Shiroma:

I have received your letter and attached material in which you requested assistance in obtaining records from the New York State Police related to a homicide investigation that has been closed for seventeen 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.

First, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and requires that an agency's determination of an appeal must either grant access to the records or "fully explain in writing... the reasons for further denial." In this instance, the determination following your appeal merely expressed a concurrence with the rationale expressed in the initial denial of access and essentially reiterated statutory language of §87(2)(e). From my perspective, the response to the appeal could not be characterized as having "fully explained" the reasons for further denial. I note that the New York City Department of Investigation was criticized in Lewis v. Giuliani (Supreme Court, New York County, NYLJ, May 1, 1997) for a denial of access also based merely on a reiteration of the statutory language of an exception, stating that "DOI may not engage in mantra-like invocation of the personal privacy exemption in an effort to 'have carte blanche to withhold any information it pleases'".

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

Of likely relevance is §87(2)(g) of the Freedom of Information Law, which enables an agency to withhold records that:

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

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

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

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

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

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

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

It is noted that the Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the 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 different from that referenced in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the Division of State Police appears to have engaged in a blanket denial of access. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the Division for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

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

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.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Lt. Laurie M Wagner
William J. Callahan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14091

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June 20, 2003

Chief Wayne Premo
Prospect Fire Co., Inc.
P.O. Box 66
Prospect, NY 13435

The staff of the Committee on 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 Premo:

I have received your letter of June 9 concerning access to certain records of the Prospect Fire Company, Inc. ("the Company").

You wrote that the Company's treasurer provides a financial report to the Board of Directors that includes:

> "1) A monthly abstract listing all bills to be paid with dates, check numbers and amount. This is signed by the President and Treasurer.
> 2) A complete list of all money in or out and the balance on all accounts held by the fire company.
> 3) A copy of the budget updated monthly on what has been spent and how much remains."

Those items are "entered into the minutes" and sent to the Prospect Village Board of Trustees, and you indicated that a resident recently requested "copies of all checks and bank statements for the last two years." It is your view that those records are "confidential" and that they are not "official documents" because they were not presented at any meeting of the Board of Trustees. You have questioned "where we legally stand" on the matter."

In this regard, I offer the following comments.

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

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The Village, or any other municipal government, is clearly an agency subject to the Freedom of Information Law.

As a general matter, an agency generally is an entity of state or local government, such as a fire district. 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].

Based on the decision cited above, a volunteer fire company, despite its status as a not-for-profit corporation, also is an agency required to comply with the Freedom of Information Law.

Second, that law is applicable to all agency records, and §86(4) defines the term "record" to include:

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

Due to the breadth of the language quoted above, all records maintained by or for the Village or the Company fall within the coverage of the Freedom of Information Law, whether they are characterized as official or otherwise. I note, too, that the decision cited earlier involved a request for documents of a volunteer fire company relating to a lottery conducted by the company as a fund raiser. Although it was contended that the materials did not relate to fighting fires or the performance of the fire company's official duties and, therefore, were not subject to the Freedom of Information Law, the Court of Appeals determined that they constitute "records" subject to rights of access conferred by that 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. It is emphasized that the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the grounds for denial of access that follow. The quoted phrase indicates that a single record may include both accessible and deniable information, and that an agency, or the Company in this instance, is required to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

With respect to your suggestion that some of the records are confidential, based on judicial decisions, an assertion or promise of confidentiality, unless it is based upon a statute, is generally meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); There is no statute of which I am aware that would render the records at issue confidential.

You referred to "names and numbers", and it is assumed that the reference involves checks payable to the company. In my view, if a person makes a charitable contribution to the Company, identifying details appearing in a record, i.e., a check, may be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Similarly, personal bank account numbers could, in my opinion, be withheld on the basis of the same provision. It is likely, however, that the remainder of the records sought would be accessible.

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: Board of Trustees, Village of Prospect

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1409 2

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June 23, 2003

Hon. Paul M. Guilianelle
Commissioner of Accounts/City Clerk
City of Mechanicville
36 North Main Street
Mechanicville, NY 12118

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

Dear Mr. Guilianelle:

I have received your letter in which you asked whether you are required to make a copy of a tape recording of a City Council meeting available under the Freedom of Information Law.

From my perspective, the City is required to reproduce the tape recording if it has the ability do so and the applicant pays the appropriate fee.

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, the tape recording would constitute a "record" that falls within the coverage of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom

of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

Third, if the City has the ability to prepare a duplicate recording, I believe that it would be obliged to do so [see §89(3)] upon payment of the requisite fee. I note that §87(1)(b)(iii) indicates that the fee for copies of records other than photocopies should be based on the actual cost of reproduction. If the City cannot copy the tape recording, an applicant would have the right to listen to the tape or copy it. In my view, the City would not be required to relinquish custody of a tape recording or any record; however, presumably the applicant could place his tape recorder next to the City's recorder, and simply permit his machine to record the sound that emanates from the City's machine.

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-14093

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June 23, 2003

Mr. Richard P. DePaolo
[redacted]

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

Dear Mr. DePaolo:

I have received your letter, as well as a resolution adopted by the Tompkins County Board of Representatives, concerning the publishing of certain assessment data on the Internet. In short, although the resolution indicates that "nearly all" of the County's assessment data is available under the Freedom of Information Law, the availability of that data on the Internet has been limited. You have questioned the propriety of the County's action.

In this regard, there is nothing in the Freedom of Information Law that requires agencies to make records available online via the Internet. When they choose to do so, I believe that they would be acting above and beyond the responsibilities imposed upon them by law. The Internet and the placement of data on a website, in my view, involve the means by which information is transmitted. While an agency may choose to make data available through the Internet, there is no obligation to do so. An agency's responsibility under §§87(2) and 89(3) of the Freedom of Information Law pertains to making records available for inspection and copying at a designated location or locations, and making copies of records available upon payment of the appropriate fee.

I note that the issue that you raised is the subject of national debate, and that a variety of approaches have been taken. On one hand, the kind of data to which you referred has historically been accessible to the public and remains available from the traditional custodians of records containing the data, i.e., assessors, county offices of real property services and court clerks. In some states, records and data that have long been available and have been made readily accessible via the Internet. On the other hand, however, many members of the public have expressed concern with respect to the extent to which personally identifiable information, even though it may be available from other public sources, should be made available, to anyone, worldwide, via the Internet.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Tompkins County Board of Representatives

STATE OF NEW YORK
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June 24, 2003

Ms. Dee Estelle Alpert
[redacted]

The staff of the Committee on 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. Alpert:

I have received your letters of June 12 and June 20, as well as the materials relating to them. In brief, in a letter dated March 10, you requested certain records pertaining to District 75 from the New York City Department of Education. The receipt of your request was soon acknowledged, indicating that one aspect of the request would be honored by April 28, and you were in fact sent a copy of that document. Another letter was sent to you by the Department's Office of the Auditor General stating that the remainder of the request would be fulfilled by April 28. On May 1, you received notification that the request would be honored by May 29; on June 5, you were informed that the records would be made available by June 20; most recently, on June 20, you were told that it could be anticipated that a response would be provided by July 31.

You have asked whether, in consideration of the foregoing, the Department "could be construed to have acted unreasonably" and whether its failure to grant or deny access to the records sought "can reasonably be construed as a denial of [your] demand, and therefore be formally appealed."

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 note, too, that in a case that described an experience similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming.
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including 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 "is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law, §89(4)(a)."

In view of the foregoing, I believe that your request has been constructively denied and that you may appeal.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan W. Holtzman
Arlene Longoria

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 24, 2003

Ms. Jo Craven McGinty
Newsday
235 Pinelawn Road
Melville, NY 11747

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

Dear Ms. McGinty:

I have received your letter and the materials relating to it. You referred to two "opinions" that I prepared concerning access to certain records that "appear to be contradictory" and asked that I clarify my views on the matter.

By way of background, you indicated that you transmitted a request under the Freedom of Information Law to the New York State Department of Transportation (DOT) for records that identify hazardous intersections and locations in particular geographic areas. You added that the Department is required to maintain the records sought to comply with the federal "Hazard Elimination Program." The Department denied access based on 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."

The Department has apparently contended that the records sought are exempt from disclosure based on the language quoted above when it is read in conjunction with §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."

In a letter addressed to a DOT regional director in 1995, a communication that this office did not characterize as an advisory opinion, it was suggested that 23 USC §409 is a statute that exempts records from disclosure through the application of §87(2)(a). However, having reviewed that letter, it is clear that the suggestion offered involved a cursory review of the matter. More detailed and expansive is the advisory opinion rendered on December 1, 2000 and addressed to the Chief Counsel at DOT. In that opinion, it was suggested that the capacity to deny access under the federal statute is limited, and if that is so, that the records are subject to rights of access conferred by the Freedom of Information Law. Having considered the federal statute again and the intent of Congress, I believe that a request for the records pursuant to the Freedom of Information Law must be honored, and that rights of access should be determined by that law.

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

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

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

> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a litigant, and the nature of the records or their materiality to a proceeding. The materials made available in discovery to a litigant through discovery may not be available to the public under the Freedom of Information Law. Conversely, there may be instances in which records are beyond the scope of discovery, but which may be available under the Freedom of Information Law.

The language of the federal statute indicates that the intent is to preclude the use of certain records in a litigation context, perhaps to the detriment of a government agency and, therefore, taxpayers. In a statement clarifying the intent of 23 USC §409 when it was minimally amended in 1995 by inserting the phrase "or collected" after "compiled", the Congressional Record states that:

> "This section amends section 409 of title 23 to clarify that data 'collected' for safety reports on surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.
>
> "This clarification is included in response to recent State court interpretations of the term 'data compiled' in the current section 409 of title 23. It is intended that raw data collected prior to being made part of any formal or bound report 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 mention[ed] or addressed in such data."
>
> H.R. Rep. 104-246 §328, at 59 (1995); see Act of Nov. 28, 1995, Pub. L. No. 104-59, 1995 U.S.C.C. AN. (109 Stat) 591.

If the records sought are disclosed under the Freedom of Information Law, they could not be obtained via discovery or used in a proceeding relating to an occurrence at a location mentioned in those records; a court, being informed of the direction provided in 23 USC §409, would be required to ensure that any such records are not used in the proceeding. That being so, the harm sought to be avoided by 23 USC §409 would be avoided. Concurrently, the public, by obtaining records under

the Freedom of Information Law, would have the ability to know which locations may be most hazardous, thereby enabling drivers and others to use greater care and caution.

In my view, 23 USC §409 focuses on the use of the records sought. Unless and until you or any other person attempt to use those records in a litigation context as envisioned by that statute, I believe that they are 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:tt

cc: William MacTiernan
John Dearstyne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 25, 2003

Ms. Cheryl Strom
Co-President
Lynbrook Special Education PTA (SEPTA)
18 Mallow Road
East Rockaway, NY 11518

Ms. Nancy Wolfsohn
Co-President
Lynbrook Special Education PTA (SEPTA)
9 Walnut Road
East Rockaway, NY 11518

The staff of the Committee on 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. Strom and Ms. Wolfsohn:

I have received your letter and the materials attached to it concerning the implementation of subdivision (7) of §4402 of the Education Law, which was enacted last year. That provision requires the board of education or trustees of a school district to ensure that teachers and other "service providers" receive a copy of a student's "individualized education program" (IEP).

Based on §4402(7) and the regulations promulgated by the Commissioner of Education you requested from the Lynbrook Union Free School District "memoranda to staff implementing the SED regulations." Although the District's records access officer indicated that she would provide you with a copy of a certain School Board resolution, she wrote that she "cannot provide you with memoranda." She offered no reason for the denial of access to the memoranda, and you have questioned the propriety of her response.

In this regard, the regulations of the Commissioner include direction to school districts concerning the implementation of subdivision (7) of §4402. Section 200.2 of the regulations entitled "Board of education responsibilities, specifically, subdivision (b) states in part in paragraph (11) that:

> "Each board of education or board of trustees shall adopt a written policy that....establishes administrative practices and policies to ensure that:

> (i) each regular education teacher, special education teacher, related service provider and/or other service provider.....who is responsible for the implementation of a student's individualized education program (IEP), is provided a paper or electronic copy of such student's IEP prior to the implementation of such program."

In addition, §200.4 of the Commissioner's regulations entitled "Procedures for referral, evaluation, individualized education program (IEP) development, placement and review" requires in paragraph (3) of subdivision (e) that "recommendations on a student's IEP are implemented" by teachers, related service providers and paraprofessionals and that those persons must be informed, prior to the implementation of the IEP of his or her responsibility to implement those recommendations.

As I understand the foregoing, the Board of Education is required to adopt written policy and procedures to implement §4402 of the Education Law and the regulations promulgated pursuant to that statute. In my view, any such records, perhaps as well as others, must be disclosed under the Freedom of Information Law, whether they are characterized as "memoranda" or otherwise.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 greatest significance is §87(2)(g). Although that provision potentially serves as a ground for denial of access, due to its structure, it often requires substantial disclosure. Specifically, §87(2)(g) authorizes an agency, such as a school district to withhold records that:

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

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

By their nature, the "administrative practices and procedures" required to be established pursuant to §200.2(b)(11) and the procedures regarding IEP required to be carried out pursuant to

§200.4(e)(3) of the Commissioner's regulations indicate that the Board and the District must prepare records that may be characterized as "instructions to staff that affect the public" or final agency policies or determinations that must be disclosed under subparagraphs (ii) or (iii) of §87(2)(g).

Whether the documentation required to be prepared pursuant to the regulations are characterized by the District as "memoranda" is unknown to me. However, irrespective of their characterization, I believe that the records required to be prepared and adopted to implement §4402(7) of the Education Law and the regulations promulgated thereunder by the Commissioner must be disclosed. It is suggested that you might resubmit your request and seek "records" as described in the preceding sentence rather than memoranda.

Lastly, the District's records access officer indicated that she could not grant access to certain records, but she failed to inform you of your right to appeal the denial of access as is required by law. When an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

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

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

I note 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)].

The foregoing is not intended to suggest that you initiate a lawsuit. On the contrary, copies of this opinion will be sent to the District with the goal of enhancing compliance with and understanding of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Clara Goldberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 25, 2003

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:

As you are aware, I have received your letter of June 13. You have questioned the propriety of a fee for copies of records imposed by a county clerk.

In this regard, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in other capacities, such as clerk of a court. When the Freedom of Information Law governs, 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 under the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

Lastly, I note that §8019(f) of the Civil Practice Law and Rules, entitled "Copies of records", states in relevant part that:

> "The following fees, up to a maximum of thirty dollars per record shall be payable to a county clerk or register for copies of the records of the office except records filed under the uniform commercial code:

1. to prepare a copy of any paper or record on file in his office, except as otherwise provided, fifty cents per page with a minimum fee of one dollar."

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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June 25, 2003

Mr. Paul R. Plante
[redacted]

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

Dear Mr. Plante:

I have received your letter in which you referred to a situation in which a request for records has not been answered and asked "how much time must elapse before an appeal can be taken."

From my perspective, if a proper request is made and an agency fails to respond in some manner within five business days of its receipt, the request may be considered to have been denied, and the person seeking the records may appeal.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, based on case law, 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: County Executive Jimino

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 25, 2003

Mr. Bruce T. Reiter
[redacted]

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

Dear Mr. Reiter:

I have received your letter and the correspondence attached to it. According to the materials, on May 6, you requested copies of current and previous contracts between the Enlarged School District of the City of Watervliet and its superintendent and the current teachers' contract. Because you received no response, you wrote again to the District to remind the Superintendent of your request. As of the date of your letter to this office, there had still been no response to your request.

In this regard, first, you referred in your request to the federal Freedom of Information and Privacy Acts, which generally apply to records of federal agencies. The applicable statute in this instance is the New York Freedom of Information Law.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Contracts, bills, vouchers, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff 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 an administrator, such as a superintendent, and a school district or board of education clearly must be disclosed under the Freedom of Information Law. It is noted that there is nothing in the statute 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 under the circumstances 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, 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 superintendent's contract, or 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 regarding the employment of a public employee or employees.

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 Superintendent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carol Carlson

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 25, 2003

Mr. Steven G. Poyzer
[redacted]

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

Dear Mr. Poyzer:

I have received your letter of June 13 and the materials attached to it. You have sought advice concerning requests made under the Freedom of Information Law to the City of Canandaigua and the Canandaigua Recreation Development Corporation ("CRDC").

In this regard, first, having reviewed the correspondence, it is noted at the outset that the CRDC has been found by both the Supreme Court and the Appellate Division to be subject to the requirements of the Freedom of Information and Open Meetings Laws [Canandaigua Messenger, Inc. v. Wharmby, Supreme Court, Ontario County, May 11, 2001; affirmed, 739 NYS2d 508, 292 AD2d 835 (2002)].

Second, I am in general agreement with Ms. Wharmby's comments. In some respects, your request to the City involved the making of judgments or subjective conclusions. For example, seeking records indicating the City's knowledge of the operations of the CRDC, in my view, would involve questioning City officials as to what they may have known and locating records reflective of their knowledge. Further, knowledge can be derived from any number of sources, including newspapers, journals, financial documentation, etc. It is suggested that in the future, you attempt to "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. If, for instance, minutes of meetings are not indexed by subject matter but rather are kept chronologically, a proper request would involve minutes prepared within a certain time period. If you know or can reasonably estimate that officials were considering issues concerning the CRDC from June, 2000 through March, 2001, you might request minutes of City Council meetings covering that period. Similarly, when seeking minutes of CRDC meetings, it is recommended that you request them by indicating a time period rather than subject matter.

Third, since both the City and the CRDC are agencies required to comply with the Freedom of Information Law, I note that that statute provides direction concerning the time and manner in

which agencies must respond to requests 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)].

Lastly, since much of your requests focuses on minutes of meetings, I point out that §106 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. 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, it is clear that minutes need not consist of a verbatim account of all commentary expressed at a meeting. It is also clear that 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.

I point out, too, that since its enactment in 1974, the Freedom of Information Law has included an "open vote" requirement. Section 87(3)(a) states that "[e]ach agency shall maintain a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, in each instance in which a public body, such as the City Council or the Board of Directors of the CRDC, takes action, a record must be prepared specifying the manner in which each member cast his or her vote. Typically, the record of votes appears in minutes of meetings.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Laura Kay Wharmby
Dennis Morga

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June 30, 2003

Mr. Brian Colella
[redacted]

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

Dear Mr. Colella:

I have received your letter and the attached materials in which you explained your difficulty in obtaining records indicating "overtime totals for the (New York City) Fire Department Building Unit Electricians" and expressed your desire to "appeal the non-response to (your) FOIL request."

In this regard, I offer the following comments.

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

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

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

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

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

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

Based upon the foregoing, it is clear in my view that records reflective of salaries of public employees must be prepared and made available. Similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records in my view would be relevant to the performance of one's official duties. It is noted that one of the decisions cited above, Capital Newspapers v. Burns, supra, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer. The Appellate Division found that those records must be disclosed, and the Court of Appeals affirmed. The decision indicates that the public has both economic and safety reasons for knowing whether public employees perform their duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of payment of overtime must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties.

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

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

Based on the preceding analysis, it is clear in my view that payroll and attendance records must be disclosed 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-1411

41 State Street, Albany, New York 12231
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July 1, 2003

Mr. Michael A. Kless
[redacted]

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

Dear Mr. Kless:

I have received your letter of June 15 and the correspondence attached to it. As I understand the matter, you have sought information from Erie County concerning the acceptance of U.S. currency by County agencies.

In this regard, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for that statute pertains to existing records; it does not deal with information *per se*. That being so, the Freedom of Information Law does not require that an agency offer explanations concerning its actions or policies. Further, §89(3) provides in part that an agency is not required to create a record in response to a request. In short, agency officials may choose to answer questions or explain their actions or policies, but they are not required to do so.

Based on the County Attorney's letter to you of May 16, reference was made to memoranda and §87(2)(g) of the Freedom of Information Law. Under that provision, communications between or among government agency officers or employees consisting of advice, opinions, recommendations and the like may be withheld. In addition, when an agency officer or employee seeks legal advice from the County Attorney or other attorneys in his office, the communications between those persons would, in my view, fall within the coverage of the attorney-client privilege. When that is so, the records are exempt from disclosure pursuant to §§4503 of the Civil Practice Law and Rules and 87(2)(a) of the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Frederick A. Wolf

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14103

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July 1, 2003

Mr. Kevin B. Barry
[redacted]

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

Dear Mr. Barry:

I have received your letter of June 14 and the correspondence attached to it. Based on a review of the materials, I offer the following comments.

First, §89(4) of the Freedom of Information Law pertaining to the right to appeal a denial of access to records 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 therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.

I note that it has been held that a failure by the agency to determine an appeal within ten business days as required by the provision quoted above may be considered as a constructive denial of the appeal. In that circumstance, the person denied access is 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)].

Second, your request involved a copy of a letter from the attorney for the Freeport School District to the general counsel for the union representing your wife, who is or had been an employee of the District. The records access officer denied access, stating that the record in question "is privileged from disclosure as a settlement proposal between counsel in connection with pending litigation", and "because the document is privileged under state law, it need not be disclosed under FOIL." I know of no provision that characterizes such a communication as privileged. From my

perspective, once a document is shared with an adversary, it loses whatever privileged status it might previously have had.

Lastly, you expressed the belief that "agents of the Freeport Schools may have violated the Federal Privacy Act of 1974 when they obtained personal information about [your] hotels and travel bookings." From my perspective, the federal Privacy Act had no application in the circumstances that you described. In short, that statute, 5 USC §552a, pertains to federal agencies; it does not apply to entities of state or local government, except in one instance, and that relates to the collection of social security numbers. I do not believe that the Privacy Act has any bearing on the ability of the District to seek, obtain or disclose the records at issue.

I hope that I have been of assistance and that I have clarified your understanding of the federal Privacy Act.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Eric L. Eversley
Mary R. Bediako

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 1, 2003

Mr. George D. McHugh
Attorney at Law
P.O. Box 291
Ravena, NY 12143

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

Dear Mr. McHugh:

I have received your letter of June 18 and the correspondence attached to it. According to the materials, you submitted a request to inspect certain vouchers to the Coeymans Town Clerk on June 2. Since you received no response, you deemed your request to have been constructively denied and appealed on June 13 to the Town Supervisor, who is designated to determine appeals pursuant to the Town Code. On June 16, the Supervisor responded by indicating that your view that the request was denied was "premature", that it was not and will not be denied.

You have sought assistance in the matter, and in this regard, I offer the following comments.

First, I note that the Town Clerk, pursuant to §30 of the Town Law, is the legal custodian of all Town records. Therefore, even though she may not have physical possession of the records sought, I believe that she has legal custody of the records.

Second, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing board of a public corporation, the Town of Coeymans , is the Town Board, and I believe that the Board is required to promulgate appropriate rules and regulations

consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law. Your correspondence suggests that the Board has done so.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

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

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
>
> (2) Assist the requester in identifying requested records, if necessary.
>
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
>
> (4) Upon request for copies of records:
>
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records.
>
> (5) Upon request, certify that a record is a true copy.
>
> (6) Upon failure to locate the records, certify that:

> (i) the agency is not the custodian for such records; or
> (ii) the records of which the agency is a custodian cannot be found after diligent search."

Assuming that the Town Clerk is the Town's designated records access officer, she has the duty of coordinating the Town's response to requests for records. Therefore, at her direction, I believe that a town officer or employee must either turn the records over to the Clerk or disclose the records to the extent indicated by the Clerk.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law 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*" within five business days, [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added].

In the context of your correspondence, more than five business days passed before the receipt of your request was acknowledged. Further, in his response to you, the Supervisor offered no approximate date indicating when you could expect to gain access to records. That being so, I believe that your request was "constructively denied" and that, therefore, you had the right to appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Supervisor
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1405

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July 1, 2003

Mr. Elias Cruz
02-A-3394
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. Cruz:

I have received your letter and the attached materials in which you sought assistance in relation to a response from the Albany County Sheriff's Department indicating that certain records pertaining to your arrest could not be found after a diligent search. You would like to appeal the 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.

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, the Freedom of Information Law does not provide a mechanism in which a person may appeal a certification indicating that records cannot be found. Under the circumstances, you might consider requesting the records of your interest from the District Attorney's Office.

Lastly, it should be noted that in a decision concerning a request for records maintained by the office of a district attorney, it was found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" [Moore v. Santucci, 151 AD2d 677, 678 (1989)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14106

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July 1, 2003

Mr. Derrick Corley
90-T-1984
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 12733-0116

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

Dear Mr. Corley:

I have received your letters in which you asked whether you are entitled to copies of warrants or detainers in your file. You wrote that the "Institutional Parole Officer" at your facility stated that "Internal documents, such as detainers are not discoverable."

While I am unfamiliar with the contents of the records of your interest, I offer the following comments.

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

From my perspective, §87(2)(g) is pertinent to an analysis of rights of access. 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.

Additionally, records may be withheld to the extent that disclosure would constitute an unwarranted invasion of personal privacy under §87(2)(b), or endanger the life or safety of any person under §87(2)(f). Also, records compiled for law enforcement purposes may be withheld to the extent that disclosure would interfere with an investigation or disclose confidential information related to a criminal investigation under §87(2)(e).

Second, 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 the police department that made the arrest or the court in which the warrant was introduced in a proceeding. Also, if your facility maintains a copy of a warrant related to your arrest, in my opinion, it should be available to you.

Third, with respect to your ability to request records directly from the Inmate Records Coordinator at your facility, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to include:

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

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. The Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared, the function to which it relates, or its origin are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

Based upon the foregoing, when documents come into the possession of your facility, even though they may have been forwarded by another agency, for the purpose of the Freedom of Information Law, I believe that they constitute "records" of the facility subject to rights of access conferred by that statute. Consequently, in my view, while the Inmate Records Coordinator is obliged to disclose any such records to the extent required by the Freedom of Information Law; he or she also has the ability to withhold those records in accordance with the grounds for denial appearing in that statute.

Lastly, the person designated as appeals officer by the Department of Correctional Services is Anthony J. Annucci, Counsel; and the person so designated by the Division of Parole is Terrence X. Tracy, Counsel.

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-1411/07

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July 1, 2003

Mr. Richard Bernard Lyon
82-C-0626
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. Lyon:

I have received your letter and the attached materials in which you sought an opinion concering the availability of immunity agreements from the Chemung County District Attorney's Office. You would like to obtain the immunity agreements between the District Attorney's Office and the two individuals who testified against you at your trial.

In this regard, I offer the following comments.

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

Of 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.

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-1411O8

Committee Members

Randy A. Daniels
Mary O. Donohue
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Robert J. Freeman

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July 2, 2003

Hon. Mary Zacek
Clerk/Treasurer
Village of Prospect
P.O. Box 159
Prospect, NY 13435

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

Dear Ms. Zacek:

I have received your letter in which you referred to our conversation in which it was advised that the Village of Prospect "is not responsible to provide Volunteer Fire Company records that we in fact do not have." You asked that I confirm that advice in writing.

In this regard, the Freedom of Information Law pertains to records maintained by for an agency, such as the Village. Most pertinent to the matter is §89(3), which 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 possessed or maintained by such entity..." Stated differently, when requested records are not maintained by or for the Village, the Village would not be required to prepare a new record or attempt to obtain records from another source in order to satisfy the applicant seeking the records.

I emphasize that the Freedom of Information Law includes all records within its coverage, for §86(4) defines the term "record" broadly to include:

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

Based on the foregoing, any record maintained by or for the Village, irrespective of its function or origin, would fall within the scope of the law. Therefore, insofar as the Village maintains records

relating to the volunteer fire company, they would be Village records, and the Village would be obliged to respond to a request for those records and disclose them as required by law. Nevertheless, as indicated above, if the Village does not maintain requested records, it would be not be required in my view to obtain them from another source.

Lastly, as you may be aware, an advisory opinion was prepared last month at the request of the Chief of the Prospect Fire Company indicating that the Company is subject to the Freedom of Information Law and that its records must be disclosed to the extent required by that law. A copy of that opinion was sent to the Village Board of Trustees.

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-1409

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July 2, 2003

David A. Gorlewski, Ed.D.
Assistant Superintendent for
Administration and Personnel
Orchard Park Central School District
3330 Baker Road
Orchard Park, NY 14127

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

Dear Dr. Gorlewski:

I have received your letter of June 20 and a document presented to the Orchard Park Central School District Board of Education by an architectural firm serving as a consultant to the District. You have asked that I review the document for the purpose of offering an opinion concerning "whether or not the document may be shared under the Freedom of Information Law."

In this regard, it is emphasized at the outset that the Committee on Open Government is not court and that I am not a judge. The authority of this office is purely advisory. Consequently, the ensuing comments should not be viewed as binding in any way.

Inserted with the cover page of the document is a note, presumably prepared by an employee of the consulting firm, suggesting that "The Board might want to consider this report as an internal document until it officially accepts it at a public meeting and places it on an agenda." Similarly, you wrote that:

> "The District's contention, in response to a recent FOIL request, is that the document should be withheld (at least temporarily) until:
>
> a) The document is completed (the Board asked the architect to modify the report to include his assessment of four additional sites).
>
> b) The document is officially received and approved by the Board.

> c) The document results in the determination of some policy or action on the part of the Board."

From my perspective, the recommendation offered by the consulting firm and the contentions quoted above concerning disclosure are inconsistent with both the language of the Freedom of Information Law and its judicial construction. This is not to suggest that the report must be disclosed in its entirety; on the contrary, I believe that portions may be withheld. Nevertheless, a blanket denial of access would, in my view, be inappropriate, and I offer the following comments.

First, since you asked whether the document "may be shared", I note that the Freedom of Information Law is permissive. Even when an agency, such as a school district, has the ability to deny access to records, the Court of Appeals, the state's highest court, has found that it is ordinarily not required to do so [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)] and has discretionary authority to disclose the records. The only instances in which an agency has no discretion to disclose records involves situations in which a statute, i.e., an act of Congress or the State Legislature, specifies that certain records *must* be kept confidential. For example, as you are likely aware, the Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g) prohibits educational agencies from disclosing education records that are personally identifiable to a student without the consent of a parent. In this situation, I believe that the document "may be shared" in its entirety with the public, even though portions of the document may be withheld.

Second, that a document is internal, a draft, incomplete or has not been "officially received and approved" has no bearing in determining rights of access. The Freedom of Information Law is applicable to all agency records, and §86(4) defines the term "record" expansively to include:

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

Based on the foregoing, the document in question, irrespective of its characterization as "internal", a draft, incomplete or not final, or that it has not been accepted or approved, in my view clearly constitutes an agency record that is subject to rights of access. Further, even if it never came into the physical custody of the District, it would fall within the coverage of the Freedom of Information Law, because it was prepared "for" the District.

Third 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)" [87 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the 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.).

The provision to which the Court referred in Gould, §87(2)(g), is likely the only ground for denial of significance with respect to the document at issue. While that provision potentially serves as a basis for denying 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 Gould 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, I believe that the report may be characterized as intra-agency material. However, that it is internal, incomplete, not officially accepted or approved would not remove it from rights of access. Again, I believe that those portions consisting of statistical or factual information must be disclosed.

The Court in Gould considered the intent of §87(2)(g) and what constitutes "factual" information, stating that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative

> process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [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).]

While I have not and will not read the entirety of the document at issue, a cursory review of its contents indicates that some portions clearly consist of statistical or factual information that must be disclosed, while others consist of the opinions or recommendations of the consultant that may be withheld. For instance, in the sections entitled "Building Statistics and Construction", most paragraphs factually describe certain characteristics of a building that must be disclosed. At the end of most of those paragraphs is an opinion or recommendation that may (but need not) be withheld. A simple example would include any of the paragraphs under "Heating, Ventilating and air conditioning" on page 15, i.e., "Interior spaces are served by roof mounted heating and air conditioning units which were replaced during the 1990's projects [factual]. Operation has been satisfactory" [opinion].

In sum, I believe that the District may choose to withhold portions of the document reflective of opinions or recommendations, but that the remainder consisting of statistical or factual information must be disclosed.

As an aside, if the document is to be discussed in public by the Board or Board committees during open meetings, there may be little reason to deny access to its contents.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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July 2, 2003

Mr. Dennis Timmons
01-B-0828
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929

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

Dear Mr. Timmons:

I have received your letter in which you explained your difficulty in obtaining "all transcript print-out and police memo notes" related to your request from the Monroe County District Attorney's Office.

In this regard, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 your request for a "911 transcript", 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.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning 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 [Gould, Scott and DeFelice v. New York City Police Department, 653 NYS 2d 54, 89 NY 2d 267 (1996)].

From my perspective, §87(2)(g) of the Freedom of Information Law is pertinent to an analysis of rights of access to "police memo notes." Specifically, that provision enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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

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

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

i. interfere with law enforcement investigations or judicial proceedings;

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

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

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

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

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

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
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July 3, 2003

Mr. Russell 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 facts presented in your correspondence.

Dear Mr. Mercier:

I have received your of June 18. As in the case of previous correspondence, you have sought assistance in your efforts in obtaining records from the town of Southampton.

You requested a purchase order and "all paper work" prepared in relation to work done by or for the Town at certain locations. Although the purchase order was made available, the Assistant Town Attorney indicated in a response of April 7 that the remainder of the request was "too vague." In an ensuing request made on May 15, you clarified the nature of the records sought and referred to a contract between the Town and Corazzini Asphalt, Inc., bidding documents relating to the project for which that company provided services, field notes of inspectors that "checked to see work was installed", correspondence between the Town and Corrazini Asphalt, and "invoices for payment work billed for."

In view of your clarification of the records in which you are interested, I believe that the Town must respond in accordance the direction provided by the state's highest court, the Court of Appeals. From my perspective, the issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. In considering that standard, the Court of Appeals has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

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

To the extent that the Town maintains the records sought in a manner in which they can be retrieved with reasonable effort, I believe that you would have met the requirement that the records be reasonably described. On the other hand, insofar as the records cannot be located except by means of a page by page review of hundreds or thousands of records individually, I do not believe that the request would have met that standard.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Celia Gilvary

STATE OF NEW YORK
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July 3, 2003

Mr. James Henderson
98-A-3509
Washington Correctional Facility
72 Lock 11 Lane, P.O. Box 180
Comstock, NY 12821-180

Dear Mr. Henderson:

I have received your letter, which is characterized as a Freedom of Information Law appeal.

In this regard, I note that the primary function of the Committee on Open Government involves offering advice and opinions relating to public access to government records. 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 a denial of access to records, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1411 3

Committee Members

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July 3, 2003

Mr. David Brooks
89-A-4087
P.O. Box 4000
Stormville, NY 12582-0010

Dear Mr. Brooks:

I have received your letter, which is characterized as a Freedom of Information Law appeal, and is addressed jointly to this office and the Office of the New York County District Attorney.

In this regard, I note that the primary function of the Committee on Open Government involves offering advice and opinions relating to public access to government records. 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 a denial of access to records, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

For your information, the person designated to determine appeals by the District Attorney is Mr. Gary J. Galperin, Assistant District Attorney.

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: Tara Christie Miner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 3, 2003

Ms. Carol D. Stevens
County of Greene
Office of the County Attorney
901 Green County Office Building
Cairo, NY 12413-9509

The staff of the Committee on 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. Stevens:

I have received your letter of June 13 concerning the "Applicability of Open Meetings Law and FOIL to Settlement Agreements with Greene County." Specifically, you raised the following question:

> "May a County keep the details of the settlement of a lawsuit by the County against another when the litigation has been authorized by Legislative resolution but not actually commenced?"

You added that "[a]n exchange of mutual releases is expected but no other documents would be generated."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that "[n]othing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity..." Also significant is §86(4), which 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, information existing in a physical form maintained by or for the County would constitute a record that falls within the coverage of the Freedom of Information Law. If, however, information does not exist in the form of a record or records, that statute would not be applicable.

Second, 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, 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)].

Although the Appellate Division determined that the issuance of the press release "was both arbitrary and capricious and an abuse of discretion" (id.), 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)].

Third, I believe that, insofar as it exists in the form of a record or records, a settlement or similar 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, the court found that no ground for denial could justifiably be cited to withhold the agreement.

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Freedom of Information Law [see FOIL, §87(2)(g)(iii)].

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 District, ___AD2d___ 672 NYS2d 776). There is no question that defendants lacked the authority to subvert

> FOIL by exempting information from the enactment by simply promising confidentiality (Matter of Washington Post, supra p567).
>
> "Therefore, this Court finds that the disclosure made by the defendant Supervisor was 'required by law', whether or not the contract so provided" (Hansen v. Town of Wallkill, Supreme Court, Orange County, December 9, 1998).

In short, absent the 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 a record reflective of a settlement must be disclosed in response to a request made under the Freedom of Information Law, notwithstanding any condition regarding confidentiality in the agreement.

With respect to the "Applicability of the Open Meetings Law", it appears that only issue of significance involves minutes and the extent to which information regarding settlement agreements must be included. Section 106 of that statute pertains to minutes and provides that:

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

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, I believe that the minutes of the County Legislature must indicate in general terms that settlements were reached or approved; I do not believe they are required to include a detailed description of a settlement.

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-1411S

Committee Members

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July 3, 2003

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 facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Sheehan:

I have received your letter of June 19 concerning a request made under the Freedom of Information Law to Chanango County for a "911 report" that was withheld on the basis of §308(4) of the County Law. In addition, as required by §89(4)(a) of the Freedom of Information Law, the Chairman of the Chenango County Board of Supervisors sent a copy of his determination of your appeal to this office.

In short, I agree with the determination. The County Law consists of a series of statutes enacted by the State Legislature, and those statutes apply to every county outside of New York City. Section 308 is not a local enactment; on the contrary, it is a state statute.

Relevant in terms of rights of access is 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." One such statute is §308(4), 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."

Based on the foregoing, "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. Records of that nature are, in my view, exempted from disclosure by statute. I do not believe, however, 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.

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 B. Decker
Richard W. Breslin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14116

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July 3, 2003

Hon. Dee Barbato
Council Member
City of Yonkers
City Hall
40 S. Broadway
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 Council Member Barbato:

I have received your letter of June 18 and the correspondence attached to it. According to the materials, in your capacity as a Council member and Chair of the Council's budget committee, you submitted a request to the Yonkers Industrial Development Agency ("YIDA") on June 19 for a variety of records. The request involved the certificates of incorporation, by-laws, minutes of meetings, audits, financial statements, and the names of officers, directors and chief executives relating to certain entities, as well as contracts, loan agreements between and records of monies advanced by YIDA to those entities. The receipt of your request was acknowledged in writing in June 16, and you were informed that the request would "granted or denied or otherwise considered....no later than sixty (60) business days from the date of this correspondence." You have questioned "the appropriateness of this seemingly extraordinary time parameter."

From my perspective, a delay in granting or denying access to the records sought for a period as long as sixty business days is, in consideration of the nature of the request and YIDA, inappropriate and inconsistent with law.

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

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

The records sought appear to be integral and basic to the work of an industrial development agency, and there is little doubt that they must be disclosed pursuant to the Freedom of Information Law. Further, a city's industrial development agency in my view is not so large, far flung or complex that a delay in disclosure of up to nearly three months could be characterized as reasonable or consistent with either the letter or spirit of the law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Edward Sheeran
Kevin Crozier

FOIL-AO-1117

From: Robert Freeman
To: [redacted]
Date: 7/7/2003 11:06:05 AM
Subject: Dear Leslietus:

Dear Leslietus:

I have received your inquiry concerning trial records and transcripts relating to a criminal proceeding.

In this regard, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean, in general, entities of state or local government in New York. The definition, however, specifically excludes the "judiciary", which is defined in §86(1) to mean the courts. Therefore, the courts are not subject to the Freedom of Information Law. They are nevertheless subject to other laws that require disclosure (see e.g., Judiciary Law, §255). Assuming that a transcript has been prepared, it would be available from the clerk of the court in which the proceeding occurred.

I note that court clerks are authorized to charge fees for copies that exceed those that can be charged by an agency subject to the Freedom of Information Law. Under that statute, the fee for a photocopy up to nine by fourteen inches cannot exceed 25 cents. I mention that because the office of a district attorney is an agency required to give effect to the Freedom of Information Law. In many instances, the office of a district attorney maintains trial transcripts and other records relating to a proceeding. Those records are subject to rights conferred by the Freedom of Information Law.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1411 8

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July 7, 2003

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 of June 20 and the materials attached to it. You asked that I accept your correspondence as a complaint concerning an alleged failure by the New York City Police Department to respond to your appeal in a timely manner.

According to your letter, you submitted a request under the Freedom of Information Law for crime statistics relating to a certain commercial establishment. In response, you were informed that the Department "does not index by address" and that the request, therefore, did not reasonably describe the records as required by §89(3) of the Freedom of Information Law. In your appeal, you indicated that you are a retired New York City police officer and that you are familiar with the CARS database, which includes, in your words, "all robberies, homicides, assaults, arrest records, rapes, online booking system, past crimes and crime patterns." You added that the data relating to events occurring from 1984 to the present can be retrieved "by inputting any address."

In this regard, in my view, if indeed an agency cannot locate requested records with reasonable effort due to the nature of its filing or record keeping system and the request does not meet the requirement that records be reasonably described, the inability to locate records would not involve a denial of access that can be appealed. A denial of access that may be appealed in my opinion involves a situation in which an agency has the ability to locate records and indicates that those records will not be disclosed. On the other hand, if your contention is accurate, that the data "can be extracted by means of a few keystrokes on a keyboard", I would agree that the Department is required to extract the requested data [see NYPIRG v. Cohen, 729 NYS2d 379 (2001)] and that your appeal would have been proper because retrievable data would have been withheld.

As you are aware, when an appeal is properly made, §89(4)(a) of the Freedom of Information Law requires that an agency determine the appeal within ten business days of the receipt of the

appeal by either granting access to the record sought or fully explaining in writing the reasons for further denial. I note that it has been held that a failure to determine an appeal within the statutory period may be deemed a denial of the appeal. In that circumstance, the person denied access would have exhausted his or her administrative remedies and would have the right to 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)].

Copies of this response will be sent to Department officials. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Leo Callaghan
Lt. Michael Pascucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 7, 2003

Ms. Bonnie Barkley
[redacted]

The staff of the Committee 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. Barkley:

I have received a variety of correspondence from you, the Village of Penn Yan and Yates County relating to your attempts to review the employment application and personnel records of a Village police officer. The Village and Yates County have not been able to locate the application, and your request to review the personnel file was rejected pursuant to §50-a of the Civil Rights Law.

Based on a review of the materials, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which an agency, such as a village, 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)].

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, I point out that the Freedom of Information Law is applicable to all records maintained by or for an agency. Whether the records of your interest are maintained within a personnel file or elsewhere, if they exist, I believe that they are subject to whatever rights of access exist.

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

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used "to evaluate performance toward continued employment or promotion" are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered in 1999 reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual

requesting access, nor whether the request was actually made in contemplation of litigation.

> 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)].

To acquire the records that fall within the coverage of §50-a, there must be a court order issued in accordance with other provisions in that statute that state that:

> "2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.
>
> 3. If, after such hearing, the judge concludes there is a sufficient basis he shall sign an order requiring that the personnel records in question be sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting."

Based on the language of §50-a of the Civil Rights Law, various aspects of a personnel file pertaining to a police officer are exempt from disclosure, such as evaluations of performance, complaints and related records pertaining to allegations of misconduct. However, other aspects of a personnel file, i.e., those portions that are not used "to evaluate performance toward continued employment or promotion", would not be subject to that statute. For instance, an initial application for employment would be not be used for a purpose envisioned by §50-a and, therefore, rights of access would be governed by the Freedom of Information Law.

If the employment application of the officer in question can be found, most relevant in my opinion would be §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various

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

In conjunction with the foregoing, I note that it has been held by the Appellate Division that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

Additionally, in the lower court decision rendered in Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court cited and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's public employment, must be disclosed. The Court quoted from the Committee's opinion, which stated that:

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

In quoting from the opinion, the court also concurred with the following:

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

Items within an application for employment or a resume that may be withheld in my view would include social security numbers, marital status, home addresses, hobbies, and other details of one's life that are unrelated to the position for which he or she was hired.

In affirming the decision of the Supreme Court, the Appellate Division found that:

> "This result is supported by opinions of the Committee on Open Government, to which courts should defer (*see, Miracle Mile Assocs. v. Yudelson,* 68 AD2d 176, 181, *lv denied* 48 NY2d 706), favoring disclosure of public employees' resumes if only because public employment is, by dint of FOIL itself, a matter of public record (FOIL-AO-4010; FOIL-AO-7065; Public Officers Law §87[3][b]). The dates of attendance at academic institutions should also be subject to disclosure, at least where, as here, the employee did not meet the licensing requirement for employment when hired and therefore had to have worked a minimum number of years in the field in order to have qualified for the job. In such circumstances, the agency's need for the information would be great and the personal hardship of disclosure small (*see*, Public Officers Law §89[2][b][iv]) [262 AD2d 171, (1999]."

In short, portions of a resume or employment application that relate in some manner to the performance of a public employee's duties are generally accessible; other aspects of those records that are irrelevant may be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Linda K. Banach
Sherri L. Shoff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 8, 2003

Mr. Christian Remsen
Wallkill Valley Times
23 East Main Street
Walden, NY 12586

The staff of the Committee 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. Remsen:

I have received your letter in which you sought an advisory opinion concerning the propriety of a denial of access to records by the Village of Montgomery.

The request involves materials "related to a rumored historic site commonly referred to as the Colden Canal." Although the records were withheld based on the National Historic Preservation and the Federal Archaeological Resources Protection Acts, you wrote that you "have been offered no evidence" that the Colden Canal has been deemed a sensitive historic resource by the federal government.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The initial ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." When the two federal statutes to which you referred are applicable, they create exemptions from disclosure insofar as disclosure would "risk harm" to historic resources.

Second, in an effort to learn more of the matter, I spoke extensively to Mr. Douglas Mackey of the New York State Office of Parks, Recreation and Historic Preservation. He indicated that there is no entity characterized as the "Colden Canal" on a national register, but added that the entire canal system in New York has been determined to be an eligible historic resource and, therefore, is subject

to the restrictions on disclosure imposed by federal law. He suggested that the town historian likely possesses books or other documentation that include information relating to the Canal, and that the only existing item relating to your request that is clearly confidential is a map sent to his office. Mr. Mackey emphasized that the map or similar records that provide the specific location of a sensitive historic site would be exempt from disclosure, but that other materials or portions of records that indicate the nature of a site typically must be disclosed. I agree with his view of the matter and interpretation of the law.

In consideration of Mr. Mackey's comments, it is suggested that you contact the town or other local historians. I note, too, that he offered to discuss the matter with you. Mr. Mackey can be reached at (518)237-8643, extension 3291.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Douglas Mackey
Hon. Amolia Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14121

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July 8, 2003

Mr. Robert Jaegly, 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, unless otherwise indicated.

Dear Mr. Jaegly:

I have received your letter of June 24. As in the case of previous correspondence, the issue relates to a request for certain records maintained by the City of Albany and its Police Department.

Having discussed the matter with a representative of the Office of Corporation Counsel, it appears that the difficulty involved the absence of clear communication among City officials. I note that the City Clerk is newly designated. Nevertheless, as records access officer, his duty, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR §1401.2), is to coordinate the City's response to requests for records.

With respect to rights of access to the operating procedures or directives applicable to the Police Department, I believe that some aspects of the records must be disclosed while others may properly be withheld. 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. In my view, three of the grounds for denial are pertinent to an analysis of rights of access.

First, the records in question constitute intra-agency materials that fall within the scope of §87(2)(g). However, due to its structure, that provision frequently requires substantial disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

i. statistical or factual tabulations or data;

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

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

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

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

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

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency

> records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

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

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

there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Joseph Rabito
Jamie Louridas

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1411/22

Committee Members

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July 8, 2003

Mr. Jeffrey Grune
Albany County Jail
840 Albany Shaker Road
Albany, NY 12211

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

Dear Mr. Grune:

I have received your letter in which you questioned the propriety of a response indicating that the agency "is not authorized or obligated to conduct legal research on your behalf." You had "asked for access to records containing rules and regulations governing blood analysis to determine blood alcohol content. [You] believe that [your] request specifically mentioned policies used at the N.Y. State Police Forensic Center; those required by Vehicle & Traffic Law §1194(4)(c); and those in or around 10 N.Y.C.R.R. Part 59."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. As I understand your correspondence, you might have sought records or information that may not exist or be maintained by the Department of State. If no such records exist, the Department would not be obliged to prepare records on your behalf.

From my perspective, your request might 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 legal research. For instance, in a situation in which an individual sought provisions of law that might have been "applicable" in governing certain activity, it was advised that the request was inappropriate. Specifically, the request involved "copies of the applicable provisions and pages of the Civil Service Law and applicable rules promulgated by the Department of Civil Service which govern the creation and appointment of management confidential positions" (emphasis added). In response, it was suggested that:

> "...the foregoing is not a request for records. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions of law might be 'applicable', and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for 'section 209 of the Civil Service Law', no interpretation or judgment is necessary, for sections of law appear numerically and can readily be identified. That kind of request, in my opinion, would involve a portion of a record that must be disclosed. Again, a request for laws that might be 'applicable' is not, in my view, a request for a record as envisioned by the Freedom of Information Law."

In like manner, ascertaining which records contain "rules and regulations governing blood analysis to determine blood alcohol content" might involve an attempt to render a judgment regarding the use, utility, accuracy or value of records. As in the case of locating "applicable law", equally reasonable people, even those within the same agency, may reach different conclusions regarding which records may have been used or which tend to support certain needs, actions or functions.

With respect to your complaint that you were not advised of an appeal process, §89(3) of the Freedom of Information Law requires an applicant to "reasonably describe" the records sought. If a request does not reasonably describe the records, I do not believe that an agency would have denied access to a record. A denial of access involves a situation in which an agency locates a record and determines to withhold it. A denial of access in my view does not occur when an agency cannot locate a record. For instance, if an agency maintains a large record series chronologically, but the applicant seeks records by name, an agency would not be required to search all of the records in an effort to locate those that have been requested. In that circumstance, due to the nature of the agency's filing system, no search would have been made, and consequently, no written denial would have to be prepared.

Although the Department of State maintains state agencies' regulations, its functions are unrelated to the content of the regulations. It is suggested that you might seek the records of your interest from the agencies that promulgated them, i.e., the Division of State Police and the Department of Motor Vehicles.

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
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July 8, 2003

Mr. Thomas Kaminski
00-B-0517
Mohawk Correctional Facility
6100 School Road
Rome, NY 13442

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

Dear Mr. Kaminski:

I have received your letter in which you explained difficulty in obtaining a variety of records related to your "1979 case."

You wrote that you were informed that " each agency will only accept one FOIL request and if certain documents are not included, they cannot disclose them later." You also indicated that the New York State Police denied your request for records concerning an "IG investigation" of a deceased police officer, but your request was denied "under Civil Right Act and Privacy Act."

In this regard, I offer the following comments.

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

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 is no longer alive, 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. I note, too that it was held that §50-a does not apply with respect to records pertaining to a former police officer [Village of Brockport v. Calandra 745 NYS2d 662 (2002)].

Second, with respect to the "Privacy Act"providing grounds for denial of access to records pertaining to the deceased, 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; 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).

Third, several grounds for denial under the Freedom of Information Law may be applicable in determining rights of access to records of your interest. For instance, when the deceased was alive, the disclosure of records indicating the identity of a witness or confidential source might have interfered with an investigation or judicial proceeding and, therefore, might properly have been withheld under §87(2)(e)(i). While that provision might not be pertinent after the person's death, it is possible that records or portions of thereof might nonetheless be withheld pursuant to §87(2)(b)

on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" relative to persons other than the deceased, §87(2)(e)(iii) concerning the identification of a confidential source, §87(2)(f) involving endangering life or safety, or perhaps §87(2)(g), which pertains to the ability to withhold certain aspects of internal governmental communications.

Fourth, you questioned the propriety of an agency having a policy of "only accepting one FOIL request." From my perspective, a previous request may be renewed, particularly if there are new records falling within the scope of the request or if circumstances have changed. As you may be aware, many of the grounds for withholding records appearing in §87(2) of the Freedom of Information Law are based on potentially harmful effects of disclosure, and in some instances, those harmful effects will diminish or disappear due to changes in circumstances or the passage of time. However, if a second request is made that "constitute[s] nothing more than an effort to obtain reconsideration of the prior request without any change in circumstances" [Corbin v. Ward, 554 NYS2d 240, 241, 160 AD2d 596 (1990)], I do not believe that an agency would be required to reconsider the request. As a general matter, when a request is denied, the applicant, pursuant to §89(4)(a) of the Freedom of Information Law, has the right to appeal. If the appeal is denied, the applicant may seek judicial review of the denial by initiating a proceeding under Article 78 of the CPLR.

Lastly, I point out that in a decision concerning a request for records maintained by the office of a district attorney it was found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" [Moore v. Santucci, 151 AD 2d 677, 679 (1989) id.].

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

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July 9, 2003

Mr. John V. Oldfield, 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 facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Oldfield:

As you are aware, I have received your letter of June 28 and the materials relating to it. You have complained with respect to the treatment of a request made under the Freedom of Information Law to the City of Syracuse.

In your request, you established certain parameters and requested records as follows:

> "Records of all communications by telephone, FAX, and other means between City officials and Syracuse University from 9 am Monday, January 27, 2003, to 6:00 pm that day, including time, duration, and the general topic(s) discussed.
>
> "You may exclude the following City Departments: Aging Metropolitan Commission, Assessment, Aviation, Citizen Review Board, City Auditor, City Court, City Marshall, Dog Control, Finance, Fire, Human Rights Commission, License Inquiries, Management & Budget, Parking Ticket Collection Bureau, Parks Recreation and Youth Programs, Personnel and Labor Relations, Police Department, Public Works, Purchase, Research Bureau, School District, Urban Cultural Park, Water.
>
> "All other departments must be included."

You complained that it took an "excessive time" to fulfill the request, that certain items sought were not included among those made available, that some the of the records disclosed were "irrelevant", and that the City did not respond to your request for a waiver of fees.

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) provides in part that an agency, such as the City of Syracuse, is not required "to prepare any record not possessed or maintained." Therefore, if, for example, there is no record prepared in relation to a telephonic communication, the City would not be obliged to create a new record memorializing the communication. Similarly, if a record of a contact was prepared but does not contain the time or duration of the contact, City officials would not be required to insert information not included in the record.

Second and perhaps most significant in my opinion is the requirement in §89(3) that an applicant must "reasonably describe" the records sought. I point out that it has been held by the state's highest court, the Court of Appeals, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the recordkeeping systems of the City, to extent that the records sought could have been 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 thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

I would conjecture that, in many instances, records of communications involving Syracuse University would not be marked or filed in a manner that would identify them as communications with that entity. By means of example, I maintain a log telephone calls made or received, but the entries rarely

include reference to the location of a person or entity or the source of a call. The call from you yesterday includes your name, a "P" indicating that you are a member of the public, an "F" indicating that the call related to the Freedom of Information Law and the following notation: "his letter." The entry for the first call received this morning identifies the caller, includes an "L" because she is a local government official, an "O" because the inquiry involved the Open Meetings Law and the following notation: "exec.sess. disclosure." There is no additional description. In short, if an entry in a log does not identify a communication as relating to Syracuse University, there may be no way of identifying the records or portions of records that you requested. In that kind of situation, I do not believe that the request would have met the standard that it must reasonably describe the records. Further, since you requested records involving a particular time period, if the records are not maintained chronologically, the request might not reasonably describe the records.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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, although the federal Freedom of Information Act, which applies to federal agencies, includes provisions concerning fee waivers, there is no analogous provision in the New York Freedom of Information Law. Moreover, it has been held that an agency may charge its established fees pursuant that statute, even if an applicant is indigent [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Nancy J. Larson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 9, 2003

Mr. Salvatore Pulice
02-A-3912
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. Pulice:

I have received your letter in which you requested assistance and advice related to your case.

In this regard, it is emphasized that the functions of this office involve providing advice and guidance concerning public access to government information, primarily under the state's Freedom of Information Law. Since many of the issues raised in your correspondence pertain to matters outside the jurisdiction of this office, we have neither the authority nor the expertise to address them. However, I offer the following comments in relation to your questions concerning access to government records.

You complained that a district attorney's office did not respond to your request for records. 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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

With respect to your ability to obtain medical records pertaining to a person other than yourself, relevant is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute.

Section 18 of the Public Health Law deals specifically with access to patient records. In brief, that statute prohibits disclosure of medical records to all but "qualified persons." Subdivision (1)(g) of §18 defines the phrase "qualified person" to mean:

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

If you are not a "qualified person", I believe that the medical records of your interest would be exempt from disclosure. To obtain additional information regarding access to patient information, it is suggested that you contact Mr. Peter Farr, NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

Lastly, §89(2)(b) of the Freedom of Information Law indicates that disclosure of medical records would constitute 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-1411 26

41 State Street, Albany, New York 12231
(518) 474-2518
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July 9, 2003

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 facts presented in your correspondence.

Dear Mr. Rizzo:

I have received your letters in which you complained that your facility did not provide reasons for redacting portions of records you received under the Freedom of Information Law.

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 to entire records or portions of records must be stated in writing. This is not to suggest that any such reasons must be explained in an exhaustive manner. Later in the process of seeking records, if an appeal is denied, §89(4)(a) provides that the reason for further denial must be "fully explain[ed] in writing."

Lastly, a records access officer, in my opinion, may but is not required to inform an applicant prior to payment for copies that portions of the requested records will be redacted.

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-3652
FOIL-AO-14127

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July 9, 2003

Ms. Stephanie Kushner
[redacted]

The staff of the Committee on 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. Kushner:

I have received your letter of June 26 and the materials attached to it. You referred to an advisory opinion prepared at your request on June 18 and interpreted that opinion to mean that you are "entitled to receive a copy of the minutes from the Board meeting, even if not approved, and the backup information when decisions are made." You wrote, however that the East Williston Union Free School District views the opinion "differently" and attached a copy of a response to your request granting access to "approved minutes" of a meeting of the Board of Education and a denial of access to "notes that formed the basis" for a certain decision on the ground that are "an intra-agency communication and not subject to disclosure under the Freedom of Information Law."

In this regard, it is not clear that either you or District officials have construed my opinion or the law accurately. To attempt to clarify both the opinion and the law, I offer the following remarks.

First, based on the language of the Open Meetings Law, §106(3), minutes of meetings must be prepared and made available to the public within two weeks of the date of the meetings to which they relate. As indicated in the earlier opinion, there is nothing in the law that requires that minutes be approved.

Second, if I accurately understand the situation, the decision of the "nominating petition review board" was made available to you, but documentation indicating the basis of its decision was withheld. That documentation was described as "notes that formed the basis for Mrs. Gaglio's original decision." The notes are clearly "intra-agency material", and in the context of your request, I believe that portions consisting of statistical or factual information or which represent a final agency determination must be disclosed, respectively, pursuant to subparagraphs (i) and (iii) of §87(2)(g). Not all "backup information" leading to or used in the decision making process is necessarily available. If five recommendations were made to a decision maker and he or she in some

way considered all of them in reaching a decision, but that person did not specifically adopt a recommendation or recommendations, I believe that those records may be withheld. Similarly, if the notes to which you referred were merely used to aid in reaching a decision, I believe that those portions consisting of opinions, advice, recommendations, conjecture and the like may be withheld. An example of a situation in which "backup" material would be available would involve a proceeding in which a hearing officer prepares a recommendation and the commissioner or other decision maker adopts the recommendation as his or her decision. In that kind of situation, the recommendation becomes the decision. It would be unlikely in my view that notes would become a decision.

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: Board of Education
Edward J. Cigna

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 9, 2003

Mr. Derrick Caldwell
93-A-4157
Green Haven 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. Caldwell:

I have received your letter in which you requested guidance in obtaining your "prison commitment papers" from your facility to challenge "factual data" contained within the papers.

As I understand the matter, upon sentencing, the court clerk checks off a series of boxes and fills in blanks on a standardized "sentencing and commitment order." This record indicates sentence and type of facility in which a person is to be committed, the crimes for which an individual was convicted, and his or her identification information and indictment number.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is my understanding that commitment papers are routinely disclosed by Inmate Records Coordinators to the subjects of those records, for none of the grounds for denial would apply.

With respect to your ability to "challenge" the data contained within your commitment papers, the Freedom of Information Law contains no provision regarding the amendment or correction of records. However, the rules and regulations promulgated by the Department of Correctional Services indicate that an inmate may dispute the accuracy of information within the "personal history or correctional supervision history portion of an inmate's record" and "shall convey such dispute to the custodian of the records" (7 NYCRR §5.50). The superintendent or director of a facility generally acts as custodian of departmental records at the facility (7 NYCRR §5.15). Since "correctional supervision history" records include "court orders" and "personal

history" records include "commitment information" [7 NYCRR §5.5(a)(i)], it appears that you may dispute the contents of your commitment papers.

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-1429

41 State Street, Albany, New York 12231
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July 9, 2003

Mr. Anthony 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 facts presented in your correspondence.

Dear Mr. Marinaccio:

I have received your letter in which you sought assistance in obtaining the "Classification Guidelines Worksheet (dated 11/02) that was used to determine [your] re-classification."

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 requested record, I cannot conjecture as to its availability. 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.

Several grounds for denial under the Freedom of Information Law may be applicable for determining rights of access to the records of your interest. It is possible that records or portions of thereof might be withheld pursuant to §87(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" relative to persons other than yourself, §87(2)(e)(iii) concerning the identification of a confidential source, §87(2)(f) involving endangering life or safety, or perhaps §87(2)(g), which pertains to the ability to withhold certain aspects of internal governmental communications.

Section 87(2)(g) of the Freedom of Information Law enables an agency to withhold records that:

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

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

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

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Kheel v. Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

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

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July 10, 2003

Ms. Teri Knight
Babbitt Enterprises
6781 Forest Ave.
P.O. Box 215
Verona Beach, NY 13162

The staff of the Committee 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. Knight:

I have received your letter in which you sought assistance in obtaining a copy of a tape recording of a compliance conference conducted by the Racing and Wagering Board during which you were present.

You wrote that you were asked whether you had any objection to the use of a tape recorder and that the tape recorder was placed on a table and turned on. In consideration of the response to your request by the Board's records access officer indicating that "[t]he Board does not tape record compliance conference meetings", I contacted the compliance specialist present at the conference, Ms. Jeanette K. Loeper. Ms. Loeper said that the compliance conference was not recorded and those proceedings are not and never have been recorded.

If there is no tape recording, in short, the Freedom of Information Law would not apply, for §89(3) provides in part that the law pertains to existing records. 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) also provides 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: Sheila H. Osterhout
Jeanette K. Loeper

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-1413

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July 10, 2003

Ms. Judy Kessler-Rix
Editor
Arcade Herald
223 Main Street
Arcade, NY 14009

The staff of the Committee on 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. Kessler-Rix:

I have received your letter in which you raised issues concerning the implementation of the Open Meetings and Freedom of Information Laws by the Pioneer Central School District and its Board of Education.

You referred initially to an executive session held recently to discuss, in your words, "five specific personnel appointments." Two representatives of the Management Group of New York were asked to join the Board in executive session, and you learned that "this consulting group did a comprehensive management study and evaluation of the Pioneer district, the results of which were not favorable." A request for the study was rejected on the ground that it "is still in draft form and has not been finalized." When questioned about the function of the consultants who attended the executive session, the interim superintendent replied, "I can't say." After the executive session, the Board approved four personnel appointments but gave no indication that any different kind of discussion occurred. You also referred to a contract with District administrators that expired on June 30 and wrote that, while you "realize contract negotiations are discussed during closed sessions, the public was not advised that they were even taking place."

In this regard, I offer the following comments.

First, the Open Meetings Law is based on a presumption of openness. Meetings of a public body, such as a board of education, must be conducted in public, except to the extent an executive session may validly be held. Paragraphs (a) through (h) of §105(1) specify and limit the subject matter that may properly be considered during an executive session. Additionally, as you are aware, a procedure must be accomplished in public before an executive session may be held. Specifically, the introductory language of §105(1) states 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 language of the provision to which Board alluded in relation to the executive session, the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

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

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

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

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the appointment of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session.

Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

A "specific personnel appointment" could involve consideration of the merits of a particular candidate for a position, and in that circumstance, I believe that an executive session could properly be held. However, that phrase might also relate to the process of seeking a candidate for the position, i.e., whether the District will advertise in a newspaper or trade publication, the criteria needed to apply, and other subjects that do not focus on a particular person. A discussion of that nature, even though it relates to a specific personnel appointment, would not, in my view, qualify for consideration in executive session.

Moreover, as indicated in the language of the law and confirmed in Gordon, "the topics discussed during the executive session must remain within the exceptions enumerated in the statute..." From my perspective, a management study typically focuses on practices, policies, procedures and the like, rather than the performance of specific employees. To the extent that the Board, with or without the presence of the consultants, discussed those kinds of issues, I do not believe that there would have been a basis for conducting the executive session. Again, only to the extent that the discussion focused on a particular person or persons in conjunction with a topic appearing in §105(1)(f) could an executive session appropriately have been held.

With respect to the issue relating to the expiration of the administrators' contract, if the Board has not been involved in discussions of that subject, there is no issue involving the Open Meetings Law. If, however, the Board has discussed the matter, it appears that §105(1)(e) would be pertinent. That provision authorizes a public body to enter into executive session to consider "collective negotiations pursuant to article fourteen of the civil service law." Article 14 is commonly known as the "Taylor Law" and deals with the relationship between public employers and public employee unions, which are characterized in §201(5) of the Civil Service Law as "employee organizations." That being so, not all contract negotiations fall within the coverage of §105(1)(e).

According to the Public Employment Relations Board (PERB), to be considered an employee organization for purposes of the Taylor Law, certain criteria must be met. The organization must be certified by PERB or recognized by an employer in order to engage in collective bargaining negotiations. I was also informed that to be an employee organization, an entity must function as a collective bargaining unit in an ongoing manner with respect to all issues involving the terms and conditions of employment.

If District administrators have formed an employee organization, I believe that the Board could conduct executive sessions to discuss or engage in collective negotiations relating to the organization pursuant to §105(1)(e). 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 District Administrator's organization."

If there is no employee organization, I do not believe that §105(1)(e) would serve as a basis for conducting an executive session.

Next, with regard to the management study, that the study is in draft or may not be final would not necessarily provide a basis for denying access to its contents or portions thereof. The Freedom of Information Law is applicable to all agency records, and §86(4) defines the term "record" expansively to include:

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

Based on the foregoing, the document in question, irrespective of its characterization as a draft or not "finalized", or that it has not been accepted or approved, in my view clearly constitutes an agency record that is subject to rights of access. Further, even if it never came into the physical custody of the District, it would fall within the coverage of the Freedom of Information Law, because it was prepared "for" the District.

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)" [87 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case,

the 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.).

The provision to which the Court referred in Gould, §87(2)(g), is likely the only ground for denial of significance with respect to the document at issue. While that provision potentially serves as a basis for denying 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 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 Gould, 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, I believe that the report may be characterized as intra-agency material. However, that it is internal, not final, not officially accepted or approved would not remove it from rights of access. Again, I believe that those portions consisting of statistical or factual information must be disclosed.

The Court in Gould considered the intent of §87(2)(g) and what constitutes "factual" information, stating that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

I would conjecture that the study consists of opinions and recommendations, which may be withheld, as well as statistical or factual information, which should be accessible. It is also important to reiterate that if a discussion by the Board relating to the study does not focus on a particular person, it is likely that the discussion must occur in public to comply with the Open Meetings Law. If that is so, public discussion and, therefore, disclosure of certain aspects of the report would in my opinion result in a waiver of the ability to withhold records reflective of those aspects of the report under the Freedom of Information Law.

Lastly, you wrote that the interim superintendent replied, "I can't say", when asked about the nature of the discussion during the executive session. In my view, neither he nor others present during the executive session would have been required to inform those who questioned them about the executive session. However, they would not have been prohibiting from responding or generally indicating what transpired during the executive session. Stated differently, it would have been more accurate to reply, "I choose not to say", rather than "I can't say."

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

I am unaware of any statute that would prohibit a Board member or other person who attended the executive session 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 characterized as 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).

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, copies of this opinion will be sent to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Michael Medden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1413/A

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

July 10, 2003

Mr. Martin Schwartz
95-A-7613
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. Schwartz:

I have received your letter in which you complained that the Westchester County Legal Aid Society has not responded to your requests for records.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, pertains to records maintained by agencies. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Therefore, in general, the Freedom of Information Law is applicable to entities of state and local government.

It is my understanding the there are a variety of entities within New York that use the name "Legal Aid Society". Some are a part of the federal Legal Services Corporation, some may be private not-for profit corporations, and some may be parts of units of local government. While legal aid societies which are agencies of local government may be subject to the Freedom of Information Law, most are not "agencies" as that term is defined in the Freedom of Information Law and, as such, are not subject to that statute.

I am not fully familiar with the specific status of the Legal Aid Society in question. However, it is likely a corporate entity separate and distinct from government that it is not an "agency" subject to the Freedom of Information Law. If that is so, the records in which you are interested are outside the scope of public rights of access conferred by the Freedom of Information Law.

In view of the foregoing, it is suggested that you discuss the matter with an attorney. I hope that I have been of some assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14132

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 11, 2003

Mr. Donald Brace
94-A-8625
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. Brace:

I have received your letter in which you seek "to file a complaint against the Sing Sing Medical department for repeated failing to answer my FOIL 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 pertains to all agency records and provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 regard to medical records concerning 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.

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

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-14133

Committee Members

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 11, 2003

Mr. Gregory Jackson
00-B-0720
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. Jackson:

I have received your letter in which you questioned the availability of a "video tape interview (statement)" that an investigator referred to during your trial, and "followup records and reports made as a result" of the statement.

In this regard, I offer the following comments.

While 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.

Assuming that the records sought involving interviews of witnesses or others have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon the privacy of persons other than yourself 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14134

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 11, 2003

Mr. Melton Williams
99-A-4015
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Williams:

I have received your letter and attached materials in which you explained your difficulty in obtaining DNA test results maintained by the Office of the Chief Medical Examiner in New York City. You questioned the propriety of a denial of access to the records based on §557(g) of the New York City Charter.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant to the matter is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." In this regard, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts records of the chief medical examiner from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS2d 744, 153 Misc. 2d 1018, (1992); Mitchell v. Borakove, 639 NYS2d 791, 225 AD2d 435 (1996); mot lv to app dismissed 646 NYS2d 987, 88 NY2d 919]. 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.

I hope that the I have been of assistance and the foregoing serves to enhance your understanding of the law.

Sincerely,

David Treacy
Assistant Director

cc: Sarah Scott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1135

41 State Street, Albany, New York 12231
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July 11, 2003

Mr. Willie McNeal
99-R-7072
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McNeal:

I have received your letter in which you asked "for a clear definition of the New York City Charter Section 557(g) due to the time for appealing the Medical Examiner's denial."

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant to the matter is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." In this regard, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts records of the chief medical examiner from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS2d 744, 153 Misc. 2d 1018, (1992); Mitchell v. Borakove, 639 NYS2d 791, 225 AD2d 435 (1996); mot lv to app dismissed 646 NYS2d 987, 88 NY2d 919]. I am unaware of any provision within the New York City Charter that may pertain to appealing a denial access of records from the medical examiner's office. However, a denial of access to any government record may be appealed pursuant to §84(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."

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

FOIL-AO-1436

From: Robert Freeman
To: jpeckham@co.broome.ny.us
Date: 7/14/2003 10:35:24 AM
Subject: Dear Mr. Peckham:

Dear Mr. Peckham:

I have received your inquiry concerning access to an electronic repository of County employees' home addresses and presumably home phone numbers.

In this regard, §89(7) specifies that nothing in the Freedom of Information Law requires the disclosure of the home address of a present or former public officer or employee. Although the law does not include specific direction concerning the disclosure of public employees' home phone numbers, it has consistently been advised that home phone numbers, as you suggested, may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Numerous judicial decisions indicate, in essence, that those items of personal information that are irrelevant to the perfomance of public employees' official duties may be withheld under the exception pertaining to unwarranted invasions of privacy. In my view, the home phone number of a public employee has no relevance to the performance of his or her official duties and, accordingly, may be withheld.

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-14137

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 14, 2003

Mr. Tim Minton
4 NBC
30 Rockefeller Plaza
New York, NY 10112

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Minton:

I have received your letter relating to a delay in the disclosure of records by the Office of Parks, Recreation and Historic Preservation. Although the request is extensive, it is your belief that some of the records sought are readily accessible and should be released now. In response to that contention, you were informed that:

> "...there doesn't appear to be any provision in the Public Officer's [sic] Law compelling an Agency to respond piecemeal to verbal statements, withdrawals, or changing priorities to a written foil request...
>
> "Certainly, you had the option of splitting your written request for information into parts that you felt might concern information more easily gathered than others, but chose instead to make the request as you did...
>
> "This office stands by our original good faith estimate of the time required..."

You have asked whether an agency may delay the disclosure of records readily retrievable until a determination is made with respect to the entirety of the request.

In this regard, I offer the following comments.

First, since you suggested in your letter that some aspects of your request "should not have required a FOIL letter in the first place", I point out that an agency, pursuant to §89(3) of the Freedom of Information Law, may require that a request be made in writing, even when records are

clearly accessible to the public. This is not to suggest that an agency must require an applicant to seek records in writing; on the contrary, the regulations promulgated by the Committee on Open Government state that an agency "may make records available upon oral request" [21 NYCRR §1401.5(a)].

Second and most important in my view, every law, including the Freedom of Information Law, should be implemented in a manner that gives reasonable effect to its intent. To give reasonable effect to the intent of the Freedom of Information Law, I believe that an agency must grant access to records "wherever and whenever feasible." The phrase quoted in the preceding sentence appears in §84, the legislative declaration, which states in part that:

> "The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.
>
> "As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extent public accountability *wherever and whenever feasible*" (emphasis added).

From my perspective, if records are clearly available to the public under the Freedom of Information Law and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the 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 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."

Following the receipt of the acknowledgment indicating that you could anticipate a response within thirty days, you wrote that you telephoned the agency to ask "whether certain information might be available sooner, and attempted to prioritize five of the sixteen items" sought. Your priorities may involve records that are easy to locate and clearly public or, contrarily, records that may be difficult to locate and time consuming to review for the purpose of determining rights of access. In my view, your priorities may be considered, but not necessarily honored. More important is the ability of the agency to locate and/or review the contents of the records. Irrespective of your priorities, I believe that an agency, to give effect to the intent of the law, must disclose the records that are easy to locate and clearly public "whenever feasible." I would conjecture, for example, that records reflective of the qualifications of park police officers, the number of park police officers employed during certain recent years, training requirements and salary information would be readily retrievable. Others, however, such as those involving incidents in which seasonal officers have lost or misplaced firearms, or those concerning the role of park police officers in the prevention or investigation of terrorism, may involve substantial search time or the need to review the records to determine the extent to which they may be withheld in accordance with the grounds for denial of access appearing in §87(2) of the Freedom of Information Law.

In sum, insofar as the request involves records that are clearly public and readily retrievable, I believe that a delay in disclosure of as much as thirty days would be inconsistent with the intent of the law and its judicial construction. However, a delay of that length may be reasonable with respect to other aspects of your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Tom McCarthy
Wendy Gibson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO -14138

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July 14, 2003

Mr. Lawrence P. Strouse, Jr.
80-A-3001
Mohawk Correctional Facility
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. Strouse:

I have received your letter and attached materials in which you requested an advisory opinion regarding the propriety of a denial of your request for interview statements of co-defendants from the New York City Department of Probation.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In this regard, I am unaware of any statutory provision that pertains to access to or the confidentiality of probation records, except §390.50 of the Criminal Procedure Law, which deals with pre-sentence reports and related records. With regard to probation records, §243(2) of the Executive Law states in relevant part that the director of the Division of Probation and Correctional Alternatives has the authority to promulgate regulations and that "[s]uch rules and regulations shall be binding upon all counties and eligible programs...and when duly adopted shall have the force and effect of law". Certain provisions of the regulations promulgated by the State Division of Probation pertaining to probation records generally. Section 348.1(b) states that:

> "(b) Cumulative case record is a single case file containing all information with respect to a case from its inception through its conclusion. All records developed and/or received by the probation department and which are related to the carrying out of authorized probation functions and services are considered probation records for the purpose of retention and destruction. Reports and other records material developed by the probation department and transmitted to

> the courts of other agencies become the responsibility of the court or other agencies as records."

Further, §348.4(k) of the regulations provides that: "Case records shall be accessible, in whole or in part, only to those authorized by law or court order." It appears that the quoted provision represents one of the basis upon which the Department relied for withholding the records.

Nevertheless, it is questionable in my view whether regulations can serve as an appropriate basis for withholding records, for it has been held that regulations do not exempt records from disclosure. Section 87(2)(a) of the Freedom of Information Law permits an agency to withhold records that are "specifically exempted from disclosure by state or federal statute". It has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of an administrative code or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026, 449 NYS2d 712 (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, 137 Misc. 2d 438 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or 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 have been invalidly asserted as a basis for denial, it would appear that rights of access would be governed by the Freedom of Information Law. Without knowledge of the contents of the records sought, I could not conjecture as to their availability. However, several grounds for denial may be pertinent to an analysis to rights of access.

Perhaps most significant is §87(2)(e), which states 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;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The ability to withhold under the provision quoted above would be dependent on the effects of disclosure.

In addition, §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.

Also of relevance may be paragraphs (b)and (f) of §87(2). Those provisions respectively enable an agency to deny access insofar as disclosure would constitute "an unwarranted invasion of personal privacy" or "endanger the life or safety of any person."

Lastly, it is noted that the advisory opinion from this office cited in the initial denial (FOIL-AO-1085, 3/29/79) is many years old and involved a request made for probation records by someone other than the subject of the 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:tt

cc: Richard Levy
Pamela Goldfeder

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1413

41 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, 2003

Mr. Thomas Riley
97-A-2517
Lakeview Shock, Incarceration Correctional Facility
P.O. Box "T"
Brocton, NY 14716-0679

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Riley:

I have received your letter in which you requested assistance from this office. You wrote that you have not received a response from you facility subsequent to your request to review a "random request for an urinalysis test" authorizing the collection of your specimen.

In this regard, 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, 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. Several grounds for denial may be pertinent to an analysis to rights of access.

Perhaps most significant 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 addition, §87(2)(e) states 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;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The ability to withhold under the provision quoted above would be dependent on the effect of disclosure.

Also of relevance may be §87(2)(f) which enables an agency to deny access 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-1411/40

41 State Street, Albany, New York 12231
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July 15, 2003

Mr. Steven C. Forshey
00-B-1330
Wende Correctional Facility
3622 Wende Road, P.O. Box 1187
Alden, NY 14004-1187

Dear Mr. Forshey:

I have received your letter and attached materials in which you complained that you have not received responses to grievances filed with your facility.

This office is responsible for overseeing the implementation of the Freedom of Information Law and issues advisory opinions regarding access to government records under that law. The Committee does not maintain records generally, such as those of your interest.

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. If your facility does not maintain the record sought, the Freedom of Information Law would not apply.

I regret that I cannot be of further assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1411

41 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, 2003

Mr. Daniel E. Boyer
02-A-2121
Clinton Correctional Facility
P.O. Box 2002 - Annex
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Boyer:

I have received your letter in which you complained that the Guilderland Police Department has not responded to your request for a variety of records related to your arrest.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of 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 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 [Gould, Scott and DeFelice v. New York City Police Department, 653 NYS 2d 54, 89 NY 2d 267 (1996)].

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Another provision of potential significance is §87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal

privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

It should also be noted, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his

> counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, as requested enclosed please find a copy of Your Right to Know.

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 - 14/4/12

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 16, 2003

E-MAIL

TO: Stephen P. Watkins <[redacted]m

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. Watkins:

As you are aware, I have received your letter in which you asked whether the Suffolk County Police Department may "ignore" your request for an arrest report sought under the Freedom of Information Law, and whether such a report must be disclosed.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency, such as Suffolk County, is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be made to that person. I believe that a records access officer is designated for each department in Suffolk County government. While the recipient of your request should in my opinion have responded in a manner consistent with law or forwarded the request to the records access officer, it is suggested that you might resubmit your request to the records access officer.

Second, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to a request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, it must be disclosed in great measure, if not in its entirety. Under §160.50, when criminal charges have been dismissed in favor of an accused, the records relating to the arrest 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)].

Insofar as an arrest record includes 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. I am not suggesting that would be so in the context of your inquiry, but rather that deletions might be made 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."

I hope that I have been of assistance.

RJF:tt

cc: Records Access Officer, Suffolk County Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1414 3

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 17, 2003

Mr. Al Blanche
88-A-6605
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. Blanche:

I have received your letter in which you complained that letters sent by the office of the district attorney to the Division of Parole were withheld.

From my perspective, it appears that the denial of access was consistent with law. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

When one agency, such as the office of a district attorney, communicates in writing with another, such as the Division of Parole, the communication constitutes "inter-agency material" that falls within one of the exceptions, §87(2)(g). That provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1414

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 17, 2003

Mr. Andre Lopez
98-A-5526
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 facts presented in your correspondence.

Dear Mr. Lopez:

I have received your letter and attached materials in which you requested an advisory opinion regarding the propriety of a denial of your request for interview statements of co-defendants from the New York City Police Department.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In my view, several grounds for denial may be pertinent to an analysis to rights of access.

Perhaps most significant is §87(2)(e), which states 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;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The ability to withhold under the provision quoted above would be dependent on the effects of disclosure, and subparagraph (iii) of §87(2)(e) may be particularly significant.

Also of relevance may be paragraphs (b)and (f) of §87(2). Those provisions respectively enable an agency to deny access insofar as disclosure would constitute "an unwarranted invasion of personal privacy" or "endanger the life or safety of any person."

Lastly, it should be noted that when records might ordinarily be withheld under the Freedom of Information Law, it has been held that there is no basis for denial once the records have been presented in a public judicial proceeding. In Moore v. Santucci, a decision rendered by the Appellate Division, Second Department, the Court found that:

> "...while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (*see, Matter of Knight v Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [151 AD2d 677,679 (1989)].

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 the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Daniel Gonzalez
Leo Callaghan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1411/45

Committee Members

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 21, 2003

Mr. Frank Bellezza
97-A-4585
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bellezza:

I have received your letter in which you have sought assistance in obtaining your records from a psychiatric center. According to your letter, although a request was made for the records, that entity did not respond.

In this regard, while the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, pertains generally to government records in New York, a different provision of law, §33.16 of the Mental Hygiene Law, deals specifically with the records in question.

As I understand §33.16 of the Mental Hygiene Law, it provides rights of access to clinical mental health records, with certain exceptions, to "qualified persons," and paragraph 7 of subdivision (a) of that section defines that phrase to include "any properly identified patient or client." It appears that you are a "qualified person" and that you may assert rights of access under that statute.

Section 33.16(b) states in relevant part that a facility must respond to a request within ten days, and subdivision (d) of §33.13 pertains to the right to appeal a denial of access and states that:

> "(d) Clinical records access review committees. The commissioner of mental health the commissioner of mental retardation and developmental disabilities and the commissioner of alcoholism and substance abuse services shall appoint clinical record access review committees to hear appeals of the denial of access to patient or client records as provided in paragraph four of subdivision (c) of this section. Members of such committee shall be appointed by the

> respective commissioners. Such clinical record access review committees shall consist of no less than three nor more than five persons. The commissioners shall promulgate rules and regulations necessary to effectuate the provisions of this subdivision."

If you do not receive a satisfactory response to your request, it is suggested you request the rules and regulations from the appropriate commissioner in order to ensure that you are following the correct procedure and that you can properly assert your rights.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

From: Robert Freeman
To: nrumsey@pj.ouboces.org
Date: 7/21/2003 10:42:51 AM
Subject: Dear Ms. Rumsey:

Dear Ms. Rumsey:

I have received your inquiry concerning the ability of one public employee to "see payroll records of another employee under the Freedom of Information Law."

In this regard, various elements of payroll records are accessible to any person. For instance, every agency, such as a school district, is required to maintain and make available a record that includes the "name, public office address, title and salary of every officer or employee of the agency." In addition, insofar as an employee's gross wages, overtime amounts and other payments appear in records, those portions must be disclosed on request to any member of the public.

Other aspects of payroll records, i.e., those that are irrelevant to the performance of one's governmental duties, may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." Those kinds of details would include a home address, social security, number of deductions claimed, reference to particular deductions and amounts (i.e., for charity, alimony, garnishment, etc.).

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
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July 21, 2003

Mr. Phillip Leslie
97-A-3641
Barehill Correctional Facility
Box 20, Cady Road
Malone, NY 12953-0020

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Leslie:

I have received your letter in which you complained that certain agencies have not responded to your requests for records.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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
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July 21, 2003

Mr. Chandran Nathan
95-A-1665
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 12733-0116

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Nathan:

I have received your letter in which you questioned the propriety of a denial of your request for the names and official titles of all mental health staff at your facility.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With certain exceptions, the Freedom of Information Law does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a "payroll list" of employees is included among the records required to be kept pursuant to subdivision three of section eighty-seven of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law.

One of the grounds for denial, §87(2)(b), permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, subject to the following qualification, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

In my opinion, the only exception to rights of access that might appropriately be cited with respect to the payroll record is §87(2)(f). The cited provision states that an agency may withhold records or portions of records when disclosure would "endanger the life or safety of any person." In my view, disclosure of the identities of public employees, including law enforcement officers, would not in most instances endanger their lives or safety. In rare circumstances in which a law enforcement agency has engaged employees in undercover positions, for example, §87(2)(f) might be cited with justification as a basis for deleting those portions of a payroll record that identify such individuals. Other than in that or other analogous rare situations, I believe that the payroll record required to be maintained pursuant to §87(3)(b) must be made available.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm
cc: Robin Goldman

STATE OF NEW YORK
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July 22, 2003

Ms. Donna Nicolardi
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Nicolardi:

I have received your letter in which you complained that you have written without success to both Governor Pataki and the Office of the Mayor of New York City to request copies of "the 'Moreland Acts' Commission reports (all 4) concerning the N.Y.C. Board of Education findings." You added that you "would also like the findings" of several other state and city agencies, as well as the FBI.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to offer advice and opinions involving public access to records of entities of state and local government in New York, primarily in relation to the state's Freedom of Information Law. Since you referred to the FBI, I point out that the federal Freedom of Information Act (5 USC §552) is the statute that generally pertains to rights of access to records of federal agencies. That being so, the following comments will pertain only to agencies of state and local government subject to state law.

First, requests should be made to the agencies that you believe maintain the records of your interest. For instance, if it is your understanding that a particular report was prepared by or is in possession of the New York City Commission on Human Rights, a request should be made to that agency. Further, pursuant to the regulations promulgated by the Committee (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and requests should ordinarily be made to him or her. When seeking records, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify 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)].

Third, although I am unfamiliar with the contents of 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.

In consideration of the nature of the records, it is possible that the initial ground for denial of access, §87(2)(a), may be pertinent. That provision relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute concerns records developed in a Moreland Act inquiry and states in part that:

> "Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the governor or the attorney-general the name of any witness examined or any information obtained upon such inquiry, except as directed by the governor or the attorney-general, shall be guilty of a misdemeanor."

Similarly, §5 Chapter 254 of the Unconsolidated Laws pertains to the State Commission on Investigation and contains the following language:

> "Any person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined, or any information obtained or given upon such examination or investigation, except as directed by the governor or commission, shall be guilty of a misdemeanor."

In sum, while some of the records of your interest may have been disclosed previously or would be accessible, perhaps in part, under the Freedom of Information Law, it is possible that other aspects of the records would be exempt from disclosure. It is suggested, however, that requests be submitted to the records access officers at the agencies that maintain the records of your interest, and that the requests include sufficient detail to enable agency staff to locate the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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July 22, 2003

Mr. Zachary Holmes
97-B-2449
Wende Correctional Facility
P.O. Box 1187
Alden, NY 14004-1187

Dear Mr. Holmes:

I have received your letter in which you appealed to this office due to a failure on the part of certain entities to respond to your requests for records in a timely manner.

In this regard, the Committee on Open Government is authorized to provide advice and opinions relating to the Freedom of Information Law. The Committee is not empowered to compel an agency to grant or deny access to records or to determine appeals. An appeal should be directed to the head of an agency or that person's designee in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Since one of your requests was apparently made to a court reporter, I point out that the Freedom of Information Law does not apply to the courts. This is not to suggest that court records may not be accessible; on the contrary, many court records are available to the public under other statutes (see e.g., Judiciary Law, §255). To seek records from a court, it is suggested that a request be directed to the clerk of the court in which the proceeding was conducted, citing an applicable provision of law as the basis for the request.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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July 22, 2003

Ms. Nancy Daly
[redacted]

The staff of the Committee on 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. Daly:

As you are aware, I have received your letter and the materials relating to it. You have sought assistance in obtaining records from the Nassau County Police Department and the Office of the Nassau County District Attorney.

In short, you requested the files maintained by those agencies relating to the arrest and conviction of your husband, who is now serving a thirty-five year sentence in a state correctional facility. Although the request made to the Office of the District Attorney had not been answered, the Police Department denied the request in full pursuant to subparagraphs (i) and (ii) of §87(2)(e) of the Freedom of Information Law, stating that "Disclosure at this time would interfere with law enforcement investigations or judicial proceedings and deprive a person of a right to a fair trial or impartial adjudication."

While some aspects of the records might justifiably be withheld, in view of the fact that your husband has been convicted, I believe that the language of the Freedom of Information Law and the direction provided in judicial decisions indicate that others must be disclosed. In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, confirmed its general view of the intent of the Freedom of Information Law in Gould, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the New York City Police Department contended that certain reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception different from those referenced in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the Nassau County Police Department has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the Department and the Office of the District Attorney for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the

decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In short, I believe that the basis for the denial of your appeal was incomplete and inadequate, and that the blanket denial of the request was inconsistent with law.

The provision cited by the Department, §87(2)(e), authorizes an agency to withhold records that:

> "...are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;"

In view of the fact that your husband was convicted, it is inconceivable in my opinion that every aspect of every record relating to the event would, if disclosed, interfere with an investigation. Whether investigative activity has recently occurred or is in any way ongoing is questionable. The less such activity has recently occurred or is ongoing, the less is the ability, in my view, to contend that disclosure would interfere with an investigation. If the case has effectively been closed, it might be contended that disclosure at this juncture would neither have an effect on nor interfere with the investigation; in essence, the investigation would be over.

The Department also contended that disclosure could deprive a person of a right to a fair trial. As I understand the facts, that provision appears to be irrelevant.

I note that other grounds for denial might be pertinent, even if the case is closed. For instance, those portions of records identifying witnesses or persons interviewed might be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Further, many of the records prepared in relation to the investigation would likely fall within §87(2)(g), the provision upon which the Court of Appeals focused in Gould in its consideration of certain police reports. That exception 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 Court stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual

tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department,89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports could be withheld in their entirety on the ground that they constitute intra-agency materials.

Lastly, when an agency denies access to records, as the Police Department did, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

I point out that the Court of Appeals has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

Although litigation is not encouraged, I believe that the failure of the Department to inform you of the right to appeal its denial of access provides you with the right to seek judicial review of the denial.

In an effort to enhance compliance with and understanding of the Freedom of the Freedom of Information Law, copies of this response will be sent to the Police Department and the Office of the District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas C. Krumpter
Michael Walsh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 22, 2003

Mr. Steven Francis Wavra
#23916-053
United States Penitentiary
P.O. Box 26030
Beaumont, TX 77720-6030

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wavra:

I have received your letter and the attached materials in which you questioned the propriety of a denial of access to records by the office of a district attorney.

According to your correspondence, records were withheld because they were "provided to you, through your attorney during the pendency of the criminal proceeding."

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 to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the office of the district attorney.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1453

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 22, 2003

E-Mail

TO: James Higgins [redacted]

FROM: David Treacy, Assistant 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. Higgins:

I have received your correspondence in which you asked whether the U.S. Department of Labor is subject to the New York State Freedom of Information Law.

In this regard, the Freedom of Information Law is applicable to agencies, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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 would not apply to the U.S. Department of Labor.

I note, however, that the U.S. Department of Labor is an agency for purposes of the federal Freedom of Information Act (5 U.S.C. §552). Therefore, it is suggested that you cite the federal Act when requesting records from the U.S. Department of Labor.

I hope that I have been of assistance.

DT:jm

FOIL-AO-1415

From: Robert Freeman
To: Thomas Callahan
Date: 7/22/2003 3:22:24 PM
Subject: Re: Are sales tax records available?

Dear Mr. Callahan:

I have contacted the Department of Taxation and Finance in an effort to provide an accurate response to your question.

In brief, I was informed that municipalities generally do not maintain sales tax records; those records are transmitted to and maintained by the Department of Tax and Finance and are exempt from public disclosure under the tax secrecy provisions of the Tax Law. I was also informed that some sales tax records are sent by the Department to county treasurers for budgeting purposes and to ascertain trends. However, the secrecy requirements imposed by the Tax Law preclude the recipients of those records from disclosing them.

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
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Albany, NY 12231
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FOIL-AO-1411

From: Robert Freeman
To: jtharris@nycap.rr.com
Date: 7/25/2003 10:04:30 AM
Subject: Dear Captain Harris:

Dear Captain Harris:

I have received your inquiry concerning the propriety of displaying "who has what training classes in the firehouse", whether it is "ok for the members of the department to know who has taken what class and who has not", and "whether it is legal to leave the drill log out, and the monthly run sheets."

In this regard, first, as you may be aware, it was determined more than twenty years ago that volunteer fire companies are "agencies" that are required to comply with the Freedom of Information Law because they perform "an essential governmental function."

Second, since that is so, it has been advised that records pertaining to volunteer firefighters and other volunteers should be treated in much the same manner as public employees in relation to disclosure. In this regard, it has been held in numerous contexts that items that relevant to the performance of one's duties are generally accessible to the public, because disclosure in those instances would result in a permissible, not an unwarranted or unreasonable invasion of personal privacy.

Based on those decisions, I believe that records indicating training taken by volunteer firefighters, as well as the drill log, would be accessible to the public under the Freedom of Information Law. Further, there is nothing in the law that would preclude the Department from displaying or disclosing the records in question.

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1456

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 25, 2003

Hon. Charles L. Michaux, III
City Clerk
City of Buffalo
City Hall - Room 1308
Buffalo, NY 14202

Mr. Michael A. Kless
87 Payne Avenue
Buffalo, NY 14220

The staff of the Committee 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. Michaux and Mr. Kless:

I have received correspondence from both of you concerning numerous "reports of hazards" transmitted by Mr. Kless to Mr. Michaux. In each of those reports, Mr. Kless writes as follows in his first paragraph:

> "I need to report a hazard. After the hazard is recorded I want a copy of the hazard notice, I do not want a copy of my letter just a copy of the hazard notice and copy of any and all paperwork the department(s) involved send to your office. Just add this paperwork to the pile of stuff you have for me and I will pick it up at once."

In Mr. Kless' second and third paragraphs, he asserts the following:

> "This is to be considered a freedom of information request."

From my perspective, the requests need not be honored. As you may be aware, the Freedom of Information Law pertains to existing records maintained by an agency, such as the City of Buffalo [see §89(3)]. Because that is so, it has consistently been advised that an agency is not required to honor a request that is prospective in nature. In short, an agency can neither grant nor deny access to records that do not exist.

The requests made by Mr. Kless are not requests for existing records and, therefore, I do not believe that Mr. Michaux is required to take any action other than informing Mr. Kless that the records sought do not exist.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14157

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 25, 2003

Mr. Alfred J. Chiuchiolo
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Chiuchiolo:

I have received your letter concerning your continuing efforts to obtain records from the Village of Patchogue relating to the Village Center for the Performing Arts. Based on your comments, I offer the following remarks.

First, I believe that the Village is required to respond to requests made under the Freedom of Information Law. That statute provides direction concerning the time and manner in which an agency, such as the Village, must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 indicated in the opinion addressed to you on May 13, the Freedom of Information Law includes all records maintained by or for the Village within its coverage. 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.

Next, you attached a request that included minutes of meetings during which the Board of Trustees discussed the operation of the Center for the Performing Arts. Unless the Board's minutes are indexed by subject matter, a request of that nature would in my view be inadequate. 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, 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 Village, 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 my experience, minutes of meetings are generally kept chronologically, not by subject matter. If that is so in this instance, it is suggested that a request for minutes of meetings relate to a time period, rather than the Center for the Performing Arts.

Lastly, assuming that the Center for the Performing Arts is a not-for-profit corporation, I believe that it is required to disclose to any person a form filed with the Internal Revenue Service, a form 990, which is a basic, annual financial statement. It is suggested that you request that form from the Center.

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-14158

41 State Street, Albany, New York 12231
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July 25, 2003

Mr. Stephen Galowitz
UtiliSave, LLC
1 Ramada Plaza
New Rochelle, NY 10801

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Galowitz:

As you are aware, I have received your letter prepared on behalf of your employer, UtiliSave, LLC.

By way of background, you wrote that "UtiliSave represents a large number of utility customers in the greater New York area in connection with the review and correction of their utility bills." In New York City, the Department of Environmental Protection (DEP) has the duty of providing and billing water and sewer services, and UtiliSave "is engaged to audit thousands of DEP accounts." In the past, DEP authorized public access to its Customer Information Service (CIS) through use of its computer terminals located at DEP offices, and additionally, it offered online access to the public through a subscription service. Two of the screens that had been accessible to the public, according to your letter, "contain account notes and inspection notes" which are also known as "trigger notes." You indicated that those notes "contain factual information and data relating to meter reads, inspection results, property uses, meter locations, water/sewer piping and other data." You indicated that the notes "also occasionally contain instructions to staff relating to inspections and billing the accounts." Despite DEP's practices, you wrote that:

> "Earlier this year, public access to the 01-20 and 02-10 screens was eliminated through both the public computer terminals and online subscription service. On March 13, 2003, we initiated a FOIL request for a copy of the trigger notes for one of our client's accounts. Notwithstanding the requirement that the agency must make the record available within five business days and despite our repeated requests, no substantive response was received until June 10, 2003, when our request was denied."

DEP's response to the request indicates that "a policy decision that trigger notes....are to be accessed only by employees" was made because the notes "constitute internal agency records and are therefore exempt from disclosure under Section 87.2 (g) of the Freedom of Information Law..."

From my perspective, that the trigger notes are "internal agency records" does not remove them from the scope of rights of access. In this regard, I offer the following comments.

First, I believe that the trigger notes constitute "records" subject to the requirements of the Freedom of Information Law. 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, information maintained by an agency electronically, such as the notes, at issue, in my view clearly are agency records. 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)].

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 opinion, 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 same provision as that cited by DEP in its 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). 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.).

That a record consists of intra-agency material or is internal or 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, because a record is a 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, insofar as the records sought consist of statistical or factual information, I believe that they must be disclosed.

Third, in consideration of DEP's delay in responding to your request, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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.*" 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 decision also involving a New York City agency 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), 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).

Since you were not informed of the right to appeal, it is noted that the Court of Appeals has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR

> 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marie A. Dooley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1459

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July 25, 2003

Mr. Michael Gregory Bobick
[redacted]

Dear Mr. Bobick:

I have received your letter in which you asked how one might "file a 'Formal Complaint' against a State Agency that refuses to provide information....under the Freedom of Information Act by ignoring each and every written and oral request." You added that you have been required to complete the agency's form and indicate the reason for your requests.

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions to any person having questions involving public access to government information in New York. While the advisory opinions provided by this office are not binding, it is our hope that they are educational and persuasive and that they encourage compliance with law. You may submit a complaint, therefore, to this office, and I can prepare an advisory opinion and send a copy to the agency to which your requests were made.

Based on the nature of the difficulty described in your letter, I offer the following additional remarks.

First, an agency may, pursuant to §89(3) of the Freedom of Information Law, require that a request be made in writing. The same provision states that an applicant must "reasonably describe" the records sought. Consequently, a request should include sufficient detail to enable agency staff to locate and identify 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..."

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)].

Third, I do not believe that an agency can require that a request be made on a prescribed form. As indicated previously, §89(3) of the law, 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. 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.

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, the reason for which a request is made generally has no bearing or effect on rights of access. 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 intended use of records is in my opinion generally irrelevant.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 29, 2003

Mr. Percival Valentine
#55317-053
FCI Allenwood Med.
P.O. Box 2000
White Deer, PA 17887

Dear Mr. Valentine:

I have received your letter in which you requested from this office copies of records involving "unclaimed bail funds" posted approximately fifteen years ago on Rikers Island.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning public access to government records, primarily in relation to New York's Freedom of Information Law. The Committee does not have possession or control of records generally, and we do not maintain the records of your interest.

It is suggested that you request the records at issue from the entity that you believe would maintain them. If the records are maintained by an agency of State or New York City government, a request should be directed to the "records access officer" at that agency. Pursuant to the regulations promulgated by the Committee (21 NYCRR §1401.2), each 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. It is also emphasized that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include detail sufficient to enable agency staff to locate and identify the records.

If you believe that the records are maintained at Rikers Island, a request should be made to the New York City Department of Correction. If the records are maintained by a court, I note that the courts are not subject to the Freedom of Information Law. However, court records are generally available under other statutes (see e.g., Judiciary Law, §255). When seeking court records, a request should be made to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

Lastly, since the records of your interest relate to events that occurred some fifteen years ago, it is possible that they may no longer exist. If that is so, the Freedom of Information Law would not be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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July 29, 2003

Mr. Usher Z. Piller
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Piller:

I have received your letter and the material attached to it. You have sought an advisory opinion concerning a denial of your request for records by the Department of Correctional Services.

Your request is as follows:

> "Copy of all records in former DCS employee Gail Hallerdin's Personal History File (including, but not limited to, performance evaluations) and her original employment Application or resume."

You added that the person who is the subject of the records served as a hearing officer and left her employment with the Department in 1999. The Department denied the request in its entirety, citing "Public Officers' Law 87 (2) (A) {Personal Privacy Protection Law} and (B)."

While I believe that some aspects of the records sought may properly be withheld, others must be disclosed. In this regard, I offer the following comments.

First, in ascertaining rights of access to the records sought, as well as the ability to deny access, the relationship between the Freedom of Information Law and the Personal Privacy Protection Law must be considered. The former pertains to rights of access conferred upon the general public 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 with records maintained by state agencies that include or focus upon personal information pertaining to a "data subject." 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)].

To the extent that the records identify a data subject and a request is made for those records by a third party, such as yourself, §96(1) states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions, §96(1)(c), involves a case in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Consequently, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law; alternatively, if disclosure of a record would not constitute an unwarranted invasion of personal privacy and if the record is available under the Freedom of Information Law, it may be disclosed under §96(1)(c).

In short, insofar as disclosure would constitute an unwarranted invasion of personal privacy, I believe that the records sought would be exempt from disclosure via the operation of §96(1) of the Personal Privacy Protection Law. However, insofar as disclosure would result in a permissible invasion of personal privacy, the records must be disclosed, and I believe that there many aspects of personnel records that are accessible to the public.

Second, 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.

Third, 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].

There numerous instances in which portions of personnel records are available, while others are not. By means of example, items within a record indicating a public employee's gross pay would be accessible, but items involving charitable contributions, alimony, deductions and the like would be exempt; those latter items are unrelated to the performance of one's official duties. Attendance records indicating time in and out, days and dates of leave claimed have been found to be accessible (see Capital Newspapers, supra), but portions of those records indicating an employee's medical condition could be withheld.

Since you referred to an employment application, a judicial decision that focused that kind of record, 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 or employment application that are relevant to the performance of one's duties, including certification, must be disclosed. In addition, it has been held that those portions of records indicating one's general education background must be disclosed [Ruberti, Girvin and Ferlazzo v. NYS Division of State Police, 218 AD2d 494 (1996)].

Lastly, I believe that performance evaluations are accessible in part. In addition to consideration of the exception relating to personal privacy, also relevant with respect to those records, as well as others found within a personnel file, is §87(2)(g). That provision authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

While their contents may differ, in my experience, 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 an effort to enhance compliance with and understanding of the Freedom of Information and Personal Privacy Protection Laws, copies of this opinion will be sent to Department officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Annucci
Daniel F. Martuscello, III

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 1, 2003

Mr. Julio Arce
92-A-9982
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Arce:

I recently received two letters from you, one of which is a request for records made pursuant to the Freedom of Information Law; the other is an appeal.

In this regard, it appears that you misunderstand the functions of the Committee on Open Government. The Committee is authorized to provide advice and opinions concerning the Freedom of Information Law. This office does not maintain custody or control of records, and it is not empowered to determine appeals or compel an agency to grant or deny access to records.

When seeking records, a request should be made to the "records access officer" at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. I note, too, that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

Section 89(4)(a) pertains to the right to appeal a denial of access to records and states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated to determine appeals at the Department of Correctional Services is Anthony J. Annucci, Counsel to the Department.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 1, 2003

TO: Kevin Dantzler [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. Dantzler:

I have received your inquiry concerning the status of the New York Metropolitan Museum of Art and similar entities under the Freedom of Information Law.

That statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law includes entities of state and local government within its coverage. Private and not-for-profit entities typically fall beyond the scope of that statute. Most museums and similar cultural institutions are not-for-profit corporations that are not subject to the Freedom of Information Law.

If records pertaining to a museum, for example, are maintained by a government agency, those records fall within the coverage of the Freedom of Information Law, and a request for those records could be made to that agency. Often a private entity receives funds from government, and in those situations, while the private entity is not required to disclose, the government agency that provided funding has records concerning its relationship with the private entity, and those records are subject to rights of access.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14164

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August 4, 2003

Ms. Joan K. Harris
Assistant Corporation Counsel
City of Rome
Rome City Hall
198 North Washington Street
Rome, NY 13440

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Harris:

I have received your letter in which you referred to a request for records from an individual who has threatened a lawsuit against the City. You have asked whether the City is required to respond to the request in this circumstance.

In this regard, the possibility that the records might be pertinent to or used in litigation is, in my view, largely irrelevant. As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public

> right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

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-14165

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August 4, 2003

Mr. Elliot B. Pasik
Jaroslawicz & Jaros
150 William Street
New York, NY 10038

Dear Mr. Pasik:

I have received a copy of your letter addressed to Mr. Leo Callaghan, Records Access Appeals Officer for the New York City Police Department, in which you wrote that, by doing so, you are seeking an opinion "concerning the disclosure of the demanded documents."

You wrote that your firm represents a person in a civil lawsuit in which money damages have been sought for personal injuries arising out of a motor vehicle accident. In short, your client stated that he was walking alongside his parked car when he was struck by a vehicle driven by an employee of the Police Department, a traffic enforcement agent. Although a routine motor vehicle accident report was made available, you indicated that "this accident was subject to an additional internal Police Department investigation." A request was made on October 29 for all records relating to the accident, but the request was denied on November 12 "on the basis of Public Officers Law section 87(2)(g)(iii) as such records/information does not represent final agency determination." Your request was renewed on June 25 and access was denied pursuant to a different provision, §87(2)(g)(i), "as such records/information, if disclosed would interfere with law enforcement investigations or judicial proceedings."

In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the records have been withheld in their entirety, based initially on §87(2)(g) and later on §87(2)(e)(i). In my view, those blanket denials of access are equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the Division for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or

the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

It appears that the records sought fall within the scope of §87(2)(g). However, in consideration of the structure of that provision and its judicial interpretation, I believe that various aspects of the records must be disclosed. 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 Police Department in Gould was that intra-agency materials 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 that it does not represent a final determination would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the records at issue consists of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information or other material accessible under subparagraphs (ii) or (iii) of §87(2)(g), I believe that it must be disclosed unless a different exception may properly be asserted.

Next, as suggested earlier, I do not believe that the other ground for denial offered by the Department would justify a blanket denial of your request. That provision, §87(2)(e)(i), permits an agency to withhold records that "are compiled for law enforcement purposes and which, if disclosed, would...interfere with law enforcement investigations or judicial proceedings...."

As I understand the situation, although the driver the vehicle involved in the accident is an employee of the Police Department and may be subject to some sort of discipline or admonition, there was no arrest or charge. The review of the matter may be somewhat routine and a similar kind of inquiry might be carried out as a matter of course with respect to employees of other City agencies involved in accidents. In consideration of the nature of the event, the extent to which the records were "compiled for law enforcement purposes" is, in my view, questionable. Insofar as the records cannot justifiably be characterized as having been compiled for law enforcement purposes, §87(2)(e) would not apply. Even if some of the records were compiled for law enforcement purposes, in consideration of the passage of time since the event, the extent to which disclosure would "interfere" with an investigation or judicial proceeding is also questionable. In short, should the denial of access be challenged in court, I believe that the Department would have difficulty

proving that the harmful effects described in the exception at issue would in fact arise by means of disclosure.

Lastly, the possibility that the records might be pertinent to or used in litigation is, in my view, largely irrelevant. As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

In an effort to enhance compliance with and understanding of applicable law, a copy 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: Leo Callaghan
Lt. Daniel Gonzalez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 5, 2003

E-Mail

TO: Julia Cherven [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. Cherven:

As you are aware, I have received your letter in which you wrote that you are attempting to locate your brother's unmarked grave. You indicated that you know the approximate year of his death, the municipality in which he died, and that he was buried in a "state owned graveyard in the pauper section."

From my perspective, the provisions of the Freedom of Information Law, as well as §§4144 to 4147 of the Public Health Law, are pertinent to your inquiry.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, §4174 of the Public Health Law, specifies that "a certified copy or a certified transcript of the record of any death" is exempt from disclosure to the general public and is available only to specified persons or entities in specified circumstances. I know of no analogous provision that pertains to burial permits. Although §4147 is entitled "Deaths: confidentiality of records", the restriction on disclosure is limited. That provision states that:

> "The death certificate, burial permit or any other record of death or interment, as defined by article forty-one of this chapter, including but not limited to the name, address or telephone number of the decedent, next of kin or surviving relatives of such decedent, shall not be sold or offered for sale for commercial, promotional or profit-

> making purposes, without the written consent of the next of kin or the legal representative of such decedent or next of kin. The provisions of this section shall not apply to newspapers or newsletters providing general information to the public. A violation of this section shall constitute a violation as defined in the penal law."

Assuming that you would not seek a burial permit for "commercial, promotional or profit- making purposes", I believe that the permit, or that portion of the permit indicating the location of your brother's grave, must be made available to you.

Although §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", the burial permit pertains to a person deceased more than twenty-five years, and there is simply nothing personal or intimate about the fact of a death or the location of a burial.

Under §4145 of the Public Health Law, the burial permit is required to be transmitted to the registrar, who in this instance, would be the Town Clerk of the Town of Perrysburg. That being so, it is suggested that a request for a record containing the information sought be made to the Town Clerk.

I hope that I have been of assistance.

RJF:jm

cc: Town Clerk, Town of Perrysburg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 5, 2003

Mr. John J. Sheehan
J. J. Sheehan Adjusters, Inc.
213 Green Street
Dunnmore, NY 18512

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sheehan:

I have received your letters of July 8 and August 1 in which you expressed confusion concerning an advisory opinion sent to you on July 3.

Although I believe my comments to be clear, I offer the following additional remarks for the purpose of providing clarification.

Section 308(4) of the County Law pertains to the record of the emergency call itself. If a person calls 911 and the recipient either records the call, i.e., on tape, or if a verbatim transcript of the call is prepared, a record or records of that nature would, in my view, be exempt from disclosure. Other records, those prepared in relation to or following an emergency 911 call, such as notes pertaining to the call (but not a verbatim account of the call itself), police blotter entries, notations of additional or further dispatches, notes of interviews carried out after receiving the emergency call and the like, would not fall within the scope of §308(4). Those other records would in my view be subject to whatever rights exist under the Freedom of Information Law. That being so, they would be accessible or deniable, in whole or in part, depending on their content and the effects of disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Richard Decker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3600
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August 5, 2003

Dr. Janusz R. Richards, D.C.
Chiropractic Office
150 Purchase Street
Rye, NY 10580

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Dr. Richards:

I have received your letter in which you asked whether the Graceland Terrace Housing Development Fund Corporation is subject to the Freedom of Information and Open Meetings Laws.

In this regard, the Freedom of Information Law is applicable to agencies, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The Open Meetings Law pertains to 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."

In consideration of the foregoing, as a general matter, the two statutes to which you referred pertain to records and meetings of governmental entities.

According to the Private Housing Finance Law, a housing development fund corporation is a private entity. Section 571, which is the "Statement of legislative findings and purposes", refers to "eleemosynary institutions, settlement houses, fraternal and labor organizations, foundations and other non-profit associations [that] are desirous of organizing companies to build or rehabilitate housing for low income families", and that the purpose of the law is to "provide temporary financial and technical assistance to enable such companies to participate in" government assistance programs. Further, §573 states that a housing development fund company shall be incorporated pursuant to the Business Corporation Law or as a not-for-profit corporation.

In short, while a housing development fund corporation may have a relationship with one or more units of government, it is not itself a governmental entity and, therefore, in my view, is not subject to either the Freedom of Information Law or the Open Meetings Law.

I note, however, that records maintained by an agency that is subject to the Freedom of Information Law which pertain to a housing development fund corporation fall within the scope of that statute and may be requested from the agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 6, 2003

Mr. Hugh M. Spoljaric
President
Kingston Teachers' Federation
P.O. Box 4481
Kingston, NY 12402

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Spoljaric:

I have received your letter in which you sought an opinion concerning rights of access to certain records of the Kingston City School District.

According to your letter, the District:

> "....has refused to disclose to the leadership of the Kingston Teachers' Federation, as well as to members of the public, information relative to the elimination of and the restoration of positions that were and are a part of the budget process for funding the schools."

You added that:

> "Prior to the June 3, 2003 budget vote, the Superintendent stated that several positions would not be retained and produced a list of those positions. Additionally, the Superintendent indicated that several positions would be eliminated if the budget failed to pass. Among the stated positions were seven administrative jobs. The Superintendent stated that the exact list of positions had been discussed with the Board of Education, but he refused to disclose the exact list of positions.
>
> "After the budget passed, some of the 'not to be retained' positions were, in fact, retained... The Superintendent indicated that some other positions would be reinstated. He said that a list had been prepared

> and presented to the Board of Education, but that he was not disclosing the list...
>
> "In both instances, public information was discussed in private and the Superintendent refused to share that information with the Federation and with the members of the school district community.
>
> "We believe that the district and Superintendent refusal to disclose public information that was discussed in executive session is in violation of the Open Meetings Law..."

Based on the language of the Open Meetings Law and its judicial interpretation, it appears that the matters to which you referred could not properly have been discussed during executive session. Further, records reflective of determinations made either by the Board of Education or the Superintendent must, in my view, be disclosed. In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

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 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).

In Doolittle, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive

> sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. the City of Middletown, Supreme Court, Orange County, December 26, 1978).

In consideration of the foregoing, and subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the retention or elimination of positions or programs, could appropriately be discussed during an executive session.

I note, too, that 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 confirmed that advice. 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)].

Insofar as records indicate positions that have been retained or eliminated, I believe that they would be available under the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While one of the exceptions to rights of access is pertinent to the matter, due to its structure, it often requires disclosure, and I believe that to be so in this instance. Specifically, §87(2)(g) authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

From my perspective, records or portions of records indicating the positions that have been retained or eliminated would constitute factual information accessible under §87(2)(g)(i) or alternatively would reflect a final agency determination accessible under §87(2)(g)(iii).

In an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, copies of this opinion will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 6, 2003

Mr. Ron Loeber
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Loeber:

I have received your letter in which you described a series of difficulties and sought assistance in relation to your efforts in obtaining copies of oaths of office of judges from county clerks.

Since I am not an expert on the subject of oaths of office, I sought to research the matter and found direction in §10 of the Public Officers Law. As I understand that provision, not all of the oaths of office in which you are interested are necessarily filed with a county clerk. Section 10 provides in relevant part that:

> "Every officer shall take and file the oath of office required by law, and every judicial officer of the unified court system, in addition, shall file a copy of said oath in the office of court administration, before he shall be entitled to enter upon the discharge of any of his official duties....The oath of office of every state officer shall be filed in the office of the secretary of state; of every officer of a municipal corporation, including a school district, with the clerk thereof; and of every other officer....in the office of the clerk of the county in which he shall reside, if no place be otherwise provided by law for the filing thereof."

Insofar as a county clerk or any other state or municipal office or officer maintains the records of your interest, I believe that they must be disclosed. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial of access would be applicable when an agency maintains oaths of office.

In a situation in which 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 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1417

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August 7, 2003

E-Mail

TO: Jonathan E. Rubin <RUBINJ@BrooklynDA.org>

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rubin:

I have received your letter in which you asked whether the Long Island Railroad is an agency for purposes of the Freedom of Information Law.

As you are aware, 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."

The foregoing indicates that public authorities and public corporations are agencies. In this regard, the Metropolitan Transportation Authority ("MTA") is, according to §1263(1) of the Public Authorities Law, "a body corporate and politic constituting a public benefit corporation." A public benefit corporation is also a "public corporation" as that phrase is defined in §66 of the General Construction Law. The provisions of Article 5, Title 11 of the Public Authorities Law concerning the MTA refer repeatedly to the MTA's "subsidiaries" and "subsidiary corporations", one of which is the Long Island Railroad, which was purchased by the MTA pursuant to an agreement consummated in 1966. Judicial decisions confirm that the Long Island Railroad is a wholly owned subsidiary of the MTA [see also §1266(5)], and the history involving the genesis, powers and duties of the MTA and its subsidiary, the Long Island Railroad, are described in detail in Long Island Railroad v. Public Service Commission 30 AD3d 409 (1968).

In sum, because it is a subsidiary of the MTA, which clearly is an "agency", I believe that the Long Island Railroad constitutes an agency subject to the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3063
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August 7, 2003

Ms. Dorothy Stundtner
[redacted]

The staff of the Committee on 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. Stundtner:

I have received your letter and enclosed copies of the Open Meetings Law and "Your Right to Know", which describes that law and the Freedom of Information Law.

You have raised a variety of questions relating to "grievance day", and in this regard, I must inform you that many provisions of law relating to the assessment of real property are found in statutes separate from the Open Meetings Law. To obtain information focusing on the assessment of real property and the right to challenge an assessment, it is suggested that you seek the assistance of the Office of Real Property Services, 16 Sheridan Avenue, Albany, NY 12210-2714. That agency's website address is <www.orps.state.ny.us> and its public information office can be reached by phone at (518)486-5446. Insofar as your questions relate to the Open Meetings Law, I offer the following comments.

First, there is often a distinction between a meeting and a hearing. A meeting is generally a gathering of quorum of a public body for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A hearing is generally held to provide members of the public with an opportunity to express their views concerning a particular subject, such as a proposed budget, a local law or a matter involving land use. Hearings are usually required to be preceded by the publication of a legal notice. In contrast, §104(3) of the Open Meetings Law specifies that notice of a meeting must merely be "given" to the news media and posted. There is no requirement that a newspaper, for example, publish a notice given regarding a meeting to be held under the Open Meetings Law.

There is no general provision that relates to legal notice that must be given prior to hearings. Those requirements are usually found in the sections of law dealing with the subject or activity at issue. For example, while towns, villages and school districts all must hold public hearings on their proposed budgets, there are separate provisions in the Town Law, the Village Law and the Education Law dealing with each. I believe that there is statutory direction concerning the publication of notice

prior to grievance day. Again, that is a matter that can be addressed with expertise by staff at the Office of Real Property Services.

Second, I believe that a board of assessment review is 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.

Third, you asked whether there is a requirement that "in an open meeting for Grievance day the Committee members the meeting give their names." I know of no such requirement. However, I know of no reason why those persons would not disclose their identities. Further, a record maintained by a municipality identifying those persons would be available under the Freedom of Information Law. That statute is also pertinent to your final question, whether you can ask for the credentials of those who serve on the Board.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Pertinent to an analysis of rights of access is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees, as well as those performing duties for agencies, enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of those persons are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of

Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. 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 resumes of public employees, 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 or similar records that are relevant to the performance of one's duties, including certification, must be disclosed. In addition, it has been held that those portions of records indicating one's general education background must be disclosed [Ruberti, Girvin and Ferlazzo v. NYS Division of State Police, 218 AD2d 494 (1996)].

Lastly, it is suggested that you ask staff at the Office of Real Property Services whether particular qualifications must be met to hold the positions of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Encs.

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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August 7, 2003

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.

Dear Ms. Black:

I have received your letter and the materials attached to it. You referred to a request made to the Albion Central School District for a list of its teachers and administrators, including their salaries. You were then asked to complete that agency's form, which you did, and in response, you were given a list that excluded names of employees. Although the Assistant Superintendent contended that the District honored your request, it is your view that the response was incomplete.

You have sought assistance in the matter, and in this regard, I offer the following comments.

First, 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) 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.

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. 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.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of

Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be sent to the Assistant Superintendent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Shawn E. Liddle

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 8, 2003

Mr. Craig Gurian
Executive Director
Anti-Discrimination Center of
Metro New York, Inc.
26 Court St., Suite 2805
Brooklyn, NY 11242

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gurian:

I have received your letter and the materials associated with it. You have sought advisory opinions concerning a variety of issues and questions raised relating to your request for records of the New York City Commission on Human Rights.

It is noted at the outset that in many of your questions, you asked whether the Commission engaged in "violations" of law. The Committee on Open Government does not have the authority to determine whether a violation was committed, and our statements and opinions do not refer to violations. In short, the Committee is authorized to render advisory opinions which are not binding in any way, and the remarks that follow should be considered in that light.

Rather than reiterating the facts as you presented them or answering each question specifically, I will attempt to focus on issues. In many of your questions, the issue involves the propriety of redactions, particularly the redaction of names of complainants. In this regard, I offer the following comments and observations.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation

on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

One of your questions relating to redactions involves whether the Commission is required to disclose copies of conciliation agreements "in fully unredacted form." Pertinent is §8-115 of the New York City Administrative Code, which states in subdivision (d) that:

> "Every conciliation agreement shall be made public unless the complainant and respondent agree otherwise and the commission determines that disclosure is not required to further the purposes of this chapter."

From my perspective, there is no legal authority for conferring the ability to shield a conciliation agreement from the public upon the complainant, the respondent or the Commission. 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 [see Washington Post v. Insurance Department, 61 NY2d 557 (1984)].

I note, too, that it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. 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.

In short, it is not the Administrative Code or the desire or one or more parties or a promise or agreement conferring confidentiality that determines whether or the extent to which records must be disclosed or may be shielded; on the contrary, a statute, in this instance, the Freedom of Information Law, determines rights of access and the Commission's ability to deny access.

Next, despite your contentions, I believe that the name of a complainant may be withheld unless and until there is a finding of probable cause. If and when there is such a finding, it can be assumed that the names of the parties will be disclosed during a public proceeding. Before that point is reached, however, it is my view that disclosure of identifying details pertaining to a complainant, as well as the name of respondent who is a natural personal not involved in a business or professional activity, may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. You sought to distinguish between situations in which a matter which is currently under investigation from the case in which the investigation has been concluded, suggesting that names must be disclosed in the latter situation. I see no difference in the nature of the disclosure or the magnitude of the invasion of privacy in the two situations. Again, until there is a finding of probable cause, I believe that personally identifying details may be redacted.

You also referred to the language of §89(2)(b)(iv), which provides that an unwarranted invasion of personal privacy includes "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it." You contend, in your words, that the foregoing "requires *both* irrelevance and reporting in confidence to apply" (emphasis yours). Nevertheless, the introductory language of §89(2)(b) indicates that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the examples that follow, one of which is subparagraph (iv). That being so, while the provision to which you referred may offer guidance, it merely serves as one example among conceivable dozens of instances in which disclosure might constitute an unwarranted invasion of personal privacy.

With respect to the redaction of the names of persons other than complainants or respondents, you contend that their identities should be disclosed, particularly when they are "acting in a business or professional capacity." As I interpret case law on the subject, the privacy exception does not apply to "business activities" [see Cohen v. Environmental Protection Agency, 575 F. Supp 425 (D.C.D.C. 1983) and ASPCA v Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989)]. I would conjecture that persons whose names appear in the records in question may often be analogous to witnesses or bystanders offering observations. I would agree that reference to those persons in relation to their business activities likely must be disclosed. In other instances, however, their identities may, in my view, be redacted to protect against unwarranted invasions 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..."

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: Avery Mehlman

STATE OF NEW YORK
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August 8, 2003

E-Mail

TO: Michael Luffred <[redacted]>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Luffred:

As you are aware, I have received your letter concerning your ability, as a member of a board of education, to gain access to certain records.

You indicated that a resident of the District filed an appeal with the Commissioner of Education and that you want to read "the contents of the appeal, and letter of response by the Pres. of our school board." Your request to do so was rejected by the Superintendent and the Board, because, "to paraphrase: It's in litigation and you have no right as an individual on the school board to read the contents."

I believe that you, as well as any member of the public, generally have a right to gain access to the records at issue. In this regard, I offer the following comments.

First, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A board of education, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a

majority of its total membership (see General Construction Law, §41). In my view, in most instances a board member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

Second, there is nothing in the Freedom of Information Law that generally shields records relating to litigation or, as in this instance, an administrative proceeding, from disclosure.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." 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 or, in the context of your inquiry, with the Commissioner of Education. In like manner, when legal advice is sought or rendered, the attorney-client privilege ordinarily shields those written communications from disclosure, unless and until the client waives the privilege or the communication is served upon or disclosed to a person or entity other than the client.

The provisions cited above are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on either in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103

> A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

In my view, since the records in question have been sent to the Commissioner of Education and have been or can be obtained by the petitioner, any claim of privilege or its equivalent would have been effectively waived.

Lastly, having spoken with an attorney at the State Education Department, it was confirmed that the kinds of records at issue are generally disclosed by the Department in accordance with the Freedom of Information Law, and that rights of access would be the same when those records are maintained by a school district. I note, however, that there may be instances in which portions of the records may be redacted to protect personal privacy. For example, as you may be aware, insofar as District records are personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) may prohibit disclosure without the consent of a parent. In other cases, the records might include information of an intimate or personal nature, i.e., in relation to a medical or mental health condition. In those kinds of situations, personally identifying details may be deleted insofar as disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)(b)]. Nevertheless, following redactions, I believe that the remainder of the records would be accessible.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14176 OMC-AO-3606

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August 8, 2003

Mr. Michael A. Kless
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kless:

I have received your letter in which you asked whether the New York State Ethics Commission "is exempt from the Freedom of Information Law" and "any other NYS sunshine laws...."

In this regard, as you are aware, the Freedom of Information Law generally requires that government agency records be made available for inspection and copying, unless a ground for denial of access may properly be asserted. In the context of your question, 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."

Article Six of the Public Officers Law is the Freedom of Information Law, and based on the foregoing, the only records required to be disclosed by the Commission are those identified in (1) through (4) of paragraph (a). I note, too, that the introductory portion of the provision quoted above refers to certain records that are "available for inspection." Based on that language, it has been held that the Ethics Commission is not required to prepare photocopies of those records [John v. NYS Ethics Commission, 178 AD2d 51 (1992)].

Similarly, subdivision (18) of §94 of the Executive Law specifies that the meetings of the Ethics Commission are outside the coverage of Article Seven of the Public Officers Law, which is the Open Meetings Law. That provision states in relevant part that : "Notwithstanding article seven of the public officers law, no meeting or proceeding...of the commission shall be open to the public..."

In sum, neither the Freedom of Information Law nor the Open Meetings Law is applicable to the State Ethics Commission.

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: Walter C. Ayres

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 1411

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August 8, 2003

Mr. Victor Maltsev
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Maltsev:

I have received your letter in which you complained with respect to delays in relation to your requests for records by the New York City Transit Authority.

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.

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: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14178

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August 8, 2003

Mr. Frank J. Ioli, Sr.
[redacted]

Dear Mr. Ioli:

I have received a copy of your letter of August 8 to Charles Kelsey, Village Clerk of the Village of Mayville. You wrote: "Mr Kelsey I object to your and Mr Freeman denying me the opportunity to investigate Mr Brauns resume."

In this regard, first, I have no control over the records of the Village, and this office is not empowered to compel an agency, such as the Village, to grant or deny access to records. Certainly there has been no effort on my part to deny you an opportunity to gain access to records that you have the right to review or copy.

Second, the primary role of this office involves offering advice and opinions based on the law and its judicial interpretation. Although you might desire to gain access to the entirety of a person's resume, the law authorizes an agency to withhold portions of that and other documents when disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)(b)]. Moreover, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, the first of which refers to employment histories.

In an effort to foster accountability and give effect to the intent of the Freedom of Information Law, this office has advised and the courts have agreed that a person's prior public employment history must be disclosed, for the fact one's public employment has always been a matter of public record. It has also been advised and determined that when certain criteria must be met to hold a position, those portions of a resume indicating that a person has met those criteria must be disclosed [Kwasnik v. City of New York, Supreme Court, New York County, September 26, 1997; affirmed, 262 AD2d 171 (1999)]. Absent disclosure, the public has no way of knowing whether a person is qualified. Nevertheless, other aspects of a resume involving a person's employment in the private sector may, as a general matter, be withheld on the ground that disclosure would indeed constitute an unwarranted invasion of personal privacy.

There is no effort on my part to deprive you of any right. My goal, very simply, is to offer accurate information and guidance regarding the law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles Kelsey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 19, 2003

Mr. Alfred Mower
87-A-8232 D-3-06
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. Mower:

As you are aware, I have received your correspondence concerning a denial of your request for a statement submitted by a nurse employed by the Department of Correctional Services to a Department grievance committee.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While I am unfamiliar with the content of the record in question, it is possible that several of the grounds for denial of access might be pertinent.

That statement would, under the circumstances fall within §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.

Also relevant may be §87(2)(b), which enables an agency to deny access insofar as disclosure would constitute "an unwarranted invasion of personal privacy." That provision might apply in relation to unsubstantiated allegations, as well as information identifying persons other than yourself.

Since the matter appears to relate to an investigation, §87(2)(e) may be significant. That provision pertains to 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."

To the extent that the harmful effects described in §87(2)(e) would arise by means of disclosure, records or portions of records may be withheld.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Deborah Jarvis
Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14180

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August 19, 2003

Mr. Joseph R. Gonzalez
86-A-7623
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. Gonzalez:

I have received your letters in which you asked that I "force" the New York City Department of Correction and the New York State Department of Correctional Services to obey the law.

In this regard, I emphasize 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 enforce the law or to compel an agency to grant or deny access to records.

Your request to the Department of Correction involved that agency's subject matter index and "the index to the DOC employee manual." You were informed that those records do not exist.

Due to the direction provided in the Freedom of Information Law, a subject matter list must be maintained by the Department. As a general matter, 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 that does not exist or that it does not possess. However, an exception to that principle involves records that must be "maintained" by each agency pursuant to §87(3). Paragraph (c) of that provision 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, 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.

With respect to the existence of other 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." If you consider it worthwhile to do so, you could seek such a certification.

Your request to the State Department of Correctional Services was based on a news article indicating that the agency "supplied the D.A.'s office with data about various inmates", and you believe that information about you is included in the data. Without knowledge of the nature of the "data", I cannot offer specific guidance. However, several grounds for denial may be pertinent.

Communications between the Department and the office of a district attorney would fall within §87(2)(g). That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Also relevant may be §87(2)(b), which enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." That provision may apply to information pertaining to persons other than yourself.

Often most significant in the kind of circumstance to which you referred 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."

Related is §87(2)(f), which permits an agency to deny access to records insofar as disclosure "would endanger the life or safety of any person."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas J. Antenen
Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 19, 2003

Mr. Eugene Ely Forman
91-A-8549
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. Forman:

I have received your letter in which you asked whether a request can be made to the State Legislature for what you characterized as an "invisible" statute relating to a particular provision of the Criminal Procedure Law.

In this regard, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable personnel to locate and identify the records of your interest. From my perspective, seeking an invisible statute likely would not reasonably describe the record.

It is suggested that you review Article 440 of the Criminal Procedure Law and perhaps focus on the notes following each section that identify other statutes that make reference to a particular section of law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14182

41 State Street, Albany, New York 12231
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August 19, 2003

Mr. Gabriel Midalgo
97-A-7235
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. Midalgo:

I have received your letter in which you sought assistance in obtaining "polaroid pictures" taken of you and "u i reports" prepared following an altercation between yourself and another inmate. You wrote, however, that a facility official indicated that there are "no such records on file."

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, insofar as the records sought exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In my view, there would be no basis for withholding photographs of yourself from you. With respect to the "u i reports", since I am unaware of the contents of the records or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Relevant is a decision by the Court of Appeals concerning records prepared by police officers in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate. The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, it was determined that the agency could not claim that the records can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness, or others interviewed in an investigation.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

I hope that 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 - 14183

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August 19, 2003

Mr. Heriberto Seda
98-A-4814
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. Seda:

I have received your letter in which you sought assistance concerning denials of requests for records characterized as "transfer reviews" that indicate the reasons for a denial of your request to transfer to a different 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.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14184

41 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, 2003

Mr. Armando Torres
94-B-2073
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. Torres:

I have received your letter in which you sought guidance relating to two issues.

First, you referred to a request made under the Freedom of Information Law that has 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)].

Second, you asked how you might obtain a copy of your pre-sentence report "for free." Here I note that 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, and that you seek status as a poor person in an effort to have the fee for a copy waived or reduced.

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-14185

41 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, 2003

Mr. Carl Young
00-B-0574
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. Young:

I have received your letter in which you sought guidance concerning the Freedom of Information Law, a copy of which is attached.

In this regard, first, the title of the Freedom of Information Law may be misleading, for it is a statute that pertains to requests for records. Section 89(3) states in part that an agency is not required to create or prepare a new record in response to a request. Further, although the Freedom of Information Law requires that an agency respond to a request for records and disclose records in accordance with §87(2), it does not require that agency staff answer questions or provide information in response to questions.

Second, assuming that you enjoy rights of access to records maintained by an agency, I believe that you may designate a person to review or obtain copies of those records on your behalf.

Last, as I understand your correspondence, it appears that you expect that an agency is required to prepare a list either of records disclosed or records withheld. In short, there is nothing in the Freedom of Information Law that requires an agency to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1418b

41 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, 2003

Mr. William Sawyer
01-A-1325
Bare Hill Correctional Facility
Caller Box 20, Cady Road
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sawyer:

I have received your letter and the correspondence attached to it.

The materials pertain to a request for "'the oath of office and the name and address of the bond holding agent' for Queens County District Attorney Richard A. Brown & Queens County Assistant District Attorney Nicole H. Baker." In response to your request, you were informed that a search would be made upon receipt of an "indictment/docket number."

In this regard, first, the records sought are not unique to your case, and unlike records that pertain to a particular proceeding, neither an indictment nor docket number would be needed to search for those records.

Second, the Freedom of Information Law pertains to records maintained by or for an agency, and if the Office of the District Attorney does not maintain oaths of office, for example, that agency would not be required to prepare or acquire those records from another source in order to satisfy your request [see Freedom of Information Law, §89(3)].

If the oaths of office are not maintained by the Office of the District Attorney, I would conjecture that they may be filed either with the Department of State or the Queens County Clerk. To seek the records from the former, it is suggested that such a request be made the Department's Bureau of Miscellaneous Records (at the same address as indicated above). If you want a certified copy, the fee is $5.50; for a plain copy, I was informed that there is no charge. A request may be directed to the attention of Ms. Mono Orciuoli at the Bureau of Miscellaneous Records.

Insofar as the Office of the District Attorney maintains the records of your interest, those records are subject to rights conferred by the Freedom of Information Law. In brief, that statute 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.

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-1418

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2003

Mr. Errol Russell
02-A-3573
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. Russell:

I have received your letter in which you requested an advisory opinion concerning the Freedom of Information Law.

Your request to the New York City Police Department involves a "transcript" relating to a "license plate check" made by means of a "Mobile Digital Terminal", which you described as " a car computer." You wrote that it has been stated that there is "no computer printout capacity from the squad car computer, but it contains a hard data-base drive." You have sought my views concerning access to a transcript of the license plate check.

From my perspective, your inquiry involves a matter of first impression and I know of no judicial decision dealing with your question. In my view, there may be several issues.

First, the Freedom of Information Law pertains to agency records and §86(4) defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

If the fact that a license plate check was made and has been recorded or stored, it is possible that information of that nature might be found to constitute a record that falls within the frame work of the Freedom of Information Law. On the other hand, if there is no means of ascertaining that a check was made in relation to a particular license plate, the information sought would not exist and the Freedom of Information Law would not apply.

A second issue would involve whether the information sought, if it exists, can be retrieved. If there is no means of printing the information or recapturing information on screen, again, I do not believe that the Freedom of Information would serve as a means of gaining access.

And third, assuming that the information cannot be retrieved or generated, it appears that your request may not involve access to a record, but rather access to a machine, a computer. If that is so, it does not appear, in my opinion, that the Freedom of Information Law would apply.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1418

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2003

Mr. Mark Barker
96-A-2209
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Barker:

I have received your letter in which you referred to difficulty in obtaining medical records under the Freedom of Information Law from the Mid-Orange Correctional Facility.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by a correctional facility. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, §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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14189

41 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, 2003

Mr. Paul King
98-A-6792
South Port 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. King:

I have received your letter in which you requested guidance concerning your attempt to obtain an "attendant [or perhaps "attendance"] sheet" and other records from your court appointed attorney.

In this regard, first, the Freedom of Information Law applies to agency records and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally pertains to records maintained by entities of state and local government in New York; it does not apply to records of a private attorney or firm.

Second, although the Freedom of Information Law does not apply to the courts, court records are generally available under other statutes (see e.g., Judiciary Law, §255). Consequently, it is suggested that you seek the records from the clerk of the court in which the proceeding was conducted, citing an applicable provision of law as the basis for your request.

I hope that 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-14190

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2003

Mr. Peter Graziano
86-A-4738
Midstate Correctional Facility
P.O. Box 2500
Marcy, NY 13403

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Graziano:

I have received your letter and the materials attached to it. You have sought guidance concerning a record that is copyrighted. Both the Department of Correctional Services and the company that claimed copyright protection have denied access.

In this regard, first, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, a private company is not an agency and, therefore, is not subject to the Freedom of Information Law.

Second, with respect to the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to §87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from

disclosure by state or federal statute." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department may properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted material would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1419

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2003

Mr. Seeley Shelton
01-R-3781
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. Shelton:

I have received your letter and the correspondence attached to it. As I understand the matter, the issue involves a request for records that had been made available to your attorney.

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 to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the Office of the District Attorney.

I note that, in your request, you asked that fees be waived. While the federal Freedom of Information Act, which applies to federal agencies, includes provisions concerning fee waivers, the New York Freedom of Information Law contains no similar provision. Further, it has been held that an agency subject to the New York Freedom of Information Law may charge its established fees, even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 55 NYS 2d 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

cc: Susan C. Roque

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1492

41 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, 2003

Mr. Michael Jacobs
01-B-1157
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. Jacobs:

I have received your letter, which you characterized as an "appeal" following a denial of your request for a copy of a warrant for your arrest by the City of Rochester.

The denial of your request indicated that the warrant is pending and that its release "would disclose confidential information in a law enforcement investigation in accordance with Section 87(2)(e)(iii) of the Public Officers Law."

Based on a review of the transcript of your trial, it appears that the investigation has been completed. If that is so, I believe that the warrant should be disclosed.

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 cited by the City states that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would...identify a confidential source or disclose confidential information relating to a criminal investigation..."

During the trial, the arresting officer was asked whether he had a warrant for your arrest; he answered that he did, and that it was issued by the Rochester Police Department. Soon after, the officer was asked the following question:

> "...so you went to 95 West Street for the purpose of effecting an arrest pursuant to the warrant from Rochester?"

The officer answered "Yes."

If my understanding of the matter is accurate, you are incarcerated now due to the arrest made pursuant to the warrant issued by the City of Rochester. If that is so, again, the investigation relating to the address appears to have ended. In that circumstance, the provision cited as a basis for the denial of access, in my opinion, would not be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Linda S. Kingsley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14193

41 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, 2003

Mr. Shaun V. Stolfi
[redacted]

The staff of the Committee on Open 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 in which you sought assistance in obtaining "the business name, address, and phone number of the organization/establishment in which the Fishkill Correctional Facility (FCF) sends an Inmate donations it receives from the processing of Inmates' packages."

In this regard, it is noted at the outset that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to crate a record in response to a request. If the Department of Correctional Services does not possess a record a record containing the information of your interest, it would not be required to prepare a new record containing the information sought on your behalf.

Assuming that such a record is in possession of the Department, the Freedom of Information Law would be applicable. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. If I understand the matter accurately, the record would be accessible, for none of the grounds for denial of access would be pertinent.

Lastly, as you may be aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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: Jo Ann Walsh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14194

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2003

Mr. David Bullock
82-A-5787
Exchange Street Box 149
Attica State Prison
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. Bullock:

I have received your letter concerning what appear to be requests for records pertaining to yourself that may be maintained by entities that you characterized as "union free school districts."

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 an agency is generally an entity of state or local government in New York.

From my perspective, in consideration of the names of the three entities, Children's Village, Pope Pius XII and Holy Cross, it is doubtful that the latter two and perhaps all three are subject to the Freedom of Information Law.

Perhaps more relevant under the circumstances would be the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "FERPA". In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal points of the Act are rights of access by certain persons and the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Concurrently, if a parent of a student requests records pertaining to his or her child, or a person who has reached the age of eighteen years seeks education pertaining to himself/herself, those persons ordinarily will have rights of access to those records identifiable to their children or themselves.

Lastly, even if the entities that you identified are subject to the Freedom of Information Law or FERPA, the extent to which records of your interest continue to exist is, in my view, questionable.

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-14195

41 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, 2003

Mr. Herbert Tunstall
98-A-7036
Eastern Correctional Facility
P.O. Box 338
Napanoch, NY 12458

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Tunstall

I have received your letter in which you asked whether you may obtain copies of your medical records under the Freedom of Information Law from a county jail and a state correctional facility. Please note the current address of this office, which appears above.

In this regard, the Freedom of Information Law includes all agency records within its coverage, including medical records [Mantica v. NYS Dept. of Health, 699 NYS2d 1, 94 NY2d 58 (1999)]. That statute, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With specific respect to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Daniel Hogue
Brian Fischer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1411 96

41 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, 2003

Mr. Ricardo Bonilla
01-B-1697
Auburn Correctional Facility
135 State Street - Box 618
Auburn, NY 13024

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bonilla:

I have received several letters from you concerning requests for records made to Livingston and Monroe Counties, as well as the Village of Mt. Morris. In consideration of the chronology of developments relating to your requests, I offer the following comments.

First, in response to your request to Livingston County, you were informed that the materials involve approximately a thousand pages, and that the figure does not include the transcript of your trial. That being so, the fee for copies would be $250. In an effort to ascertain which among those records would be greatest interest, you requested an index or synopsis of the records. You were informed that there is no index and asked whether there is a requirement that a record of that nature be prepared.

In this regard, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if no index to or synopsis of records within a file exists, the agency would not be required to prepare such a record on your behalf. Perhaps you could designate a person to review the records on your behalf in order to identify those that may be of interest.

A second issue involves your ability to obtain duplicate color photographs from the Mt. Vernon Police Department. In a relatively recent decision, the court determined that "colored photocopies are to be copied in color, unless Respondents satisfy the Court that the County does not own a color copier," and if the person seeking copies pays "the full costs of such duplications." If there is no color copier, the Court directed that photocopies be made and if they do "not prove sufficiently legible", this court would consider "photo-reproduction services" [Mixon v. Wolf, Supreme Court, Erie County, March 4, 2002].

Next, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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.

That advice was confirmed in Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), in which 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, in consideration of your requests, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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.

Relevant is a decision by the Court of Appeals concerning records prepared by police officers in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate. The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, it was determined that the agency could not claim that the records can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness, or others interviewed in an investigation.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was previously made available to you or your attorney, i.e., in conjunction with a criminal proceeding, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: David Morris
Sherman A. Yates
Richard F. Mackey
John C. Putney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14197

41 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, 2003

Mr. Benjamin Stephens, Jr.
83-B-0072
Altona Correctional Facility
555 Devils Den Road
Altona, NY 12910-0125

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Stephens:

I have received your letters addressed to this office and former Deputy Secretary of State Wescott.

In brief, as I understand the matter, you requested copies of complaints that you prepared from the Department of Correctional Services. The Department denied access, indicating that they are within the Inspector General's files, and that an investigation is currently open and ongoing.

In my view, it appears that your request may have been misconstrued. While I agree that records prepared as a result of your complaints might properly be withheld [see Freedom of Information Law, §87(a), (b) and (e)(i), as well as Civil Rights Law, §50-a], I do not believe that there would be a basis for denying a request for copies of records that you prepared. It is suggested that you offer clarification of the matter to the Department's records access officer.

Further, when a request is denied, the person denied access has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

As you may be aware, 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

cc: Daniel F. Martuscello, III

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1411 98

41 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, 2003

Mr. Ernest Bacote
78-A-3537
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0510

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bacote:

I have received your letters concerning access to certain evaluation reports. That latest indicates that the reports were made available after portions were deleted. The other issue relates to access to what appear to be mental health records.

In this regard, with respect to evaluations as well as 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.

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 records containing evaluations that may be similar to those 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.

With regard to the other matter, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14199

41 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, 2003

Mr. Richard Grennon
01-R-4104
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 information presented in your correspondence.

Dear Mr. Grennon:

I have received your letter in which you requested assistance in relation to your requests to the North Greenbush Town Clerk for a Child Protective Services' report, domestic incident report and records of police calls concerning the incidents leading to the 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, 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.

Relevant in this instance is §87(2)(a) which provides that an agency may deny access to records or portions thereof that "are specifically exempted from disclosure by state or federal statute...". Section 422 of the Social Services Law is a statute which pertains specifically to the statewide central register 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 (4)(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."

Based on the foregoing, although a report may generally be available to a parent, those portions that would, if disclosed, identify the source of the report may be withheld to protect that person's privacy and safety.

I note that subdivision (5) of §422 of the Social Services Law generally prohibits the disclosure of reports that have been determined to be unfounded.

In relation to your request for a domestic incident report concerning yourself and others, I cannot conjecture as to its availability because I am unaware of the nature of the complaint or your involvement with the incident. Three scenarios commonly arise regarding access to the contents of domestic incident reports.

The first involves requests by "involved parties", the complainant or victim and the subject of the complaint. The second involves a request by an "interested party", such as a person seeking a report relating to an ex-spouse and that person's new spouse or "significant other." In those instances, the reports may be reviewed "on a case by case basis", for the person seeking the record may have valid concerns pertaining to the safety of his or her children, for example. Reports may be released in that kind of situation, but that in others, the report may be heavily redacted prior to disclosure. The third scenario involves requests by members of the public and the news media. Names of those involved in a domestic dispute need not be disclosed in my opinion, unless there is an arrest, in which case the identity of the person charged would clearly be public, or some other event in which disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

With respect to your request for "police call records showing the times of the calls, who made the calls, responding officers and dispositions of the calls" related to the incidents that occurred approximately three years ago, it is noted that §89(3) of the Freedom of Information Law provides 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.

In my view, whether a request reasonably describes the records sought may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. While I am unfamiliar with the record keeping systems of the Town, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney, it was found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" [Moore v. Santucci, 151 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-14200

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 20, 2003

Mr. Robert Scott
02-A-2426
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Scott:

I have received your letter in which you complained that the New York City Police Department has not responded to your request for an arrest report pertaining 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.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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-14201

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 21, 2003

Mr. Shawn Baker
01-B-1278
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Baker:

I have received your letter in which it appears that you requested your mental health and employment records from this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning public access to government records, primarily in relation to the state's Freedom of Information Law. The Committee does have custody or control of records in general, and this office does not maintain the kinds of records that you described. Nevertheless, in an effort to assist you, I offer the following comments.

First, 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, the Freedom of Information Law generally applies to records maintained by entities of state and local government. It does not apply to private hospitals or private employers.

Second, if you worked for a government agency, records indicating your work history and attendance would be accessible to you insofar as such records exist. In that event, a request may be made to the agency's "records access officer", a person designated to coordinate the agency's response to requests for records.

If you worked for private employers, those entities would not be subject to the Freedom of Information Law and would not be required to disclose their records. However, they could choose to disclose, and it may be worthwhile to write to your former employers in an effort to obtain the information of your interest.

Lastly, §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 by seeking records pertaining to yourself from the facility or practitioner that provided mental health services.

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..."

Subdivision (d) of §33.16 pertains to the right to appeal a denial of access and states that:

> "(d) Clinical records access review committees. The commissioner of mental health the commissioner of mental retardation and developmental disabilities and the commissioner of alcoholism and substance abuse services shall appoint clinical record access review committees to hear appeals of the denial of access to patient or client records as provided in paragraph four of subdivision (c) of this section. Members of such committee shall be appointed by the respective commissioners. Such clinical record access review committees shall consist of no less than three nor more than five persons. The commissioners shall promulgate rules and regulations necessary to effectuate the provisions of this subdivision."

If you do not receive a satisfactory response to your request, it is suggested you request the rules and regulations from the appropriate commissioner in order to ensure that you are following the correct procedure and that you can properly attempt to assert your rights.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO - 1412

From: Robert Freeman
To: [redacted]
Date: 8/21/2003 3:39:51 PM
Subject: Dear Mr. Luffred:

Dear Mr. Luffred:

I have received your letter and suggest that you seek the records at issue pursuant to the Freedom of Information Law from the State Education Department rather than the District.

When making a request, the 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 of your interest. Additionally, it is suggested that you offer to pay the fee for photocopying, which cannot exceed twenty-five cents per photocopy.

A request may be addressed to Paul Tighe, Records Access Officer, State Education Department, Rm. 121, 89 Washington Avenue, Albany, NY 12234.

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-1423

41 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, 2003

Mr. Robert Lind
84-A-0812
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. Lind:

I have received your letter in which you explained that you requested records related to your arrest in 1982 from the New York City Police Department and you were informed that they were destroyed in 1996.

In this regard, it is noted that the Freedom of Information of Law pertains to existing records. If indeed the New York City Police Department does not maintain the records sought, the Freedom of Information Law would not apply.

When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I 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-1424

41 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, 2003

Mr. Barrielevia Evans
02-B-1700
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 facts presented in your correspondence.

Dear Mr. Evans:

I have received your letter and attached materials in which you explained your difficulty in obtaining a bench warrant under which you were charged with a crime in 1996. You wrote that the Monroe County Department of Communications responded to your two requests by indicating that they would be approved or denied in approximately 36 and 86 business days.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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, or if an agency delays responding for an 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. In my opinion, a warrant issued for your arrest in 1996 would be available to you if it still exists, for none of the grounds for denial would appear to be applicable.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney it was found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" [see Moore v. Santucci, 151 AD 2d 677, 678 (1989)]

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-14205

41 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, 2003

Mr. Vincent Terio
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Terio:

I have received your letter addressed to David Treacy of this office, as well as a variety of materials relating to requests made to several offices within Putnam County government.

It appears that you believe that you have been denied access to records. However, as I understand the matter, the responses to your requests offered by County officials indicate that no records were withheld. In some instances, although original paper documents were not disclosed, those documents were made available you on microfilm. In others, you were informed that certain records that you requested were not maintained by an agency. Here I point out that §89(3) of the Freedom of Information Law states in part that an agency is not required "to prepare any record not possessed or maintained by such entity." In short, if an agency indicates that it does not maintain a record that has been requested, the Freedom of Information Law does not apply.

I note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law 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 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. Dennis J. Sant
George R. Michaud

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1206

41 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, 2003

E-MAIL

TO: June Maxam [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. Maxam:

I have received your letter in which you referred to a request for records made pursuant to the Freedom of Information Law to the Essex County Clerk. You indicated that you received no response to the request or the appeal that followed and asked whether your "only remedy under the current law [is] to file an Article 78 proceeding seeking to compel the county clerk to fulfill his statutory duties and respond to the request."

From my perspective, if an agency fails to respond to a request for records or the ensuing appeal, the only remedy prescribed by law would involve the initiation of an Article 78 proceeding.

By way of background, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 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 there may be a distinction between most requests for agency records and requests for records of county clerks 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.

RJF:tt

cc: Hon. Joseph Provencha

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1420

41 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, 2003

Mr. John S. 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 facts presented in your correspondence.

Dear Mr. Wise:

I have received your letter concerning your ability to gain access to ordinances enacted by the Town of Dannemora.

In this regard, §30 of the Town Law, entitled "Powers and duties of town clerk", addresses the issue and states in subdivision (1) in relevant part as follows: "Immediately after adoption he shall enter into a book to be known as the 'ordinance book' a copy of every ordinance adopted by the town board, specifying the date of adoption thereof."

As you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the ordinance book would clearly be accessible, for none of the grounds for denial of access would be applicable.

I note, too, that the Freedom of Information Law provides direction concerning the time and manner in which an agency, such as a town, 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Doreen Benware
Mark J. Rogers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14208

41 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 25, 2003

Mr. Frank Leonard
[redacted]

The staff of the Committee 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. Leonard:

I have received your copy of an unsigned "confidentiality and nondisclosure agreement" between the Village of Haverstraw and MGD Holdings, LLC ("MGD"). You have questioned the validity of the agreement.

In this regard, there is no indication of whether the agreement has been signed or is in effect. The following remarks will be based on an assumption that it is or will be signed by the Village and MGD.

The agreement states that MGD agrees to furnish to the Village "specific confidential financial information...relating to profit margin, sales projections, evaluations, and various costs and expenses for the purposes of developing the Haverstraw Waterfront Redevelopment Project..." The agreement also provides that:

> "1. The Village Board of Trustees and its Consultants to the Haverstraw Waterfront Redevelopment Project agree to hold confidential or proprietary information or financial information ('confidential information') in trust and confidence and agree that it shall be used only for the contemplated purposes of negotiating the proposed Land Acquisition and Disposition Agreement (submitted September 12, 2002) and shall not be used for any other purpose, or disclosed to any third party.
>
> 2. No copies will be made or retained of any written information or prototypes supplied without the permission of MGD Holdings, LLC.

> 3. At the conclusion of any discussions, or upon demand by MGD Holdings, LLC, a l confidential information, including prototypes, written notes, photographs, sketches, models, memoranda or notes taken shall be returned to MGD Holdings, LLC.
>
> 4. Confidential information shall not be disclosed to any member of the press and/or communications media employee, consultant or third party unless they have been approved by MGD Holdings, LLC.
>
> 5. The Agreement and its validity, construction and effect shall be governed by the laws of the State of New York."

From my perspective, the last element of the agreement is most significant, for I believe that portions are inconsistent with the laws of the State of New York and that, to that extent, the agreement is invalid. In this regard, I offer the following comments.

First, all records maintained by or for the Village fall within the coverage of the Freedom of Information Law. That statute pertains to all records of an agency, such as a village, and §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, the information referenced in the agreement, insofar as it exists in some physical form, and is kept by or for the Village, would constitute an agency record.

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)]. Therefore, the Freedom of Information Law includes within its scope not only those materials falling within the agreement that are maintained at Village offices or are in possession of Village officials; it also includes materials maintained *for* the Village by its consultants or attorneys.

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 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).

Third, 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."

In sum, an agreement between the Village and a private entity that in any way renders records confidential is, in my view, void. The law, not the terms of an agreement, determines the extent to which records may be withheld.

While I believe that elements of the agreement are invalid, I note that there may be portions of records falling within the coverage of the agreement that may justifiably be withheld. Potentially relevant is one of the grounds for denial of access, §87(2)(d), which permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In my opinion, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" [(Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...

> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421).

Lastly, I believe that section 3 of the agreement requiring the return of materials to MGD is also inconsistent with law. 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."

It appears that materials submitted by MGD to the Village or its consultants would constitute "records" 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 or return records until the minimum period for the retention of the records has been reached. Although I am unaware of the specific retention period or periods that may be applicable, I believe that the Village must retain records in accordance with the retention schedule before returning them to MGD or otherwise disposing of them.

In an effort to enhance compliance with and understanding of the provisions referenced above, a copy of this response 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-14209

41 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, 2003

Mr. Eduardo A. Placencia
98-A-1550
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. Placencia:

I have received your letter in which you complained that your facility has not responded to your requests for records. You asked for "assistance and intervention in this matter."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or 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-1420

41 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, 2003

Mr. Elias Cruz
02-A-3394
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. Cruz:

I have received your letter in which you requested assistance in obtaining a "reasonably detailed list by subject matter of all records in the possession of the (Albany County) Sheriff's Department." You complained that the Department has not responded to your requests for the record.

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, 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.

Also, since the Sheriff's Department is part of Albany County Government, I would conjecture that reference to the Department's records may be included within the County's subject matter list. In consideration of that possibility, it is suggested that you seek the County's subject matter list by writing to its records access officer, Thomas Clingan, County Clerk.

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-1421

41 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, 2003

Mr. Dominic Bretti
80-C-0511
Elmira Correctional Facility
Box 5400
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 wrote that the Onondaga County Sheriff's Department advised you that you must submit a self-addressed stamped envelope to receive records requested under the Freedom of Information Law. You questioned the propriety of this practice and also complained that the Department did not "put forth factual basis for conclusion that requested documents come within statutory exemption."

In this regard, there is nothing in the Freedom of Information Law that deals directly with the issue, and the provisions dealing with fees pertain to the cost of photocopying records up to nine by fourteen inches or reproducing other records that cannot be photocopied. However, it has been advised that an agency may require payment of the cost of postage.

As a general matter, the Freedom of Information Law requires that accessible records be made available for inspection and copying. No fee may be assessed for the inspection of accessible records when inspection occurs at the offices of an agency. When copies of records are requested, §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, unless a statute other than the Freedom of Information Law permits an agency to charge a higher fee.

When an applicant requests copies of records, the records may be reproduced in the presence of an applicant, the applicant can physically present himself or herself at an agency's offices to obtain copies, or copies can be mailed to the applicant.

While nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) 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 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.

With respect to your complaint about the absence of any expressed reason for redacting portions of records, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the Freedom of Information Law. Section 1401.2 (b)(3) states that an agency's records access officer is responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor." Based on the foregoing, the reasons for a denial of access must be stated in writing. This is not to suggest that any such reasons must be explained in an exhaustive manner. As you may be aware, later in the process of seeking records, if an appeal is denied, §89(4)(a) provides that the reason must be "fully explain[ed] in writing."

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Christina M. Pezzulo
Sgt. Michael A. Caiella

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1421 2

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 26, 2003

Mr. Steven Garrett
91-A-9449
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. Garrett:

I have received your letter in which you complained that the Department of Correctional Services has not responded to your requests for a variety of records. You asked this office to "make sure that DOCS comply with [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)].

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 content of records of your interest, I cannot conjecture as to their availability. However, it is noted that several grounds for withholding records may be pertinent in this matter. For instance, records identifying sources of information obtained upon a promise of confidentiality might be withheld under §87(2)(b) or (e)(iii) and information which if disclosed would endanger the life or safety of any person may be withheld pursuant to §87(2)(f).

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-1423

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 26, 2003

Mr. William Sawyer
01-A-1325
Barehill Correctional Facility
Caller Box 20
Cady Road
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sawyer:

I have received your letter in which you asked for advice "about obtaining copies of the official statement/document submitted to the NYS Div. of Parole by the District Attorney."

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 the Appellate Division in Ramahlo v. Bruno [708 NYS2d 206, 273 AD2d 521 (2000)] held that a district attorney's letter sent to the Division of Parole prior to an upcoming parole hearing may be withheld pursuant to §87(2)(g). That provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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-14214

Committee Members

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 26, 2003

E-Mail

TO: Bob Goldman [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. Goldman:

I have received your letter in which you asked whether Bard College is subject to the Freedom of Information Law "if it accepts State of New York funds" or "federal monies."

In this regard, the receipt of funding from government does not bring an entity within the scope of either the state Freedom of Information Law or the federal Freedom of Information Act. 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 upon the foregoing, in general, the Freedom of Information Law is applicable to records of entities of state and local government. It does not apply to private entities, such as Bard College.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1412/5

41 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, 2003

Mr. Milton Thompson
97-A-1874
Lakeview Correctional Facility
P.O. Box T
Brocton, NY 14716

Dear Mr. Thompson:

I have received your letter in which you appealed a denial of your request made under the Freedom of Information Law by the City of White Plains.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision concerning the right to appeal a denial of access to records, §89(4)(a), states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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, since you requested the name of a village police officer who obtained a mugshot from the White Plains Police Department, I point out that the Freedom of Information Law pertains to existing records. If, for example, there is no record that identifies the officer who obtained the mugshot, there would be no obligation that a record be prepared that identifies the officer [see §89(3)], and the Freedom of Information Law would not apply.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14216

41 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, 2003

Mr. Dwayne Chapman
92-A-5516 #G1-118
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-0010

Dear Mr. Chapman:

I have received your letter in which you asked that I forward your request for records, which you enclosed in a sealed envelope, to another agency. You indicated that the agency had not responded to an earlier request.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to compel an agency to comply with law or to grant or deny access to records. Further, the Committee's functions do not include forwarding sealed mail to other agencies. Therefore, I am returning, unopened, the envelope which allegedly contains a request for records of the New York City Department of Correction.

For future reference, I note that the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 the foregoing serves to clarify your understanding of the functions of this office and the duties imposed on an agency by the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas Antenen, Records Access Officer

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14217

41 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, 2003

Mr. David Cole
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cole:

I have received your letter and the materials attached to it. You have sought assistance in relation to a request made to Chemung County. Although the requested record was made available, you wrote that "it is not complete and it has obvious overstrikes and incomplete lines..."

Having reviewed the copy of the record at issue, it is unclear whether there was an error in printing or whether it is indeed incomplete. In this regard, it has been held that if a record has been made available once, an agency ordinarily is not required to honor a second request for the same record [see e.g., Moore v. Santucci, 151 AD2d 677 (1989)]. Under the circumstances, it is suggested that you send a copy of the copy made available to you in the manner that you marked it for my review and ask whether the record made available to you was inaccurate or may be incomplete.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark M. Schneider

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3600
FOIL-AO- 14218

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 27, 2003

Ms. Sandra R. Halberstam
Editor-in-Chief
The Clinton Chronicle
444 West 50th Street #4
New York, NY 10019

The staff of the Committee 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. Halberstam:

As you are aware, I have received your letter and a variety of materials attached to it. You have raised a series of issues concerning the implementation of the Open Meetings and Freedom of Information Laws by Community Board 4 in Manhattan. In consideration of your questions, a review of the materials, and communications with Ms. Michelle Solomon, the Board's records access officer, I offer the following comments.

The initial key issues pertain to the scope and coverage of the Open Meetings Law, which pertains to meetings of public bodies. Based on the language of the law, its legislative history, and judicial decisions, when a committee consists solely of members of a public body, such as a community board, 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 community board, 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 fifty-one, its quorum would be twenty-six; 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)].

Next, I believe that an "informal meeting" of a public body falls within the coverage of the Open Meetings Law. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean, the "formal convening" of a public body for the purpose of conducting public business. 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)].

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, irrespective of its characterization.

I note that issues involving committees of the Board and informal meetings have been discussed with Ms. Solomon, who assured me that the Board and its committees intend to comply with law.

Reference was made to situations in which perhaps a majority of the members of a Board committee may have attended meetings held by another organization, particularly the Hudson Yards Alliance. It is my understanding that Board members did indeed attend those gatherings, but that they did so as interested citizens, not as members of the Board or a committee of the Board. I was also advised that, in those instances, the members did not situate themselves together, did not function as a committee, and neither intended to nor did in fact conduct public business, collectively, as a body. If that is so, their presence, in my opinion, would not have constituted a "meeting" that would have been subject to the Open Meetings Law.

You also referred to the possibility that meetings might have been held or action taken by means of telephonic communications. As indicated earlier, the definition of "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 long stated 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, 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."

In consideration of the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonably notice to all of the members. As such, it is my view that a public body has the capacity to carry out its duties only at meetings during which a quorum has convened. Again, a quorum of a committee would be a majority of its total membership.

I also direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote by phone or by mail.

In addition, a judicial decision, the first dealing with the issue, reached the same conclusion as offered here and cited an opinion rendered by this office. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), 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..."

In another, more recent decision, the court cited and concurred with an opinion rendered by this office in which it was advised that "absent specific statutory authority to do so", members of a public body may not take action or vote, by proxy or otherwise, unless they are present at a meeting (Inner City Press/Community on the Move v. The New York State Banking, Supreme Court, New York County, NYLJ, July 20, 2001). Further, the amendments to the Open Meetings Law and the General Construction Law involving videoconferencing to which allusion was made earlier clarify the circumstances in which "meetings" may properly be held. Section 102(1) was amended to define "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*"; §41 of the General Construction Law was amended to indicate that quorum is "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...*" (italics represents the language of amendments added by Ch. 289, L. 2000).

In short, when an entity is subject to the requirements of the Open Meetings Law, I do not believe that it may validly adopt a resolution, take action or conduct a valid meeting by phone. Its authority do so, in my view, is limited to those instances in which a quorum has physically convened or has convened by videoconference.

Next, I believe that a record indicating the manner in which each member voted must be prepared in any instance in which a public body takes final action. Section 87(3)(a) of the Freedom of Information Law provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency" 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)].

Lastly, you complained with respect to delays in responding to your requests for records. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michelle Solomon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 27, 2003

E-MAIL

TO: Gabe Wasserman <gwasserm@poughkee.gannett.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, unless otherwise indicated.

Dear Mr. Wasserman:

As you are aware, I have received your communication, which includes correspondence between yourself and representatives of the State University (SUNY) and SUNY/New Paltz relating to a request made under the Freedom of Information Law.

The request involves the exchange of correspondence between the office of SUNY Chancellor King and SUNY/New Paltz relating to the SUNY/New Paltz "administration, the presidential search committee, the college council, or any members of either of the latter two groups, regarding the search process and/or finalists" during a certain period. Your comments in the material suggest that some of the records sought might have been prepared by or may be in possession of consultants or other agents of those institutions. You indicated by phone that you are particularly interested in knowing how and why the Chancellor's policy changed and why the interim president would not be designated president. Although one record was disclosed, "a local faculty union's petition", the remainder of the request was denied on the basis of §87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records, such as those of SUNY, 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, the state's highest court, 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 the records sought are "kept, held, filed, produced or reproduced...*for* an agency", such as the SUNY, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding §87(2)(g), the same provision as 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.).

In the context of your request, with the exception of a single record, the request has been denied in its entirety. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed for the purpose of identifying those portions of the records that might fall within the scope of a ground for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under

any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

There appears no question but that the records sought fall within the scope of §87(2)(g). However, due to its structure, that provision frequently requires substantial disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I point out that one of the contentions offered by the New York City Police Department in Gould was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." (id., 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. However, to the extent that they include statistical or factual information, instructions to staff that affect the public or represent a policy or a final determination made by SUNY or SUNY/New Paltz, I believe that they must be disclosed.

I hope that I have been of assistance.

RJF:tt

cc: Stacey Hengsterman
Jennifer LoTurco

STATE OF NEW YORK
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August 28, 2003

Hon. Rae Proefrock
2nd Ward Councilwoman
North Tonawanda
202 Niagara Street
North Tonawanda, NY 14120

The staff of the Committee 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. Proefrock:

As you are aware, I have received your letter concerning the propriety of a disclosure of information acquired during an executive session by a member of the North Tonawanda Common Council. You indicated to me during our conversation that it was your belief that information obtained during an executive session is confidential.

In this regard, it is noted at the outset that 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 city councils, 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.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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August 28, 2003

Mr. Daniel Goodman, DPM
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Goodman:

I have received a copy of your letter addressed to Ms. Karol Gray, Records Access Officer at SUNY/Stony Brook, in which you indicated that, by transmitting it to me, you are seeking an advisory opinion.

The matter involves your continuing efforts to obtain statistical information pertaining to the ages of persons accepted by the SUNY/Stony Brook School of Medicine. You specified in your latest request that you are attempting to gain access to "precompiled demographic statistics" that include reference to the age of persons accepted and indicated that names and ancillary information other than ages are not being sought, and that you "do not seek the creation of records", but rather only "preexisting records." In response to what may have been a similar request, you were informed that SUNY/Stony Brook was "not able to identify any readily available documents responsive to your request on the ages of applicants..." However, it was stated that "other responsive documents...fall within FOIL's exemptions" as follows:

> "a) Records pertaining to the ages of students matriculated at the School of Medicine to the extent they exist, are education records protected under the Federal Education Rights and Privacy Acts. Similarly, documents pertaining to specific students accepted into the program are protected education records. For applicable FOIL exemption, see Public Officers Law Section 87(2)(a).
>
> "b) Non-official intra-agency materials which do not fall into the four FOIL exemptions to the exemption. POL Section 87(2)(g)."

In this regard, I offer the following comments.

First, I do not understand the phrase "non-official intra-agency materials" that appears in the response to your earlier request. The Freedom of Information Law pertains to all agency records, irrespective of their characterization. Section 86(4) of that statute defines the term "record" to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, information existing "in any physical form whatsoever" would constitute a "record", whether denominated as official or otherwise.

Second, as you inferred in your letter to Ms. Gray, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request. Section 89(3) states in part that nothing in the statute "shall be construed to require any entity to prepare any record not possessed or maintained by such entity...." Therefore, if the information sought does not exist in the form of a record or records, SUNY would not be required to create a new record on your behalf to satisfy your request.

I note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

In a somewhat related vein, a potentially significant issue involves whether or the extent to which your request "reasonably describes" the records sought as required by §89(3). 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 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 SUNY's recordkeeping systems, to the extent that the records sought exist and 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 information contained within records is 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 the data falling within the scope of the request, to that extent, the request would not in my opinion meet the standard reasonably describing the records.

Third, with respect to rights of access, when records exist and a request meets the requirement that it reasonably describes the records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more of the grounds for denial that follow. The phrase quoted in the preceding sentence is based on a recognition that a single record might include both available and deniable information. It also imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld and to disclose the remainder.

Relevant to the matter is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In the context of your inquiry, insofar as disclosure of the records in question would identify a student, I believe that they must be withheld. A statute that exempts records from disclosure is the Family Education Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as "FERPA." In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;

(b) The name of the student's parents or other family member;
(c) The address of the student or student's family;
(d) A personal identifier, such as the student's social security number or student number;
(e) A list of personal characteristics that would make the student's identity easily traceable; or
(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon direction provided by FERPA and the regulations that define "personally identifiable information", references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

Next, there is no question but that any existing statistics regarding the age of accepted students would constitute "intra-agency material" that falls within §87(2)(g). However, that provision, due to its structure, may require disclosure, and that would be so in this instance, again, if the data exists and can be found. In short, subparagraph (i) of §87(2)(g) specifies that those portions of inter-agency or intra-agency materials consisting of "statistical or factual tabulations or data" must be disclosed, unless a separate ground for denial can be asserted.

Lastly, in conjunction with all of the foregoing is the possibility that some data pertaining the age of accepted students exists, perhaps with respect to some of the time period of your interest, while in other instances no data may exist or be retrievable with reasonable effort. In 1981, less information was likely maintained or stored in electronic form than today, and often agencies have the ability to retrieve relatively recent data maintained electronically. The ability to do so prior to the use of electronic information systems simply may not exist.

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 an agency must follow the more reasonable and less costly and labor intensive course of action.

Perhaps most significant 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. 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. If, for example, the data of your interest is maintained as a field within a database, and if that field can be extracted with reasonable effort, I believe that SUNY would be required to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Karol Gray
Stacey Hengsterman

STATE OF NEW YORK
DEPARTMENT OF STATE
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September 2, 2003

Ms. Naomi Lindt
The Village Voice
36 Cooper Square
New York, NY 10003

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Lindt:

I have received your letter and the correspondence attached to it. You have sought an opinion concerning your efforts on behalf of *The Village Voice* to obtain certain records from the New York City Department of Citywide Administrative Services (DCAS).

By way of background, requests were made in June for the "salaries, title and agency start date" relating to certain named individuals believed to be City employees, similar materials pertaining to employees of the Office of the Comptroller, and a list of all persons employed by the Comptroller, including their salaries. Another request was made in July for "complete personnel histories (including all salary changes, title changes, and dates)" of certain named employees of the Comptroller's office.

In response to the first request, you were informed that:

> "...no individuals with names identical or similar to the ones you listed are currently employed by this agency. However, determining whether individuals with identical or similar names are employed by other City agencies would require significant research efforts by agency staff. We are not obliged to undertake investigatory projects of this kind solely to respond to a FOIL request. Your request is therefore denied."

With respect to the requests involving employees of the Office of the Comptroller, you were told that:

> "Requests for salary and/or employment information should be directed to an individual's agency of employment and not the Department of Citywide Administrative Services. In this instance, your query should be directed to Marilyn Bodner, Records Access Officer, Office of the Comptroller..."

In this regard, I offer the following comments.

First, from my perspective, the information sought is clearly accessible under the Freedom of Information Law. 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. Records containing the information of your interest has for years been accessible.

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. Although §87(2)(b) authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", insofar as records include the information sought, they have been found to be available [see e.g., Miller v. Village of Freeport, 379 NYS2d 517, 51 AD2d 765 (1976)]. Further, judicial decisions indicate that records indicating the beginning and end of one's public employment must be disclosed [see respectively Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980 and Gannett Co. v. County of Monroe, 59 AD2d 309 (1977), aff'd 45 NY2d 954 (1978)].

Second, the Freedom of Information Law includes all agency records within its coverage, for §86(4) defines the term "record" to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form

> whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, insofar as DCAS maintains the records of your interest, I believe that it required to give effect to the Freedom of Information Law and respond in a manner consistent with that statute. I note that it has been determined that if more than one agency maintains the same records, each would have the same responsibility to give effect to the Freedom of Information Law and disclose records in its possession [Muniz v. Roth, 620 NYS2d 700 (1994)]. Therefore, even though the Office of the Comptroller may be the original source of records, the language of the law and its judicial interpretation indicate that DCAS must respond to a request for the same records in its possession and disclose those records to the extent required by law.

Lastly, in consideration of the response to the first request in which it was stated that "significant research efforts" would have be undertaken by staff to determine the existence of and perhaps disclosure of certain items, the issue in my view involves whether or the extent to which the request "reasonably described" the records as required by §89(3). I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of DCAS, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the

requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

As indicated in Konigsberg, only if it can be established that DCAS 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth M. Leibowitz

STATE OF NEW YORK
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September 2, 2003

Ms. Bonnie L. Barkley
[redacted]

Dear Ms. Barkley:

I have received your letter of August 29 which you characterized as an appeal concerning your requests for records of the Penn Yan Central School District.

In this regard, the Committee on Open Government does not have the authority to determine appeals. The provision dealing with the right to appeal, §89(4)(a), states that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

Nevertheless, I will treat your correspondence as a request for an advisory opinion and will respond accordingly as soon as possible, likely within a month to six weeks.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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September 2, 2003

Mr. Freddy Arroyo
98-A-1426
Woodbourne Correctional Facility
99 Prison Road
Woodbourne, NY 12788-1000

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Arroyo:

I have received your request for an advisory opinion and attached material related to your Freedom of Information Law appeal to the New York City Department of Correction.

The response to your request for "a copy and/or list of all outgoing calls"made by you to specific phone numbers between February 17-24, 1998 indicated that "it will take several weeks to conclude this investigation for records." The letter from the Department also indicated that "if, after a diligent search, we determine that such a record does not exist, or it cannot be located despite diligent efforts, or that the request is not proper under F.O.I.L., we will inform you in writing."

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 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."

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-14225

Committee Members

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 2, 2003

Ms. J. Lynne Sebeck
[redacted]

The staff of the Committee on 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. Sebeck:

I have received your letter in which you requested an advisory opinion regarding your ability to inspect and obtain copies of "public criminal records" from county clerks' offices and the fees that may be charged for the records.

You wrote that you "have been making attempts to obtain access to public records that are housed at the county clerk's office in each county throughout the State of New York. "[You are] specifically attempting to gain access to County Clerk's files within the boroughs. [You] have placed many phone calls to the County Clerk's office of each one of the boroughs only to be told that these public records are NOT available for inspection or viewing at the County Clerk's office and that if [you] wanted to view these public records or obtain a copy of them (certified or not certified) [you] would have to go to the Office of Court Administration and pay $52.00 to do so."

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, and others, including those of your interest, which may be held as clerk of a court.

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 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 made reference to Judiciary Law §§255 and 255-b. Section 255 provides that:

> "...[A] clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

Judiciary Law §255-b states that "[a] docket book, kept by a clerk of a court, must be kept open, during the business hours fixed by law, for search and examination by any person." In my view, §255 requires a court clerk to search for records and provide copies at a rate "allowed to a county clerk for a similar service", and §255-b requires a court clerk to allow anyone to inspect a "docket-book."

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 "[t]he fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

Effective July 14, 2003, the state legislature increased the fees that county clerks may charge for copies of records. I have enclosed an excerpt from Chapter 62 of the laws of 2003, which details the maximum fees that county clerks may now charge for copies of records. Also enclosed is another section of the legislation, which authorizes the Office of Court Administration (OCA) to charge $52.00 for an individual statewide criminal history record search. The ability to obtain the results of an OCA statewide search, in my view, does not negate the responsibilities imposed upon county clerks, and I am unaware of any change in the law indicating that records previously available from county clerks are no longer available. In my opinion, notwithstanding the service being provided

by the OCA regarding criminal histories, county clerks are still required, upon request, to search files and provide copies upon payment of fees allowed by law.

Lastly, it is noted that while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14226

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 2, 2003

Mr. Reginald Persaud
95-A-1987
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. Persaud:

I have received your letter in which you explained difficulty in "obtaining a criminal history record from the New York City Police Department.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. Nevertheless, if, for example, criminal conviction records were used in conjunction with a criminal proceeding by a district attorney, it has been held that the district attorney must disclose those records [see Thompson v. Weinstein, 542 NYS 2d 33, 150 AD 2d 782 (1989)].

It is noted that in a decision rendered by the Appellate Division, Second Department, the Court reconfirmed its position that criminal history records are, in general, exempt from disclosure (Woods v. Kings County District Attorney's Office, 651 NYS 2d 595, 234 AD 2d 554 (1996). In Woods, the Court upheld a denial of a request for the rap sheets "of numerous individuals who were not witnesses at [the petitioner's] trial." However, it distinguished its determination from the holding in Thompson, supra, in which it was found that a rap sheet must be disclosed when the request is "limited to the criminal convictions and any pending criminal actions against an individual called by the People as a witness in the petitioner's criminal trial." Therefore, insofar as your request

involves records analogous to those found to be available in Thompson, I believe that the police department would be required to disclose.

Finally, it is also noted that while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14227

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 2, 2003

Mr. Angel Alicea
89-B-2526
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. Alicea:

I have received your letter in which you requested assistance in obtaining a copy of a Freedom of Information Law application you submitted to the New York City Police Department approximately two years ago, and copies of two letters sent to you in relation to your request. You wrote that the Department "stated that documents [you] requested [are] duplicative of [your] previous 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.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the records sought are accessible under the law because none of the grounds for withholding are applicable.

Nothing in the Freedom of Information Law pertains specifically to repeated requests made by an applicant for records that have already been disclosed. However, 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 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-14228

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 2, 2003

Mr. Richard Bernard Lyon
82-C-0626
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. Lyon:

I have received your letter in which you requested assistance in obtaining immunity agreements given to two individuals who testified against you at trial. You wrote that the Chemung County District Attorney's office has not responded to your request for the records, which were provided to "defense counsel" at trial.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of 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 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)].

Based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the office of the district attorney.

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-14229

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 2, 2003

Mr. Scott Randazzo
95-A-1656
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. Randazzo:

I have received your letter in which you requested assistance in obtaining several "directives" and a videotape from your facility. You wrote that you were told that "a videotape was not created" for the date and time of your interest.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, with respect to the directives, I direct your attention to §87(2)(g) of the Freedom of Information Law which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

A directive would in my view be available on the ground that it constitutes agency policy, unless a different ground for denial applies. Further, it is my understanding that directives classified for "A" distribution are generally available under the Freedom of Information Law. Those characterized as "D" involve security at a facility and, therefore, might justifiably be denied under §87(2)(f). That provision permits an agency to withhold records when disclosure could "endanger the life or safety of any person."

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14230

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 3, 2003

Mr. Gabriel Midalgo
97-A-7235
Upstate Correctional Facility
309 Bare Hill Road
Malone, NY 12953

Dear Mr. Midalgo:

I have received your letter in which you sought guidance concerning the "proper court in which [you] could commence a Vaughn motion....to require detailed indexing, justification and itemization" of records withheld.

In this regard, there is nothing in the New York 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 the foregoing serves to clarify your understanding of the New York Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1423

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 3, 2003

Mr. Michael A. Kless
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kless:

I have received your letter in which you sought clarification concerning the principle that the Freedom of Information Law pertains to existing records.

In short, even when it is clear that a record will exist, but it does not exist yet, the Freedom of Information Law would not apply. To use your example, if a budget is "being worked on" and is not yet in its final form, a request for the budget now involves a request for a record that does not yet exist. Further, it has been consistently advised that an agency is not required to honor a request that is prospective in nature. Although an agency could choose to send a copy of a budget requested in advance of its completion, it would not be required to do so. Again, in that instance, a document characterized as a budget would not exist, and, therefore, there would be no such record to be disclosed.

I hope that this serves to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14232

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 3, 2003

Mr. Robert C. Black
Attorney and Counselor at Law
P.O. Box 3142
Albany, NY 12203-0142

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Black:

I have received your letter in which you referred to your representation of an unemployment compensation claimant and "what should have been a routine request for a small number of easily recoverable records." In response to the request, you received a "standard form postcard" indicating that a response would "require approximately sixty days." It is your view that the response is inconsistent with the Freedom of Information Law.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 and that there is a backlog, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when

an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

The advice rendered by this office was certified in Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), in which 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, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, or if the approximate date given is unreasonable, 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 there are limitations on rights of access to records concerning unemployment insurance claims. Relevant may be 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." One such statute is §537 of the Labor Law, which is entitled "Disclosures prohibited", and which states in subdivision (1) that:

> "[I]nformation acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provisions of law. Such information insofar as it is material to the making and determination of a claim for benefits shall be available to the parties affected and, in the commissioner's discretion, may be made available to the parties affected in connection with effecting placement."

To the extent that the records sought fall within the scope of §537, they would be confidential, unless they are "material to the making and determination of a claim for benefits" or the Commissioner of Labor asserts his discretionary authority to disclose records for the purpose of effecting placement in a job.

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-14233

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 4, 2003

Mr. Hans Carlson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Carlson:

I have received your letter in which you raised a question concerning rights of access to a certain record.

Your letter and the materials attached to it indicate that you requested a copy of an application for an agricultural assessment from the Town of Gallatin relating to a particular parcel. Although portions of that record were disclosed, "confidential financial information" was deleted. Your question involves the propriety of the deletion.

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 introductory language of §87(2) refers to an agency's ability to withhold records "or portions or thereof" in accordance with the grounds for denial of access that follow. The phrase quoted in the preceding sentence reflects a recognition on the part of the Legislature that a single record or report may include both accessible and deniable information. It also imposes a responsibility on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

In this instance, two of the grounds for denial may be pertinent in determining rights of access.

If the property is owned by an individual and is a "family farm" or its equivalent, relevant is §87(2)(b),which authorizes an agency to withhold records or portions of records the disclosure of which would result in an "unwarranted invasion of personal privacy". While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view enable government to prevent disclosures concerning the personal or intimate details of individuals' lives.

From my perspective, a disclosure that permits the public to determine the general income level of an individual would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means at a certain level. Moreover, the New York State Tax Law contains provisions that require the confidentiality of records submitted to the Department of Taxation and Finance reflective of the particulars of a person's income or payment of taxes (see eg, §697, Tax Law). Although those provisions are not directly relevant in this instance, it would appear that the Legislature felt that disclosure of records concerning income and related information would constitute an improper or "unwarranted" invasion of personal privacy. Insofar as the application contains personal financial information, I believe that those portions of such records could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

The other ground for denial of possible significance is §87(2)(d), which enables an agency to withhold records or portions of 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".

In my opinion, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise.

In my view, the proper assertion of §87(2)(d) is dependent upon a variety of factors, such as the specific content of the records, the area of commerce in which business entities are involved, the degree of competition within that area of commerce and, most importantly, the effect of disclosure, i.e., the extent to which disclosure would "cause substantial injury" to an entity's competitive position. I would conjecture that current income and expense statements submitted in conjunction with the assessment of real property could often be withheld in great measure, if not in their entirety, under §87(2)(d).

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: Assessor, Town of Gallatin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14234

41 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 4, 2003

Mr. David Cole
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cole:

I have received your letter concerning a request made to the Village of Horseheads under the Freedom of Information Law and for the return of property.

Since you asked what this agency "is going to do about" your complaint and contentions, I note that the primary function of the Committee on Open Government involves providing advice and opinions pertaining to matters involving the Freedom of Information, Open Meetings and Personal Privacy Protection Laws. The Committee is not empowered to enforce those statutes, and it has no authority to compel an agency to grant or deny access to records. In an effort to offer guidance, however, I offer the following comments.

First, it appears that a response to a request was incomplete, for one of the items sought was not made available. In that kind of situation, it has been suggested that an applicant contact the person who responded to indicate that an item was missing; often the absence of a complete response may be the result of an inadvertent oversight. In the alternative, you could consider your request to have been partially denied, in which case you have the right to appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought..."

Second, the Freedom of Information Law pertains to records; it does not include other items within its scope. It has been determined, for example, that evidentiary materials, such as clothing, tools and other property did not constitute records and that, therefore, the Freedom of Information Law was inapplicable [Allen v. Strojnowski, 129 AD2d 700; motion for leave to appeal denied, 70 NY2d 871 (1989)].

I hope that the foregoing serves to clarify your understanding of the functions of this office and the scope of the Freedom of Information Law, and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Patricia Gross

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14235

41 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 4, 2003

Ms. Nancy S. De Luisi
[redacted]

The staff of the Committee 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. De Luisi:

I have received your correspondence concerning a denial of a request made to the Nutrition Consortium of New York State for its financial records.

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law includes entities of state and local government within its coverage. It does not include private entities, even though those entities may receive government funds or have a contractual relationship with one or more government agencies. Having spoken with its Executive Director on your behalf, I do not believe that the Nutrition Consortium could be characterized as a government agency or, therefore, that it is required to honor or give effect to a request made pursuant to the Freedom of Information Law for its records.

I note, however, that if the Nutrition Consortium has a relationship with an agency, the Freedom of Information Law may nonetheless be pertinent. As indicated earlier, that statute involves agency records, and §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 definition, if an agency maintains records about the Nutrition Consortium, those records would be subject to the Freedom of Information Law and may be requested from that agency. Additionally, insofar as the Nutrition Consortium maintains records for an agency, those records would be subject to rights of access as well. In that situation, a request would not be made directly to the Nutrition Consortium; again, that entity is not an agency required to comply with the Freedom of Information Law. Rather, a request would be made to the agency's "records access officer." Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating the agency's response to requests for records. Therefore, if, for example, the Nutrition Consortium maintains records for the State Department of Health, a request for those records would be made to the Department's records access officer.

Lastly, when requesting records under the Freedom of Information Law, §89(3) requires that an applicant "reasonably describe" the records sought. Consequently, a request should include sufficient detail to enable agency staff (or others) to locate and identify the records of interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Edie Mesick, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14236

41 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 4, 2003

Mr. Freddie Graves
86-B-0671
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. Graves:

I have received your letter in which you explained that you have not received a response to your Freedom of Information Law request and asked for assistance from 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.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 - 14237

41 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 4, 2003

Ms. Elizabeth Thomas
95-G-0576
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. Thomas:

I have received your letter in which you explained your difficulty in obtaining records from the Queens County Supreme Court.

In this regard, I offer the following comments.

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., 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 your request for your pre-sentence report, §390.50 of the Criminal Procedure Law, 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-14238

41 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 4, 2003

Mr. George L. Young
02-R-0767
Hale Creek ASACTC
P.O. Box 950
Johnstown, NY 12095

The staff of the Committee on Open 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 your difficulty in obtaining records from your "lawyer, the court, and the legal aid society", and requested "intervention" by 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, 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 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.

Second, 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, 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 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-14239

41 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 4, 2003

Mr. Frederick Patterson
Broome County Jail
Box 2047
Binghamton, NY 13902-2047

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Patterson:

I have received your letter in which you asked whether you could "request certain documents pertaining to [your] criminal case."

In this regard, I offer the following comments

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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, such as a police department or office of a district attorney. It would not apply to a private organization or a newspaper.

Third, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests, and requests for records should be directed to the records access officer at the agency which maintains the records of your interest.

Lastly, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the appropriate police department or office of the district attorney.

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-14240

41 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 4, 2003

Mr. Victor Gonzalez
01-R-0960
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 facts presented in your correspondence.

Dear Mr. Gonzalez:

I have received your letter in which you explained your difficulty in obtaining the search warrant related to your "criminal action." The New York County Supreme Court and the New York City Police Department indicated in separate responses to your requests that the record is not in their possession.

In this regard, I offer the following comments

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., 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, the right to appeal a denial or request a certification) would not ordinarily be applicable.

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-14241

41 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 4, 2003

Mr. Pedro Vega
77-B-1532
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Vega:

I have received your letter in which you explained that the representative of the Division of Parole at your facility has not responded to your Freedom of Information Law request. You asked for "intervention in this matter."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) each agency is required to designate one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests for records, and requests should generally be sent to that person. While I believe that the person in receipt of your request should have responded in a manner consistent with law or forwarded the request to the records access officer, it is suggested that you resubmit your request to the records access officer, Ms. Ann Crowell, Division of Parole, 97 Central Avenue, Albany, NY 12206.

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 - 14242

41 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 4, 2003

Mr. Anthony Cook
90-T-1693
Auburn Correctional Facility
135 State Street
Auburn, NY 13021

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cook:

I have received your letter in which you explained your difficulty in obtaining records from the Auburn Correctional Facility and asked this office to "direct the New York State Department of Correctional Services to grant [you] immediate access to all requested 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..."

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 a judicial decision cited and confirmed the advice rendered by this office, 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."

Lastly, with respect to your allegation that you have been "denied access solely because of [your] ethnicity, religion and socio-political affiliation", the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976); Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)].

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14243

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 5, 2003

Mr. Jerald Miller
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Miller:

I have received your letters and the attached materials in which you raised a variety of issues, most of which have been considered in previous correspondence addressed to you.

With respect to whether a request has reasonably described records of your interest, for you reference, I have enclosed a copy of a letter written to you on January 30, 2003. In relation to your question concerning a response received from a records appeals officer, enclosed is a letter written to you on July 12, 2002.

With regard to your question concerning the availability of a "training manual" for "disciplinary system hearing officers", 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 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.

Lastly, as requested, enclosed are the materials attached to your correspondence that you asked to be returned 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-14244

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September 5, 2003

Mr. Michael McKee
Tenants & Neighbors
105 Washington St., 2nd Floor
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 Mr. McKee:

I have received your letter in which you sought advice concerning the propriety of a denial of access by the Division of Housing and Community Renewal to certain records sought under the Freedom of Information Law.

You wrote that you requested two letters sent by a member of the Nassau County Rent Guidelines Board to the chairperson of the Board. It is your belief that the first included complaints concerning the manner in which a meeting had been conducted and a request to reconvene the meeting and "take a new vote"; the second contained suggestions concerning the conduct of future meetings.

From my perspective, although the response by the Division was incomplete, it is likely that the letters could validly have been withheld in great measure or perhaps in their entirety. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent under the circumstances is §87(2)(g), which pertains to communications between and among government agency officers and employees. That provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. In consideration of the nature of the communications to which you referred, they clearly constitute "intra-agency materials", and based on their contents as you described them, it appears that they may be withheld.

Notwithstanding the foregoing, the response to request failed to include a reason for the denial of access, which is required pursuant to the regulations promulgated by the Committee on Open Government [21 NYCRR §1401.2(b)(3)(ii)], which govern the procedural aspects of the implementation of the Freedom of Information Law and have the force of law. More importantly in my opinion, 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 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 am not suggesting that a judicial proceeding be initiated, but rather that you should have been informed of the right to appeal. Additionally, in an effort to enhance compliance with and understanding of applicable law, copies of this response will be forwarded to the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Theressa Allen
Sari Halper
David Diamond

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 5, 2003

Ms. Deborah L. Floss
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Floss:

I have received your letter and the materials attached to it. You indicated that you are "researching data" and requested from the Town of Amherst "all Violent Domestic Contacts received by the Amherst Police Department (and/or 911 from April 28 to April 30, 2002", and you asked that the Town include "all actual transcription of these calls for assistance, the radio dispatch, Police Incident Reports and D.I.R's". In response to the request, you were informed that:

> "The Town of Amherst, New York recently enacted its own Local Law implementing a Freedom of Information policy for the Town of Amherst. The Local Law prevents dissemination of information where to do so would constitute an unwarranted invasion of personal privacy. The dissemination of personal information regarding domestic violence complaints constitutes an unwarranted invasion of personal privacy. Therefore, your request is denied."

In this regard, I offer the following comments.

First, although I am unfamiliar with the specific language of the local law, I believe that it would be invalid insofar as it is inconsistent with 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.

From my perspective, an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that

an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my opinion guarantee or require confidentiality.

Moreover, it has been held by several courts, including the Court of Appeals, 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 the records sought must be disclosed; rather, I am suggesting that the records may 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, from my perspective, the extent to which the records must be disclosed is dependent on their content and the effects of disclosure.

Perhaps most significant is the provision to which the response by the Town alluded. Section 87(2)(b) authorizes an agency deny access insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In the context of your inquiry, it has been advised that the identities of those involved in a domestic dispute may be withheld, unless an arrest, a charge or some other significant police intervention occurs. When there is an arrest, the identity of the person charged would clearly be public. The provision pertaining to unwarranted invasions of personal privacy may also be applicable as a means of withholding the identities of witnesses or informants, for example.

Other grounds for denial may also be pertinent. Often most significant in relation to police activities 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."

The ability to deny access under the provision quoted above is based on the effects of disclosure and the possibility of harm or interference with a law enforcement function. Similarly, §87(2)(f) permits an agency to deny access insofar as disclosure "could endanger the life or safety of any person." I note, too, that §459-g requires that the street address of any residential program for victims of domestic violence that has applied for funding from the Office Children and Family Services be kept confidential.

Lastly, if an agency maintains statistical information reflective of the number of domestic incidents or similar data, I believe that those items contained within records must be disclosed, assuming that none of the other grounds for denial can be asserted. Under §87(2)(g)(i), internal documents consisting of "statistical or factual tabulations or data" must be disclosed, again, unless a separate provision authorizes a denial of access.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Susan Jaros
Capt. Enzio G. Villalta

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14246

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September 8, 2003

Hon. Stephen M. Saland
Member of the Senate
3 Neptune Road, Suite A19B
Poughkeepsie, NY 12601

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Senator Saland:

I have received your letter and the materials attached to it. The matter involves difficulties that a constituent has encountered in his efforts in gaining access to records under the Freedom of Information Law. You have sought "assistance in determining if the FOIL has been correctly applied..."

The initial issue involves the time in which agencies, in this instance, various municipalities, respond to requests for records. One town, according to your constituent, acknowledges the receipt of requests and indicates that, in his words, "that they will make a decision after the allowable time of 30 days." In this regard, as you are likely aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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)].

Further, the advice rendered by this office was confirmed in Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), in which 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, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, or if the estimated date is unreasonable, a request may, in my opinion, be considered to have been constructively denied [see

DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, and in a related vein, a village apparently will not accepts a request for records unless the request is made on its prescribed form. In this regard, although an agency may require that a request be made in writing pursuant to §89(3), there is no provision in the Freedom of Information Law that refers to the use of any particular form. Consequently, 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 discussed earlier. 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.

A standard form may, in my opinion, be utilized so long as it does not prolong the time limitations prescribed by law. 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 short, 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.

And third, a key issue involves the requirement imposed by §89(3) that an applicant must "reasonably describe" the records sought. I note that the original version of the Freedom of Information Law enacted in 1974 required that an applicant seek "identifiable" records. That

standard often resulted in an impossibility, for in many instances applicants could not name or identify records sought with specificity. In its consideration of the requirement that an applicant reasonably describe records, which became effective in 1978, the Court of Appeals has held that a request meets that standard when an 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.

In the context of requests made by your client, if, for example, a request is made via the identification of an address or parcel number, and if a municipality maintains records by address, locating records may be an easy task. In contrast, assuming that minutes of meetings are not indexed by subject matter but rather are kept chronologically, a request for minutes during which a particular parcel was discussed, particularly if the request does not include reference to a time period, might not reasonably describe the records. In that instance, it may be necessary to review the minutes of every meeting held over the course of years in order to locate those of interest. To avoid that kind of problem, it has been suggested that applicants attempt to become familiar with agencies' record keeping systems and that they seek records in a manner that enables agency to staff to locate the records with relative ease.

I hope that I have been of assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward E. Tunmer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14247

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September 8, 2003

Mr. John Clark
02-A-1071
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051-0975

Dear Mr. Clark:

I have received your letter of August 24, which reached this office today. You have requested records from the Committee on Open Government under the Freedom of Information and Privacy Acts, as well as the New York Freedom of Information Law. The records sought involve your arrest by the White Plains Police Department.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office does not maintain records generally, and it is not empowered to compel an agency to grant or deny access to records. In short, I cannot make the records of your interest available, because this office does not possess them.

When seeking records, a request should be made to the "records access officer" at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating an agency's responses to requests. In this instance, it is suggested that you transmit your request to the records access officer at the City of White Plains Police Department.

I hope that the foregoing serves to clarify your understanding of the use of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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September 10, 2003

Mr. Harvey M. Elentuck
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Elentuck:

I have received your letter in which you sought advice concerning a delay by the New York City Department of Education in responding to your requests for records. You also suggested that the failure on the part of Susan Holtzman to respond by granting or denying access might constitute the unlawful prevention of public access to records pursuant to §89(8) of the Freedom of Information Law and its companion, §240.65 of the Penal Law. The latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

In this regard, first, as suggested in previous correspondence, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 a judicial decision that cited and confirmed the advice rendered by this office, 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, in my view, §89(8) of the Freedom of Information Law and §240.65 of the Penal Law may apply in one of two situations: where a public officer or employee in receipt of a request conceals the existence of a record by responding that no such record exists or is maintained by an agency when he or she has knowledge to the contrary; or when a public officer or employee destroys a record to prevent a person who requested that record from obtaining it. In my view, despite the delay that you have encountered, neither §89(8) of the Freedom of Information Law nor §240.65 of the Penal Law is applicable or pertinent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan W. Holtzman
Chad A. Vignola

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3668
FOIL-AO-14249

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September 10, 2003

Mr. Jeffrey Silman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Silman:

I have received your letter and the materials attached to it. You have raised a variety of issues relating to proceedings conducted by the Town of Altamont Board of Assessment Review. In consideration of your remarks, I offer the following comments.

First, although a courtroom located on the ground floor of the Town Hall was available for use, the Board, according to your letter, chose to conduct its proceedings "on the second floor of the building accessible only by 2 flights of stairs..."

While the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend meetings of public bodies and to observe the performance of public officials who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. Pertinent to the issue is §103(b) of the Open Meetings Law which states that:

> "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty or the public buildings law."

The same direction appears in §74-a of the Public Officers Law regarding public hearings. Based upon those provisions, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law imposes a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a room that is accessible to handicapped persons, I believe that the meetings should be held in the room that is most likely to accommodate the needs of those people.

Second, 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 the Board reached its conclusion; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes. I note, too, that 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 short, 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. The minutes that you enclosed do indicate how the Board members voted.

Lastly, I point out that §525(2)(a) of the Real Property Tax Law entitled "Hearing and determination of complaints" states in part that:

> "The assessor shall have the right to be heard on any complaint and upon his request his or her remarks with respect to any complaint shall be recorded in the minutes of the board. Such remarks may be made only in open and public session of the board of assessment review."

Based on the foregoing, insofar as the assessor was present for the purpose of offering information or a point of view, I believe that the public, pursuant to the Real Property Tax Law, had the right to be present.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Dean Lefebure
Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 10, 2003

Ms. Asia Thomas
LI ACORN
91 N. Franklin, Rm. 209
Hempstead, NY 11550

The staff of the Committee on 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. Thomas:

I have received your communication and the materials attached to it.

You referred to a request made in May pursuant to the Freedom of Information Law for records indicating the qualifications, or absence thereof, of teachers in the Hempstead School District. As of the date of your letter to this office, you had received no response to the request.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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)].

In a judicial decision that cited and confirmed the advice rendered by this office, 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, I believe that the items that you requested are accessible under the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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. That being so, it is my view that records indicating the certification or certification status of teachers are available under the Freedom of Information Law, for disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

Similarly, it has been found that items indicating a public employee's general educational background must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS2d 411, 218 AD2d 494 (1996)]. This is not to suggest that a teacher's grades, for example, must be disclosed, but rather that portions of records indicating the institutions attended, major courses of study and degrees conferred must be disclosed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Dr. Nathaniel Clay

STATE OF NEW YORK
DEPARTMENT OF STATE
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September 10, 2003

Hon. Martha Librock
Town Clerk
Town of Aurora
5 South Grove Street
Aurora, NY 14052

The staff of the Committee on 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. Librock:

I have received your memorandum and the editorial attached to it. The editorial includes an "open government pledge", and you asked whether acceptance of a certain sentence within the pledge precludes you from asking that a request made under the Freedom of Information Law be in writing. That sentence states that:

> "I will support prompt, easy public access to public records and I will oppose unnecessary delays in provide public records and I will oppose a requirement for an official Freedom of Information request for records; except where there is a question of legal privacy matters."

In this regard, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a *written request* for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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, it is clear in my opinion that an agency may require that a request be made in writing.

Nevertheless, I believe that every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible.*" Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure.

That being so, the regulations promulgated by the Committee on Open Government, which have the force of law, provide in part that an agency may accept oral requests [see 21 NYCRR §1401.5 (a)]. In my view, agencies should be consistent in treatment of requests. If a request for certain records is required to be made in writing by one person, others, in my opinion, should be required to do the same. However, when a request is routine and requires no search, an agency can waive the requirement of submitting a written request. For instance, if a clerk's minute book is kept close at hand, and a person asks to inspect the minutes, there may be no reason for making or requiring a written request. On the other hand, if a request involves numerous records, a substantial search, or the need to review records to determine the extent to which they must be disclosed, it is clear that a written request may be required.

I note that it has been advised that an agency cannot require that a request be made on a prescribed form. To reiterate, 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. Neither the Law nor the regulations refers to, requires or authorizes the use of standard forms. Accordingly, it has long 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 a person mails a request 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 receives and responds to the request, it is probable that more than five business days would have elapsed. 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.

Lastly, the pledge refers the absence of a need for "an official Freedom of Information request...except where there is a question of legal privacy matters." While the protection of privacy is a valid concern, there are numerous other instances in which records or portions of records 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.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 10, 2003

Mr. John Kwasnicki
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kwasnicki:

I have received your letter and the materials attached to it. They relate to your request for a deposition apparently given or prepared by a consultant retained by the Village of Sloatsburg. As I understand the matter, the request was denied on the ground that the record in question relates to litigation, and because it is not in the possession of Village officials.

Although the facts concerning the foregoing are not entirely clear, I offer the following comments.

First, when records are prepared or held for an agency, such as a village, I believe that they fall within the coverage of the Freedom of Information Law, even when they are not in the physical possession or custody of village officials. The Freedom of Information Law pertains to all agency 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."

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 a consultant or attorney are "kept, held, filed, produced or reproduced...*for* an agency", I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law.

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, i.e., a village clerk. 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 a consultant maintains records for the Village, to comply with the Freedom of Information Law and the implementing regulations, the records access officer must either direct the consultant to disclose the records in a manner consistent with law, or acquire the records in order that he or she can review the records for the purpose of determining rights of access.

Second, as stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules (CPLR). Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

Third, as general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective,§3101(c) and (d) of the CPLR authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation. However, those kinds of records remain confidential in my opinion only so long as they are not disclosed to an adversary or a filed with a court, for example. I do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983).

> The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

The thrust of case law concerning material prepared for litigation is consistent with the preceding analysis, in that §3101(d) may properly be asserted as a means of shielding such material from an adversary.

In my view, insofar as the record in question has been communicated between the Village and its adversary or has been filed with a court, any claim of privilege or its equivalent would be effectively waived. Once records in the nature of attorney work product or material prepared for litigation are transmitted to an adversary, i.e., from the Village to its adversary and *vice versa*, I believe that the capacity to claim exemptions from disclosure under §3101(c) or (d) of the CPLR or, therefore, §87(2)(a) of the Freedom of Information Law, ends.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Trustees
Thomas F. Bollatto, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14253

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September 10, 2003

Ms. Dawn Nettles
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Nettles:

As you are aware, I have received your inquiry of August 15. You asked whether requests made under the Freedom of Information Law must be faxed or mailed, and whether an agency can refuse to accept requests made by e-mail.

In this regard, although §89(3) of the Freedom of Information Law states that an agency may require that a request be made in writing, it does not specify the means by which a request must be made. From my perspective, the use of e-mail has become commonplace, widely used and accepted. That being so, and because an e-mail request is made in writing, I believe that it serves as a valid and proper request for purposes of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Beaudoin, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14254

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September 10, 2003

Mr. Carl G. Whitbeck
Rapport, Meyers, Whitbeck,
Shaw & Rodenhausen, LLP
436 Union Street
Hudson, NY 12534-2427

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Whitbeck:

I have received your letter in which you questioned the ability of a municipality to deny access to a legal opinion prepared by a town attorney when the issue considered is unrelated to either ongoing or threatened litigation.

From my perspective, the pendency of litigation is not determinative of the ability to deny access. There are numerous instances in which attorneys render legal advice that is confidential, based on the attorney-client privilege, even though there is neither actual nor potential litigation. In this regard, I offer the following comments.

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. Two of the grounds for denial are pertinent to an analysis of rights of access.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of

the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101(c) of the Civil Practice Law and Rules. In my view, there need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that records consist of legal advice or opinion provided by counsel to the client, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

The other ground for denial of potential significance, §87(2)(g), permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that

are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the record in question consists of an expression of opinion. If that is so, it could be withheld under §87(2)(g).

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Edgar M. Masters
Nelson R. Alford, Jr., Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 10, 2003

Ms. Martha Mendoza
Associated Press
675 N. First Street #1170
San Jose, California 95112

The staff of the Committee 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. Mendoza:

I have received your letter in which you sought an opinion in order to ascertain "whether there is a legal basis in New York State for the denial of [your] request to the New York City Police Department for information concerning certain of the Department's domestic surveillance activities."

You wrote that a request made on March 31 was not answered but was later supplemented with a second request made on June 11 that "was designed to more specifically and narrowly identify the information [you were] seeking." The request involved:

> "A.) The aggregate number of organizations - political, social, religious or educational/student - that have been the subject of surveillance of other information-gathering of any kind during the period January 1, 2000 and May 31, 2003. (Street gangs and organized crime surveillance are not included in this request)."
>
> "B.) The identities of the political, social, religious or educational/student organizations referenced in (A.) above.
>
> "C.) The aggregate number of surveillance or information-gathering operations involving the organizations described in (A.) above between January 1, 2000 and May 31, 2003, identified by year of operation.

"D.) The aggregate number of requests made to libraries and bookstores within your jurisdiction for records of specific patron usage or patron purchases made by your department or made at the request of any other department (local, state or federal) during the period of September 1, 2001 and May 31, 2003 under provisions of any local or state law or the US Patriot Act of 2001 or Homeland Security Act of 2002 as it may pertain to local law enforcement.

"E.) The aggregate number of requests made to Internet Service Providers or other purveyors of online communications for e-mail records or server logs of individuals or organizations (either by name or IP address during the period September 1, 2001 and May 31, 2003.

"F.) Copies of all department orders or other instructions or guidelines distributed to members of your department containing or concerning the conduct of surveillance or the circumstances under which requests in (D.) and (E.) above can be made, and whom must approve such requests.

"G.) Copies of any regulations or operational orders distributed to members of your department that have been specifically promulgated under the provisions of the US Patriot Act of 2001 or the Homeland Security Act of 2002."

The Department denied the request in the entirety on the basis of §87(2)(e)(i) of the Freedom of Information Law. That provision authorizes an agency to deny access to records "compiled for law enforcement purposes" insofar as disclosure would "interfere with law enforcement investigations or judicial proceedings."

In this regard, I offer the following comments.

First, as we discussed during our telephone conversation, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency, such as the Department, is not required to create a record in response to a request. Therefore, if no "aggregate" figures exist with respect to the time period to which you referred, the Department would not be required to prepare new records to satisfy your request. I believe that it was suggested when we spoke that your request might be amended to seek aggregate figures or equivalent data regarding any time periods within the date to which you referred.

Second, to the extent that records fall within the scope of your request exist, even if some aspects of those records could justifiably be withheld, based on the language of the law and its judicial construction, I believe that a "blanket" denial of access would be inappropriate.

As you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or

"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 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.).

Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

As you inferred in your letter, disclosure of the names of organizations that have been the subjects of surveillance (item B of your request) could likely be withheld. Disclosure in my view, would likely interfere with an investigation. However, figures indicating "aggregate numbers" sought in items A, C, D and E of your request must, in my view, be disclosed. In short, aggregate figures, without additional information regarding the scope, currency or specific nature of a law enforcement activity, could not, in my opinion, justifiably be withheld under §87(2)(e)(i) or any other exception to rights of access.

Any such aggregate data would constitute "intra-agency material" that falls within §87(2)(g). However, subparagraph (i) of that provision requires the disclosure of "statistical or factual tabulations or data", unless separate exceptions may be asserted.

I believe that the focus of the analysis relative to items F and G of your request differs from the preceding considerations. Most pertinent with respect to orders, instructions, guidelines or regulation is subparagraph (iv.) of §87(2)(e). That provision pertains to the authority to withhold records compiled for law enforcement purposes which, if disclosed, would reveal non-routine criminal investigative techniques and procedures.

The Court in Gould referred to the leading decision concerning that exception, Fink v. Lefkowitz [47 NY2d 567 (1979)]. That decision involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702;

> Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques or procedures which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. Again, however, even if there may be portions of the records sought which if disclosed would result in those deleterious effects, the remainder of the records must, in my view, be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Leo Callaghan
Lt. Michael Pascucci
David Schulz

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September 10, 2003

E-Mail

TO: Jonathon Schilpp [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. Schilpp:

I have received your letter in which you raised a series of questions in relation to compliance with the Open Meetings Law by the Board of Trustees of Suffolk County Community College.

In this regard, first, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

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. 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.

Section 105(1) specifies and limits the subjects that may be considered during an executive session. That being so, a public body, such as the Board, may not conduct an executive session to discuss the subject of its choice.

You referred to several instances in which executive sessions were held to discuss "personnel matters." Although it is used frequently, I note that 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.

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 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 the circumstance that you described, the issue would not have focused on any "particular person", nor would it have involved the subjects relating to a particular person delineated in §105 (1)(f). 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 a "personnel matter" 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 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)].

With respect to minutes of executive sessions, §106 of the Open Meetings Law pertains to minutes and provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

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.

I point out 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 a related area, 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 Trustees, 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.

Next, when a committee consists solely of members of a public body, such as a community college board of trustees, 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 board of trustees, 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)].

Lastly, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Education Law, §1709), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

As you requested, copies of this opinion will be forwarded to those that you identified.

I hope that I have been of assistance.

RJF:jm

cc: Brian X. Foley
Michael V. Hollander
Salvatore J. LaLima

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September 15, 2003

Mr. Joseph E. DiCenzo
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DiCenzo:

As you are aware, I have received your letter and the materials attached to it. As I understand the matter, in early July, you submitted a request to the Lackawanna City School District for copies of "the current memorandums of agreement" with the District's administrators and teachers. However, it appears that your request was denied, that you appealed, and that you had received no further response from the District.

In this regard, I offer the following comments.

It is noted at the outset that there is nothing in the Freedom of Information Law that refers directly to personnel records. 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 an administrator, 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.

I point out, too, that a school district's proposed budget, also known as its "estimated expenditures", must include details regarding the compensation paid to a superintendent and certain administrators. Subdivision (5) of §1716 of the Education Law states in relevant part that:

> "The board of education shall append to the statement of estimated expenditures a detailed statement of the total compensation to be paid to the superintendent of schools, and any assistant or associate superintendents of schools in the ensuing school year, including a delineation of the salary, annualized cost of benefits and any in-kind or other form of remuneration. The board shall also append a list of all other school administrators and supervisors, if any, whose annual salary will be eighty-five thousand dollars or more in the ensuing school year, with the title of their positions and annual salary identified..."

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice 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: Nancy Parker
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14258

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 16, 2003

Mr. Nancy S. De Luisi
[redacted]

Dear Mr. De Luisi:

Ms. Mesick of the Nutrition Consortium has sent a copy of your letter of September 8 to me. In short, it appears that you consider the opinion sent to you on September 4 as support for your contention that the Nutrition Consortium is required to comply with the Freedom of Information Law. You added that "It is federally funded and therefore open to Freedom of Information."

If that is your belief, you have misinterpreted my remarks. On page 1 of the opinion addressed to you, I wrote that "I do not believe that the Nutrition Consortium could be characterized as a government agency or, therefore, that it is required to honor or give effect to a request made pursuant to the Freedom of Information Law for its records." That an entity receives government funding from a local, a state or a federal agency does not bring the entity within the coverage of either the state or federal freedom of information statutes.

To reiterate, if a government agency, such as a state agency or a county agency, maintains records about the Nutrition Consortium, those records can be requested from the state or county agency. Similarly, even if the Nutrition Consortium maintains records for a state or county agency, the Nutrition Consortium itself would not be subject to the Freedom of Information Law. Rather, in that circumstance, a request should be directed to the records access officer at the state or county agency for those records. In that situation, the state or county agency would be obliged, in my opinion, either to acquire the records sought from the Nutrition Consortium, or to direct the Nutrition Consortium to disclose state or county agency records maintained by the Nutrition Consortium to the extent required by law.

I hope that the foregoing serves to clarify your understanding of the scope of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Edie Mesick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14259

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September 17, 2003

Mr. Charles Hearon
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hearon:

I have received your letter in which you questioned a denial by the Board of Commissioners of the Hicksville Fire District of your request for the "sign in sheets for the voters at the annual election for the years 2000-2002." Although the District Secretary suggested that a "full list" could be obtained from the County Board of Elections, he wrote that the list of those "who actually voted....could expose....persons to commercial mailing list, telephone soliciting, etc." and concluded that the request would be denied "based on concerns for use of the list for commercial purposes."

In my view, the reasons offered in the denial of your request are without merit.

I note initially that the voter list maintained by a county board of elections is based on "actual voting" by citizens; if a person fails to vote within a certain number of years, his or her name is removed from the list.

Second, 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 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].

Nevertheless, §89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

As such, if records are available as a right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access [see e.g., Szikszay v. Buelow, 436 NYS 2d 558, 583 (1981)]. Relevant in this instance is §5-602 of the Election Law, entitled "Lists of registered voters; publication of", which states that voter registration lists are public. Specifically, subdivision (1) of that statute provides in part that a "board of elections shall cause to be published a complete list of names and residence addresses of the registered voters for each election district over which the board has jurisdiction"; subdivision (2) states that "The board of elections shall cause a list to be published for each election district over which it has jurisdiction"; subdivision (3) requires that at least fifty copies of such lists shall be prepared, that at least five copies be kept "for public inspection at each main office or branch of the board", and that "other copies shall be sold at a charge not exceeding the cost of publication." As such, §5-602 of the Election Law directs that lists of registered voters be prepared, made available for inspection, and that copies shall be sold. There is no language in that statute that imposes restrictions upon access in conjunction with the purpose for which a list is sought or its intended use.

Since §5-602 of the Election Law confers unrestricted public rights of access to voter registration lists, in my opinion, nothing in the Freedom of Information Law could be cited to restrict those rights. Further, as a general matter, I believe that a statute pertaining to a specific subject prevails over a statute pertaining to a general subject. A statute in the Election Law that pertains to particular records would in my view supersede a statute pertaining to records generally, such as the Freedom of Information Law.

The provisions of the Election Law cited above pertain to voter registration lists prepared and maintained by county boards of elections. However, the information at issue would be available to any person, irrespective of the intended use, from the County Board of Elections. That being so, and in consideration of the direction provided in the Election Law, I do not believe that there is any basis for withholding the list of those who voted in the Fire District, regardless of the intended use of the list.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: John Knight

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14260

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 18, 2003

Hon. Frances C. Nugent
Town Clerk
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 information presented in your correspondence.

Dear Ms. Nugent:

I have received your letter concerning a request made under the Freedom of Information Law to the Town of Rye. The request involved the names and amounts paid by persons or entities that rented Town recreational facilities during the past year. The request was denied by the Town Attorney on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Although an appeal was filed with your office, since "the Town does not have an appointed Appeals Officer, the denial appeal was presented to the Supervisor and the Town Board...."

In this regard, I offer the following comments.

First, I do not believe that the denial of the request was consistent with law or justifiable. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Although §87(2)(b) authorizes an agency to withhold records to the extent that disclosure would constitute an unwarranted invasion of personal privacy, in my view, there is simply nothing personal or intimate about the use of a Town facility or a record reflective of what, in essence, is an agreement between the Town and a person and entity concerning the use of a Town facility. From my perspective, a disclosure that merely indicates the names of renters and the amounts paid would not reveal the nature of an event, its purpose or any other item that could be characterized as intimate or "offensive to a reasonable person of ordinary sensibilities." Moreover, the information sought is equivalent in substance to that 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 short, when a person or entity uses a Town facility and pays for its use, there is nothing secret about the identity of that person or entity or the amount that is paid.

Second, as you are aware, when an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

The governing body in this instance is the Town Board, and I believe that the Board must designate either itself of a person to determine appeals made under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Monroe Yale Mann

FOIL-AO-14261

From: Robert Freeman
To: hammond@shuntington.k12.ny.us
Date: 9/22/2003 4:40:11 PM
Subject: Dear Ms. Hammond:

Dear Ms. Hammond:

I have received your inquiry concerning a request for the personnel file pertaining to a former school district employee.

In this regard, rights of access are dependent on the contents of the records. In general, insofar as items pertaining to public employees are relevant to the performance of their duties, they are accessible, for disclosure in those instances would result in a permissible invasion of personal privacy. Conversely, when items are irrelevant to the performance of one's duties (i.e., social security number, home address, names of dependents or beneficiaries, etc.) they may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." If an employee is the subject of a complaint or allegation that did not result in an admission or finding of misconduct, it has been advised that the records relating to the matter may be withheld. However, if there is an admission or determination to the effect that an employee has engaged in misconduct, it has been held that a determination of that nature must be disclosed.

The preceding comments are, again, general. To obtain additional information, I would need to know more about the contents of the records, and you can phone me any time to discuss them (I will, however, be out of the office on Tuesday). Also, you can go to our website and click on to advisory opinions rendered under the Freedom of Information Law. Then click on to "p", for example, to find opinions regarding "personnel records" or "payroll information", or "D" for disciplinary action or proceeding". The opinions prepared within the past 10 years are available in full text.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14262

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September 24, 2003

Mr. Timothy Paige
00-B-2829
Oneida Correctional Facility
P.O. Box 44580
Rome, NY 13442-4580

Dear Mr. Paige:

I have received your letter in which you appealed a denial of your request for certain records by the Rochester Correctional Facility.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to public access to government information, primarily under the state's Freedom of Information Law. The Committee is not empowered to determine appeals or to compel an agency to grant or deny access to records.

The provision dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated to determine appeals at the Department of Correctional Services is Anthony J. Annucci, Counsel to the Department.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-14263

From: Robert Freeman
To: [redacted]
Date: 9/24/2003 10:40:56 AM
Subject: As I understand the issue, it involves a delay in disclosure. It appears to involve a request for a

As I understand the issue, it involves a delay in disclosure. It appears to involve a request for a single record made on September 10, and a response by the assessor indicating that a copy would be available on or after November 15.

In my view, a delay in disclosure of so long a time would be unreasonable and inconsistent with the Freedom of Information Law and its judicial interpretation. If a request involves a great volume of records, a substantial search or the need to review the contents, a delay might be reasonable. However, if a request involves a small number of records that are easy to find, as seems to be so in this instance, there is no valid basis for delaying disclosure. As indicated in the statement of intent appearing at the beginning of the law, agencies are required to make records available "wherever and whenever feasible."

I would conjecture that you, as town clerk, are the records access officer. In that role, it is your duty to coordinate the Town's response to requests. That being so, I believe that you would have the authority to direct the assessor to disclose in a manner consistent with law or to acquire the record (you are the legal custodian of all town records) so that you may do so.

When a request is denied, the person denied access may appeal to the governing body (the Town Board in this instance) or a person designated by the Town Board. The Board should have adopted rules and procedures long ago that include the designation of itself as appeals body or a person to carry out that function.

If you have additional questions, please feel free to contact me. I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14264

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 24, 2003

Ms. Julie Broyles
[redacted]

The staff of the Committee on 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. Broyles:

I have received your letter and the materials attached to it. You have sought an advisory opinion concerning the treatment and partial denial of your requests for records made to the Town of Hamburg. The records involve 911 calls made by you and your neighbors with whom you share a duplex residence and related materials prepared following those calls. The Town denied access to some of the records on the basis of §308(4) of the County Law.

A careful review of Article 6 of the County Law, which includes §308, indicates that §308 does not serve as a basis for a denial of access in this circumstance. That being so, I believe that the provisions of the Freedom of Information Law govern and must be used to determine rights of access, and conversely, the ability of the Town to deny access to the records sought.

Subdivision (4) of §308 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."

Although the term "municipality" most often would include a town, city or village, that is not so in this instance. Section 301 of the County Law contains a series of definitions for application in Article 6, and subdivision (1) defines "municipality" to mean "any county except a county wholly contained within a city and any city having a population of one million or more persons." That being so, §308(4) applies only to counties outside of New York City and does not apply to the Town.

Again, since §308 does not apply, the Freedom of Information Law governs rights of access. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. As I understand the facts, two of the grounds for denial are potentially relevant.

Section 87(2)(b) states that an agency may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Clearly you could not invade your own privacy. However, it is possible that disclosure of a tape recording or transcript of a 911 call made by a person other than yourself, or perhaps related records, might result in an unwarranted invasion of that person's privacy. To that extent, records may properly be withheld.

The other exception of significance pertains to communications between an employee of the agency in receipt of an emergency call and another public employee, i.e., a town police officer or a state trooper, both of whom would be "agency" employees. 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 my experience, the communications at issue typically consist of factual information (i.e., fire at 210 Main St.), or perhaps an instruction to staff that affects the public, both of which would be available unless a different exception applies, such as §87(2)(b) concerning unwarranted invasions of personal privacy. On occasion, the communications may also include opinions or recommendations ("I think that a person may be hurt"), which an agency may withhold.

Lastly, although some aspects of your request were denied, it does not appear that the Town informed you of the right to appeal the denial. Section 89(4)(a) confers a right to appeal upon a person denied access 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 therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

It is noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In short, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

I note, too, that if an appeal is not determined within ten business days as required by §89(4)(a), it has been held that the person denied access may consider the appeal to have been denied and may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Cathy Rybczynski
Robert C. Mueller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14265

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 25, 2003

Mr. Michael A. Kless
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kless:

I have received your letter in which you raised issues relating to a request made under the Freedom of Information Law for records of the Erie County Clerk.

In this regard, first, the Freedom of Information is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts 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.

Second, as you are may be aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. An area in which the distinction between agency records and court records may be significant involves fees. Under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute". In the case of fees that may be assessed by county clerks, §§8018 through 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, the fees may exceed those permitted by the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. David J. Swarts

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14266

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 25, 2003

Hon. Ronald E. Wilson
Mayor
Village of Port Byron
52 Utica Street
Box 398
Port Byron, NY 13140

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mayor Wilson:

I have received your letter and the materials attached to it. You have sought assistance concerning unanswered requests made to the Cayuga County Water Authority under the Freedom of Information Law. The requests involve the water rate charged to certain entities and locations.

In this regard, I offer the following comments.

First, §1199-dddd of the Public Authorities Law states that the Cayuga County Water and Sewer Authority ("the Authority") is a public corporation and a "corporate governmental agency." Since the Freedom of Information Law is applicable to agencies, and since §86(3) of that statute defines the term "agency" to include public corporations, the Authority constitutes an "agency" required to comply with the Freedom of Information Law.

Second, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the information sought does not exist in the form of a record or records, the Freedom of Information Law would not apply.

Third, however, insofar as records are maintained by or for an agency, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I would conjecture that bills or similar records are generated and maintained that indicate the rate assessed relative to certain entities or locations. If that is so, I believe that records of that nature must be disclosed, for none of the grounds for denial of access would be pertinent or applicable.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the Authority.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Executive Director, Cayuga County Water and Sewer Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14267

41 State Street, Albany, New York 12231
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September 25, 2003

Mr. Frank Ioli
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ioli:

As you are aware, I have received a variety of correspondence from you concerning your efforts in obtaining information from the Village of Mayville. In consideration of your remarks, as well as those of the Village Attorney, I offer the following general comments.

First, the title of the Freedom of Information Law is somewhat misleading. That statute pertains to existing records, and §89(3) states in part that a government agency is not required to create or prepare a record in response to a request. Therefore, if, for example, you request a "list" that contains specified items, and the Village does not maintain a list containing those items, it is not required to create a new record that includes those items on your behalf.

Similarly, the Freedom of Information Law is not a vehicle that requires government officers or employees to speak with members of the public or answer their questions. While public officers and employees may choose to do so, they are not required to do so by the Freedom of Information Law or any other statute of which I am aware. In short, if Village officials do not want to speak with you or answer your questions, I do not believe that they are acting in contravention of any provision of law.

Second, the Village attorney wrote that he considers you and the Village to be "in a de facto litigious situation." Even if that is so, it would have no effect upon your rights under the Freedom of Information Law. In M. Farbman & Sons v. New York City Health and Hosps. Corp. [62 NY2d 75 (1984)], the state's highest court determined that a person involved in litigation against an agency who seeks records under the Freedom of Information Law from that agency has the same rights under that statute as any other member of the public. That a person is a litigant neither enhances nor diminishes his or her rights when seeking records under the Freedom of Information Law. That being so, I do not believe that the Village can preclude you from seeking records under the Freedom of Information Law.

Notwithstanding the foregoing, in situations in which requests for particular records have been made and an agency has responded either by granting or denying access in accordance with statutory requirements, it has been advised that an agency is not required to respond to requests for the same records repeatedly. In short, if records are requested and denied, and if an appeal is made and also denied, the person seeking the records may consider the matter concluded or may within four months of the determination of an appeal seek judicial review of the denial of access. In that circumstance, the person denied access may initiate a proceeding pursuant to Article 78 of the Civil Practice Law and Rules in the Supreme Court of the county in which the municipality is located.

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
Michael J. Bolender

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 30, 2003

Ms. Ann Fanizzi
Putnam County Coalition to Preserve
Open Space
2505 Morgan Drive
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. Fanizzi:

As you are aware, I have received your letter in which you sought clarification and guidance concerning a request made under the Freedom of Information Law to the Town of Southeast.

According to your letter, having submitted a request to "inspect" a file, the Town Clerk denied the request on the ground that it "lacked specificity." You indicated that you could not specify the documents of your interest without first inspecting the file.

From my perspective, "specificity" is not and should not serve as the basis for accepting or rejecting your request.

In this regard, I offer the following comments.

First, the Freedom of Information Law does not require that an applicant seek or describe a specific document. When that statute was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the Town's recordkeeping systems, assuming that the records sought can be located with reasonable effort, I believe that your request would have met the requirement that you "reasonably describe" the records, irrespective of the volume. On the other hand, if the records requested could not be located or retrieved except by reviewing hundreds or thousands of records, one by one, the request would not in my opinion reasonably describe the records, even if the request is "specific."

In an effort to resolve the matter, a copy of this response will be sent to the Town Clerks.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Ruth Mazzei

STATE OF NEW YORK
DEPARTMENT OF STATE
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September 30, 2003

Mr. Francis D. Monterosso
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Monterosso:

I have received your letter and the correspondence attached to it. You referred to a request for records made to the Capital Regional BOCES. Because you received no response, you asked that this office "intervene" on your behalf.

In this regard, it is noted at the outset that the authority of the Committee on Open Government is advisory. While the Committee cannot "intervene" in the legal sense, our hope is that opinions rendered by this office are educational and persuasive and that they serve to enhance compliance with and understanding of the Freedom of Information Law.

With respect to the issue raised, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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)].

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, policies, contracts, memoranda of agreement and similar records must be disclosed, for none of the grounds fro denial would apply. With regard to records pertaining to a particular public employee, I believe that rights of access would be dependent on the contents of the records. Insofar as they are intimate or unrelated to the performance of one's duties, they may likely be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. However, insofar as they are factual and pertinent to the performance of one's duties, there may be no basis for denial of access, for disclosure in that circumstance would often result in a permissible rather than an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: District Superintendent
Robert Boneker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14270

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 30, 2003

Ms. Patricia Rosen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Ms. Rosen:

I have received your letter and related materials, including a copy of a determination of your appeal rendered by Raymond J. Fashano, Superintendent of the Jamestown Public Schools.

By way of background, early in July, you asked to inspect:

> "Any and all documents including attorney fees, expenses and itemization of work performed by the law firm Hodgson-Russ for the Jamestown Public School District from January 1, 2003 to present in regards to Danniel Lynn Rosen."

Although significant aspects of the records were disclosed, "all the itemization portions of billing statements of legal services submitted by the firm of Hodgson and Russ to the...District were redacted." Following your appeal, the Superintendent agreed that some of the material initially withheld, those portions describing the "general nature of services rendered", should be disclosed. Nevertheless, upon review of the records made available, names and other details reflective of the nature of services rendered were deleted. You sent copies of redacted records, and some were redacted to the extent that nothing was disclosed other than the fact that a telephone call was made on a certain date and lasted for a certain duration.

From my perspective, some of the redactions appear to have been improperly made. 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)].

Most pertinent in my view is the first ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared 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 the context of your request and the deletions made by the District, I believe that names of students, private citizens and witnesses, for example, could be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Similarly, insofar as the records include information in the nature of a description of legal advice, legal strategy or similar information reflective of communications falling within the scope of the attorney-client privilege, I believe that deletions would have been proper. However, I do not believe that the name of a current or former officer or employee of the District in relation to a discussion involving the performance of that person's duties could be withheld in every instance. For example, if the reference to a service rendered on 2/21/03, "Conferred with _____ regarding _____ for preparation for hearing and preliminary review of legal issues..." involved conferring with the Superintendent, a teacher or other school official did not include an actual description of the legal issues, there would appear to be no basis for the deletion of a name. In many instances, it appears that names of District staff, or even perhaps the name of your child, were deleted. Again,

it does not appear that those deletions may be justified or proper in every instance. One entry referred to services rendered on 2/27/03 merely states: "Telephone discussion _____ regarding _____ discussed _____." That kind of disclosure in my view does not indicate the general nature of services rendered, let alone the identification of a person with whom discussion was had.

In an effort to encourage the District to reconsider the propriety of the deletions from the materials made available to you, a copy of this response will be sent to the Superintendent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Raymond J. Fashano

STATE OF NEW YORK
DEPARTMENT OF STATE
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September 30, 2003

Ms. Bonnie L. Barkley
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Barkley:

As you are aware, I have received your correspondence concerning your request to the Penn Yan Central School District under the Freedom of Information Law.

In your appeal, you wrote as follows:

> "I am requesting copies of **ALL COSTS associated with my current, past, and pending litigation with the Penn Yan Central School District.** This means every penny that this district has spent on legal fees related to Bonnie L. Barkley. I have requested this information and I have not gotten true, correct and accurate costs in this request. I have been offered copies of phone calls and copying costs. I want to know the **TOTAL COST** for this school district to pursue all matters where Bonnie L. Barkley is concerned. This means Court Fees, Lawyers travel time, etc, etc. I would also request a copy of **ALL BILLS that have been submitted by Attorney Frank Miller"** (emphasis yours).

You specified in your letter to me that you "would like to know the lawyer fees, court costs, court reporters, transcripts, travel time to and from hearings, phone calls, and any other charges that this school district may have paid due to these claims that [you] filed against this school district."

In the response to your appeal, it was determined that "all of the information you requested has been made available to you for your inspection." You added that the District does not have an appeals officer, but rather, in your words, "conveniently created a committee."

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) states in part that an agency is not required to create or prepare a record in response to a request. Therefore, if, for example, there is no record indicating travel time to and from hearings, the District would not be obliged to create a new record containing that information.

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, however, it is also emphasized that the Freedom of Information Law is applicable to all records maintained by or for an agency, such as a school district. 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, records kept in District offices, as well as those kept for the District by an attorney or consultant, for example, would fall within the coverage of the Freedom of Information Law.

Third, an issue of possible significance relates to the means by which the District files or maintains its records. Section 89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be specifically designated, that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that

> 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. I am unaware of the means by which the District maintains the records. Insofar as the District can locate and identify records falling within your request, I believe that the request would have reasonably described the records. On the other hand, if the District keeps or files bills in chronological order, receives thousands of bills annually, and if those falling within your request can be found only by reviewing each bill, one by one, the request likely would not meet the standard of reasonably describing the records.

Next, when records can be located 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.

In my opinion, bills, vouchers, contracts, receipts and similar records reflective of payments made or expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable in most instances.

With specific respect to payments to attorneys, I point out that, while the communications between an attorney and client are often privileged, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. If, however, portions of time sheets, bills or related records contain information that is confidential under the attorney-client privilege, those portions could in my view be withheld under §87(2)(a) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute" (see Civil Practice Law and Rules, section 4503). Therefore, while some identifying details or descriptions of services rendered found in the records sought might justifiably be withheld, numbers indicating the amounts expended and other details to be discussed further are in my view accessible under the Freedom of Information Law [see also Orange County Publications, Inc. v. County of Orange, 637 NYS2d 596 (1995)].

Lastly, with respect to the designation of an appeals officer, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity

> with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation is the Board of Education. Since that is so, the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

As indicated in previous correspondence, when a request is denied, it may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Gene Spanneut
Kathleen M. Dean

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14272

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 30, 2003

E-Mail

TO: Jill Knapp [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. Knapp:

As you are aware, I have received your letter. You referred to a request for "a document from Cornell Cooperative Extension about an association review that was conduct [sic] by Extension Administration in March of this year in Orange County." In response to the request, you wrote that:

> "Applebee's stated 'the report is advisory and recommendatory to the Association and is not a final agency determination or instruction. The advice and recommendations contained in the report would be considered pre-decisional 'inter-agency or intra-agency materials' under FOIL and specifically exempted from disclosure requirements. This information may also be exempt as an 'unwarranted invasion of personal privacy' or pursuant to other provisions of FOIL'."

It is your belief that you were fired from your job due the recommendation.

In connection with the foregoing, you raised the following questions:

> "1) Is Applebee correct in his statement that this report, which was intended to address management concerns of the association, is exempt from FOIL?
>
> 2) If there is a concern about the 'unwarranted invasion of personal privacy' how is that balanced with allowing those named to respond to unfounded allegations by unnamed individuals?
>
> 3) Would the Executive Director's performance review be subject to FOIL?"

In this regard, it is emphasized that the use and meaning of certain terms is unclear. For instance, I do not know that meaning of "association" when you referred to an "association review."

Similarly, I am unaware of whether the review was conducted by "Extension Administration" of the Orange County Cooperative Extension or of Cornell University. Depending on the meaning of those terms, the answers, and, therefore, rights of access, may differ.

First, if the association is the Cooperative Extension of Orange County and the review was conducted by the administration of that entity, I believe that the document would constitute "intra-agency material." Based on §224(8) of the County Law, a county cooperative extension is clearly an agency subject to the Freedom of Information Law, for that provision refers to such as entity as a "subordinate governmental agency."

In that circumstance, the provision that pertains to such communications, §87(2)(g) of the Freedom of Information Law, authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

If the Extension Administration is part of Cornell University, the question is whether the function of the Extension Administration is unique to the statutory colleges or is performed university-wide. If its function is unique to the College of Agriculture and Life Sciences, one of the statutory colleges, that entity would constitute an agency, and the review would fall within §87(2)(g) in the same manner as in first scenario.

On the other hand, if the function is not unique to a statutory college but rather reflects a university-wide practice or procedure, the review in my opinion would not constitute inter-agency or intra-agency materials, for Cornell in that instance would not constitute an agency. If that is so, §87(2)(g) would not serve as a basis for denial of access.

Second, the phrase "unwarranted invasion of personal privacy" represents one of the grounds for denial of access [see Freedom of Information Law, §87(2)(b)]. In connection with your second question, the Freedom of Information Law deals with rights of access to records; it does not deal with or provide a "right to respond to unfounded allegations." In the context of your inquiry, insofar as agency records pertain to you, I do not believe that you could invade you own privacy. However, insofar as the records at issue identify others, names or other identifying details might properly be withheld on the ground that disclosure would result in an unwarranted invasion of the privacy of those persons.

Lastly, with respect to rights of access to the "performance review" of an agency employee, I point out that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may

differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

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].

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.

I hope that I have been of assistance.

RJF:jm

cc: Glenn J. Applebee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14273

41 State Street, Albany, New York 12231
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September 30, 2003

Mr. Vincent Terio
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Terio:

I have received your letter, which, as in the past, pertains to access to certain Putnam County records.

While your comments are not entirely clear, if the records in question are maintained on paper or microfilm, I believe that you have a right to inspect and copy those records. If paper records have been discarded and the records at issue exist only on microfilm, those records must, in my view, be equally available as if they existed in paper format.

As indicated previously, if an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I 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: Tony Hay
Paul Eldridge

FOIL-AO-14274

From: Robert Freeman
To: [redacted]
Date: 10/1/2003 3:16:23 PM
Subject: Dear Chief Fragomeni:

Dear Chief Fragomeni:

I have received your inquiry concerning a landlord who has begun eviction proceedings against a tenant and has requested police reports that include information relating to the tenants' sixteen year old son. You wrote that the son has no involvement in the incidents reported and is mentioned as a child living in the residence and that he became upset during an argument between the adults.

In this regard, the Freedom of Information Law provides equal rights of access, as well as an equal ability to deny access, when records are sought, irrespective of the status or interest of the person seeking the records. Stated differently, even though the landlord may have initiated eviction proceedings, his status as a litigant has no effect on his rights as a member of the public when seeking records under the Freedom of Information Law.

Further, in my view, particularly in the circumstance that you described, the records sought may be withheld pursuant to §87(2)(b), which authorizes an agency to deny access when disclosure would result in "an unwarranted invasion of personal privacy."

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
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STATE OF NEW YORK
DEPARTMENT OF STATE
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October 2, 2003

Mr. W. Crenshaw
98-B-0745
Five Points Correctional Facility
P.O. Box 119
Romulus, NY 14541

Dear Mr. Crenshaw:

I have received our letter in which you appealed a denial of access to certain records that you requested from the Department of Correctional Services.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning access to government records, primarily in relation to the state's Freedom of Information Law. The Committee is not empowered to determine appeals and cannot compel an agency to grant or deny access to records.

The provision dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated to determine appeals at the Department of Correctional Services is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-14276

From: Robert Freeman
To: richfield-clerk@stny.rr.com
Date: 10/3/2003 3:41:30 PM
Subject: Dear Ms. Harris:

Dear Ms. Harris:

I have received your inquiry. In brief, the Freedom of Information Law applies to all agency records, including those that include "details" regarding public works projects or the performance of duties by public employees. Further, in my opinion, any person, including a member of a town board, has a right to gain access to those records or portions of records indicating the amount of wages paid to public employees as well as time sheets or similar records that indicate the times and dates during which public employees worked. If a time sheet includes a social security number, for example, that item could be deleted to protect privacy prior to the disclosure of the remainder of the record.

If you need additional information, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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Albany, NY 12231
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FOIL-AO-14277

From: Robert Freeman
To: [redacted]
Date: 10/3/2003 4:28:49 PM
Subject: Dear Ms. Williams:

Dear Ms. Williams:

I have received your letter in which you sought guidance in obtaining information concerning the trials of two persons who apparently were convicted for the murder of your great grandmother, as well as newpaper articles pertaining to the matter.

In this regard, the statute with which this office deals, the New York Freedom of Information Law, pertains to agency records. An "agency", in brief, is a unit of state or local government. A court is not an agency, but most court records are available to the public. Assuming that either or both of the persons named were convicted, the best source of material in my opinion would be court records. I would doubt that those records are accessible online, but they may be requested from the clerk of the court in which the proceedings occurred pursuant to §255 of the Judiciary Law. I note that when charges are dismissed in favor of an accused, the records pertaining to the matter are sealed. Again, however, if there was a conviction, and especially if there was a trial, a court would likely maintain detailed and voluminous records relating to the proceeding.

With respect to newspaper articles, newspapers are not governmental entities and are not subject to the Freedom of Information Law. Nevertheless, many maintain libraries and may be able to conduct a search for articles based on a name or names. It is suggested that you might contact or locate online the newspapers in the vicinity of Mechanicville. Likely sources of articles would be the Albany Times-Union and the Schenectady Daily Gazette. The website address for the former is <www.timesunion.com>.

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
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(518) 474-2518 - Phone
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Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-14278

From: Robert Freeman
To: MULLEN, VICTORIA
Date: 10/7/2003 8:08:46 AM
Subject: Re:

Good morning - -

I hope that you are well and enjoying the fall.

With respect to your questions, if it continues to exist, the survey would be subject to the FOIL. As you may recall, FOIL pertains to all agency records and 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, such as a town. The results or responses would, in my view be accessible, unless those who responded identified themselves. In that instance, it is likely that names, addresses or other identifying details could be deleted before disclosing the remainder.

Since the survey was performed in 1998, it is possible that it was discarded in accordance with the retention schedule, and you might want to check that. In a situation in which a request is made and the agency cannot locate the record, the applicant should be so informed. He or she may ask for a certification, which would be like an affidavit, in which a town official, likely you or the clerk, essentially swear in writing that the record could not be found after making a "diligent search". The certification requirement appears in §89(3) of FOIL.

If you have further questions, 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

>>> "MULLEN, VICTORIA" <VMULLEN@oswego.org> 10/6/03 8:28:07 AM >>>
Hello there Robert!....I NEED YOU
....Robert, I received a FOIL request the other day and the person foiling asked for a survey and a mailing list that prompted the changes to our land use map. This survey was done in 98 under the former supervisor, I remember it but I do not have the information that this FOIL is requesting...my first question, is this survey public information...YES my gut says yes because it was paid for by tax payer dollars.
My second would be, what if I can not located the information,...I just send out an answer saying I am not able to locate the information....

What will happen to me if I can not find it.....jeepers will I be hung....how can I be held responsible for every document even generated...woe is me...

Hey I was down at the WAR room at the capital at the gov's reception on the 23rd and I was thinking, I wonder if you were in that building somewhere, and I should have looked to see if you were there and then I could have picked your brain in person!>.....<SMILE>

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14279

41 State Street, Albany, New York 12231
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October 8, 2003

Mr. Pal Lleshi
03-A-0548
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

Dear Mr. Lleshi:

I have received your letter in which you appealed to this office following what appears to have been a denial of access to records by the Rockland County Jail.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision pertaining to the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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-14280

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 8, 2003

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 information 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 Mount Vernon Police Department and the Westchester County District Attorney's Office. You wrote that requests for records related to your trial have either been "ignored" or denied because you have no money to pay the fees.

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, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the appropriate police department of office of the district attorney.

Third, it is noted that in a decision in which an inmate claimed indigency, it was held that nothing in the Freedom of Information requires a waiver or reduction of fees that may otherwise be charged [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Lastly, you asked whether a Freedom of Information Law request may be made again if it previously had been denied. From my perspective, a request may be renewed, if there are new records falling within the scope of the request or if circumstances have changed. As you may be aware, many of the grounds for withholding records appearing in §87(2) of the Freedom of

Information Law are based on potentially harmful effects of disclosure, and in some instances, those harmful effects will diminish or disappear due to changes in circumstances or the passage of time.

On the other hand, if a second request made that "constitute[s] nothing more than an effort to obtain reconsideration of the prior request without any change in circumstances" [Corbin v. Ward, 554 NYS2d 240, 241, 160 AD2d 596 (1990)], I do not believe that an agency would be required to reconsider the request. As a general matter, when a request is denied, the applicant, pursuant to §89(4)(a) of the Freedom of Information Law, has the right to appeal. If the appeal is denied, the applicant may seek judicial review of the denial by initiating a proceeding under Article 78 of the CPLR.

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-14281

41 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, 2003

Mr. Donald G. Hobel
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hobel:

I have received your letter in which you referred to "a questionable refusal of the Niagara County IDA as 'Auditors have archived the files and NCIDA would have to pay a fee to research those files.'" If I understand your inference correctly, you question whether a fee to research the files must be borne by a member of the public who requests the records 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 pertains to all records of an agency, such as an industrial development agency. 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."

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 [Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University, 87 NY2d 410 (1995)]. In this instance, assuming that the records at issue are maintained for the IDA, I believe that they would clearly fall within the scope of the Freedom of Information Law.

Second, with respect to fees, in my opinion, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for inspecting or 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.

Although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Lastly, you asked why "Sec 110 of the law is not prominently featured" in the Committee's publication, "Your Right to Know." That publication is intended to serve as a general guide to the Freedom of Information and Open Meetings Laws; it is not intended to include detailed information. Further, §110 is part of the Open Meetings Law; it has no application in the situation to which you referred.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Niagara County Industrial Development Agency

FOIL-AO-14282

From: Robert Freeman
To: [redacted]
Date: 10/15/2003 8:11:32 AM
Subject: Dear Ms. Heyward:

Dear Ms. Heyward:

I have received your inquiry, and if I understand your question correctly, I would like to offer the following comments.

First, there is no particular form that must be used when seeking records under the Freedom of Information Law (FOIL). Although an agency may require that a request be made in writing, any written request that "reasonably describes" the records sought should suffice.

Second, each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and requests should generally be made to that person. At the local government level, the clerk is most often designated as records access officer.

Third, following the receipt of the request, agency personnel have five business to respond by granting access, denying access in writing and informing the applicant of the right to appeal to the head or governing body of the agency, or by indicating that more than five business days will be needed. In that last situation, the agency is required to acknowledge the receipt of the request in writing and provide an approximate date indicating when it believes that the request will be granted or denied. The approximate date must be reasonable in consideration of the volume of the request, the need to search, the need to review records to determine what is available and what is not, etc.

To obtain additional detail, it is suggested that you go to our website, which is identified below, and click on to advisory opinions rendered under the Freedom of Information Law. From there, you might click on to "R" and scroll down to "records access officer" and "regulations", and perhaps "T" for "time limits". The opinions prepared within the last ten years are accessible in full text.

If after reviewing the opinions you have additional questions, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
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FOIL-AO-14283

From: Robert Freeman
To: [redacted]
Date: 10/15/2003 8:34:38 AM
Subject: Dear Mr. Little:

Dear Mr. Little:

I have received your inquiry and offer the following remarks.

First, the NYS Energy Research and Development Authority, like all public authorities, constitutes an "agency" that is required to comply with the Freedom of Information Law. While I am unfamiliar with the records to which you referred, I note that the Freedom of Information Law is based on a presumption of access. Stated differently, all agency records are accessible, except to the extent that records or portions thereof fall within one or more of the grounds for denial of access that appear in §87(2) of the Law.

Second, while an agency may require that an applicant request records in writing, there is no particular form that must be used to seek records. Any request that "reasonably describes" the records should suffice.

Third, each agency is required to designate on 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. To request the records of your interest, you might contact Mr. Tom Collins at (518) 465-6251, ext.250. If he requires a written request, you may write to: Tom Collins, Manager of Technical Communications, NYS Energy Research and Development Authority, Corporate Plaza West, 286 Washington Avenue Extension, Albany, NY 12203-6399.

To obtain additional information, it is suggested that you might connect with our website, which is identified below, and then click on to "Your Right to Know" under the heading of "publications." That document is a general guide to the Freedom of Information Law that includes a sample letter of request.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14284

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October 15, 2003

Mr. Archie Bristol
99-A-2496
Five Points Correctional Facility
P.O. Box 119
Romulus, NY 14541

Dear Mr. Bristol:

I have received your letter in which you appealed a denial of your request for certain mental health records.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. The provision pertaining to the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 15, 2003

MEMORANDUM

TO: John O'Donnell

FROM: Robert J. Freeman, Executive Director RJF

I have received your message and attempted to contact you without success on several occasions at the times that you suggested. In addition, I have spoken with both the Town Clerk and the Town Attorney concerning your request. As I understand the situation, the records of your interest involving the costs of litigation borne by the Town of Evans are maintained by the Town's accountant.

I am unaware of the means by which the records are filed. If all bills and similar records are filed chronologically and locating those of your interest would involve, in essence, the search for the needles in the haystack, I do not believe that the Town would be obliged to engage in an effort of that nature. In short, the request would not "reasonably describe" the records sought. On the other hand, if the records of your interest are maintained in a manner in which they can located or retrieved with reasonable effort, I believe that the Town must do so and disclose them to you in a manner consistent with the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

cc: Hon. Carol Meissner
Grant Zajas, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 16, 2003

Mr. Mark Lomax
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lomax:

I have received your letter and the materials attached to it. You indicated that you have attempted without success to obtain copies from the Kings County Public Administrator and asked whether I can "suggest anything short of a lawsuit that might elicit a response" from that office.

It is noted at the outset that your correspondence was addressed to the Office of the Public Administrator at 350 Adams Street in Brooklyn; the address according to the Official Directory of the City of New York is 360 Adams Street. For purposes of this response, it will be assumed that your correspondence nonetheless reached the Office of the Public Administrator.

With respect to the substance of the matter, as you may be aware, the Committee on Open Government is authorized to provide advice and opinions pertaining to the New York Freedom of Information Law. The Committee not empowered to compel an agency to comply with law or to grant or deny access to its records. However, it is our hope that the issuance of an advisory opinion serves to educate, persuade and negate the need to initiate litigation. In accordance with that goal, I offer the following comments.

In this regard, in considering the status of public administrators in the past, I have engaged in telephone conversations involving New York City, New York State and Surrogate's Court officials. Public Administrators are appointed by the Surrogate in their respective counties, and their salaries are paid by New York City (see Surrogate's Court Procedure Act, §§1102, 1108). Further, §1110(1) of the Surrogate's Court Procedure Act states that:

> "The City of New York shall be answerable for the faithful execution by the public administrator of all the duties of his office and for the application by him of all moneys and property received by him and

> for all moneys and securities and the interest, earnings and dividends actually received by him or which he should have collected or received."

Nevertheless, a representative of the New York City Office of Corporation Counsel expressed the opinion that the Office of Public Administrator is not a City agency, for the City government has no general authority to oversee the operations of the Public Administrator or compel the Public Administrator to carry out his or her duties. Similarly, it was advised that Corporation Counsel has no jurisdiction over the Public Administrator concerning the implementation of the Freedom of Information Law. Having discussed the matter with an attorney for the NYS Office of Court Administration, it was contended that the Office of Public Administrator is something of a hybrid, and that it is not an extension or an arm of that agency.

Based upon a review of the law and the discussions described earlier, in my opinion, the Office of Public Administrator is not clearly an agency of either New York City or New York State, but rather is *sui generis*, a unique entity unto itself. Moreover, I believe that it is an "agency" with an independent responsibility to give effect to the Freedom of Information Law.

The Freedom of Information Law applies 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."

Based on the foregoing, the courts are not subject to the Freedom of Information Law. By means of analogy, however, I point out that it has been held that the Office of Court Administration is an "agency" required to comply with the Freedom of Information Law. The initial decision on the subject, which cited an advisory opinion prepared by this office, included the following discussion of the matter:

> "The court must look to the intent of the legislature to determine whether the Office of Court Administration, in the exercise of a purely administrative and personnel function, is to be excluded from the applicable provisions of the Freedom of Information Law. Public Officers Law §84 states in part 'The people's right to know the process of governmental decisionmaking and to review the documents and statistics leading to determinations is basic to our

> society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.'
>
> "In view of the legislative purpose to promote open government, the court is inclined to construe narrowly any section that would tend to exclude offices of government from the law. Public Officers Law §86 specifically refer to courts when it defines 'Judiciary.' The legislature did not include the administrative arm of the court. The Office of Court Administration does not exercise a judicial function, conduct civil or criminal trials, or determine pre-trial motions. Respondent is not a 'court.'
>
> "It is significant to note that respondent refers to several sections of the Judiciary Law that regulate access to judicial records and allegedly perform a function similar to that of the Freedom of Information Law. None of the sections specified would address access to the information sought by petitioner pertaining to personnel and salaries exclusively.
>
> "Accordingly, the court rejects respondent's contention that it is in all respects exempt from the provisions of the Freedom of Information Law." [Babigian v. Evans, 427 NYS 2d 688, 689 (1980) aff'd 97 Ad 2d 992 (1983); Quirk v. Evans, 455 NYS 2d 918, 97 Ad 2d 992 (1983)].

Like the Office of Court Administration, which administers the court system and is an agency subject to the Freedom of Information Law, the Office of Public Administrator, as its title suggests, performs administrative functions relative to Surrogates' Courts in New York City.

Assuming that the Office of Public Administrator is an agency subject to the Freedom of Information Law, it would be required to carry out its duties in accordance with certain procedural rules and regulations. By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1) of the Law requires each agency to promulgate rules and regulations consistent with the Law and the Committee's regulations.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to

> records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Section 1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests.

In addition, §1401.7 of the Committee's regulations provide in part 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."

I point out, too, that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 the head of an agency subject to the Freedom of Information Law, the Public Administrator is in my opinion required to promulgate rules for the procedural implementation of that statute, which would include the designation of a records access officer, as well as an appeals officer. The appeals officer would be the Public Administrator or a person designated to determine appeals by the Public Administrator.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Public Administrator and her Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marietta Small, Public Administrator
Louis R. Rosenthal, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14287

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October 17, 2003

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 and the materials attached to it. You have sought advice concerning "accessibility with respect to each of the seven requested categories" of records that you sought from the New York City Department of Education.

The first category involves a "list of the names and schools or offices" of 624 teachers who received a "U-rating" during a given school year. In this regard, I note 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. If the Department does not maintain a "list" that includes the items to which you referred, I do not believe that it would be required to prepare such a list on your behalf. If a list has been prepared, I believe that it would be accessible under the Freedom of Information Law for reasons to be discussed in relation to consideration of the second and third categories of your request.

In the second, you sought "for each teacher who received a U-rating, a record revealing the reasons, facts, and conditions upon which the U-rating was based." In the third, you requested "the statistical and/or factual documentation that was submitted to the Office of Appeals and Reviews in support of the U-rating pertaining to "any 5 such teachers who received a U-rating."

Assuming that there are such 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, it is likely that portions of the records must be disclosed, while others might properly be withheld.

Relevant 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].

The other ground for denial of significance 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.

It appears that all of the records falling within categories three and four of your request would constitute "inter-agency or intra-agency materials". In consideration of that provision and §87(2)(b), I believe that statistical or factual information contained within those records would be available, except to the extent that disclosure would constitute an unwarranted invasion of personal privacy. Privacy considerations might arise in relation to intimate or personal details pertaining to the subjects of the ratings, and also with respect to others, i.e., staff members, students, parents, etc.

Assuming that a rating is final, whether it is excellent or unsatisfactory, I believe that the rating with the name of the teacher, must be disclosed for it would constitute a final agency determination available under §87(2)(g)(iii). 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.

The fourth category in your request involves a "professional performance review plan." If such a record exists, I believe that it would be accessible pursuant to subparagraph (ii) or (iii) of §87(2)(g).

The fifth and sixth categories respectively involve any request regarding the 624 teachers who received U-ratings by the New York *Post* and the records that were disclosed. In short, any such records would, in my view, be available, for none of the grounds for denial of access would apply. The same would be so in relation to the final category of the request, which pertains to a press release that might have been issued by the Department of Education.

Lastly, since you requested copies of records, I note that an agency may assess fees for copies pursuant to §87(1)(b)(iii) of the Freedom of Information Law and that it has been held that an agency may seek payment in advance of preparing copies (see e.g., Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982; Van Ness v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999).

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-14288

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October 17, 2003

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.

Dear Mr. Nolen:

I have received your letter in which you sought my opinion concerning whether an agency subject to the Freedom of Information Law, in your words, "MUST, on a regular basis, accept with the same force and effect, a faxed and/or email request as if such request was made either in-person and/or via the U.S. Mail (or other physical delivery service), and, notwithstanding the fact that an email does not contain any 'written signature' of the 'applicant' that an agency cannot, as a matter of law totally reject and/or otherwise ignore such a request made by fax and/or email"(emphasis yours).

In this regard, in an effort to offer proper and up to date guidance, research was conducted on your behalf, and I believe that my response must be based on a provision within the State Technology Law, which consists of a series of relatively recently enacted statutes. Specifically, §105(1) states in relevant part that:

> "In accordance with rules and regulations promulgated by the electronic facilitator, government entities are authorized and empowered, *but not required*, to produce, receive, accept, acquire, record, file, transmit, forward, and store information by use of electronic means" (emphasis added).

Based on the foregoing, an agency may choose to accept a request under the Freedom of Information Law made by means of email, but as indicated above, it is "not required" to do so. Similarly, §105(1) specifies that an agency would not be required to "transmit" records via email sought under the Freedom of Information Law.

For your information, the regulations promulgated by the electronic facilitator appear in 9NYCRR Part 540.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Glenn Valle, Counsel, Division of State Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14289

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 17, 2003

Mr. Michael A. Kless
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kless:

I have received your letter in which you referred to your request for a list of hydrants in the City of Buffalo.

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.

And 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.

One of the grounds for denial, §87(2)(f), authorizes an agency to withhold records insofar as disclosure "could endanger the life or safety of any person." In your letter to Michael Risman, the City's Corporation Counsel, you referred to one of the reasons that would, in my opinion, justify a denial of access to the list in which you are interested or equivalent records. Specifically, you referred to the arsonist who "could pick a building where the nearest fire hydrant did not work..." That being so, I believe that denial of access would be consistent with law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Risman

STATE OF NEW YORK
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October 20, 2003

Ms. Hope Kremer
Private Equity Intelligence
P.O. Box 103
Hunker, PA 15639

The staff of the Committee 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. Kremer:

I have received your letter and the materials attached to it. You referred to a request made under the Freedom of Information Law to the Office of the State Comptroller late last year. The receipt of the request was acknowledged on November 14, when your colleague was informed that he could expect a response granting or denying the request within three or four weeks. Although efforts have been made to ascertain the status of the request, it appears that there has been no additional response, and you have sought assistance in the matter.

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)].

Further, the advice rendered by this office was confirmed in Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), in which 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, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, or if the estimated date is

unreasonable, 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 consideration of the situation that you described, I believe that your request has been constructively denied and that, therefore, the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

It is noted, too, that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Shelly Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 20, 2003

Hon. Walt Johnson
Tioga County Legislature
56 Main Street
Oswego, NY 13827

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Legislator Johnson:

I have received your letter and appreciate your kind words.

You referred to a comment offered in Tioga County in which I indicated that a vote to select a chairman of the Legislature could not be carried out by secret ballot. You have requested an advisory opinion confirming that to be so.

In this regard, even before the enactment of the Open Meetings Law, the Freedom of Information Law contained what some have characterized as an "open vote" requirement. 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", which is defined to include a state or municipal board [see §86(3)], such as a county legislature, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

> "it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)]. I note, too, that in Wallace v. City University of New York (Supreme Court, New York County, NYLJ, July 7, 2000), it was found that a secret ballot vote to elect officers of a public body failed to comply with the Freedom of Information Law and the Open Meetings Law. If a vote to elect an officer does not result in a majority for any candidate, and the vote is not "final", I do not believe that the votes of each member must be recorded. Under §87(3)(a), the members' votes must be memorialized only in the case of a "final" vote.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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October 20, 2003

E-Mail

TO: Hon. Monica Harris, Clerk <richfield-clerk@stny.rr.com>

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Harris:

I have received your letter concerning a request for time cards by a member of the Town Board.

Following the receipt of an opinion rendered by the office advising that the records are generally accessible under the Freedom of Information Law, you indicated that the Supervisor agreed to make them available "but is holding them back for thirty days." You wrote that the volume of records is not overwhelming and asked whether thirty days is "reasonable for making this information available to the public."

From my perspective, based on the language and intent of the law, as well as judicial decisions, a delay of disclosure for as much as thirty days would be unreasonable.

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..."

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)].

In a judicial decision that cited and confirmed the advice rendered by this office, 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."

Based on the foregoing, if indeed the records can be readily found, a delay in disclosure of thirty days would, in my opinion, be inconsistent with law.

It is also noted that 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.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 21, 2003

Ms. Janice Stevenson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Stevenson:

I have received your letters and related materials pertaining to your requests for records of the Port Jervis School District. Although some of the records sought were determined to be accessible, you have been informed that time sheets and "absence verification summary sheets" identifiable to employees "represent a confidential part of personnel files." You enclosed samples of those records, which include dates of attendance, time in and out, hours worked or accumulated, and the amount and nature of leave claimed, i.e., sick, vacation or personal leave.

Based on a unanimous decision rendered by the state's highest court, the Court of Appeals, the records in question must be disclosed to comply with law. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", and the courts have provided substantial direction regarding the privacy of public employees. According to those decisions, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup.

Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

One of the decisions referenced above, Capital Newspapers v. Burns, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer, and in granting access, the Court of Appeals found that the public has both economic and safety reasons for knowing when public employees perform their duties and whether they carry out those duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of leave used or accrued must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties.

In affirming the Appellate Division decision in Capital Newspapers, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, it is clear in my view that the records at issue must be disclosed under the Freedom of Information Law.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education
Richard K. Roberts

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14294

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October 20, 2003

Ms. Jo-Ellen O'Gallagher
[redacted]

The staff of the Committee on Open 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'Gallagher:

I have received your letter of September 4, which reached this office on September 15. As I understand the matter, you are seeking assistance in obtaining a transcript or copy of a tape recording of a hearing conducted by the William Floyd Union Free School District concerning the conduct of your son. You indicated that you and your former spouse, as well as District officials, were present at the hearing.

If I understand the matter accurately, a record of the hearing, whether it consists of a stenographic transcript or a tape recording, or both, must be made available to you. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if, for example, no transcript exists, the District would not be required to prepare a transcript on your behalf to comply with the Freedom of Information Law.

Second and equally important, the Freedom of Information Law includes all agency records within its scope, and it is applicable to all agency records, such as those maintained by or for a school district. Specifically, 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, a transcript or tape recording would constitute a "record" that falls within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Further, §89(6) provides that when records are available under a different provision of law, nothing in the Freedom of Information Law can be asserted to withhold those records.

Third, significant under the circumstances is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "FERPA". In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal points of the Act involve access to records by parents of students under the age of eighteen (or the students when they reach that age), and the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Concurrently, if a parent of a student requests records pertaining to his or her child, the parent ordinarily will have rights of access to those portions of records that are personally identifiable to the child.

Since you were present at the hearing and since the records pertain to your son, I believe that the District is obliged pursuant to FERPA to make them available to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent
Ehrlich, Frazier and Feldman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14295

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October 21, 2003

Ms. Julie Kessler Sabur
[redacted]

The staff of the Committee 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. Sabur:

I have received your letter in which you referred to requests for records of the Northport-East Northport Union Free School District. Although some of the records that you requested have been found to be available to you, others have been withheld, and you asked what recourse you might have.

It is noted that Warren H. Richmond, the District's attorney, wrote to me in relation to your letter and indicated that "internal memos" transmitted between the Superintendent and the Board of Education would not "voluntarily" be produced. He also advised you that, since you are currently involved in litigation against the District in federal court, your attorney may seek production of those records in that forum.

In this regard, I offer the following comments.

First, with respect to your recourse, when a request for records is denied, the person denied access has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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."

If an appeal is denied, the person seeking the records may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. Section 89(4)(b) specifies that the agency that has denied access has the burden of proving that the records sought fall within one or more of the exceptions to rights of access appearing in §87(2) of the Freedom of Information Law.

Second, based on direction provided by the Court of Appeals, the state's highest court, the pendency of litigation has no effect on your rights as a member of the public when you seek records under the Freedom of Information Law. In a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency, it was held that "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, again, 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.

Next, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent with respect to rights of access to "internal memos" is §87(2)(g), which authorizes an agency withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

According to the Court of Appeals, §87(2)(g) is intended to enable an agency "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" [Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 (1985)] and to "safeguard internal government consultations and deliberations" [Gould v. New York City Police Department, 89 NY2d 267, 276 (1996)].

Lastly, if my recollection is accurate, you indicated that the records sought pertain to your daughter, and that she entered the State University as a student several years ago. If the records involve your daughter after she no longer attended a school in the District, I believe that the preceding analysis would apply in considering rights of access. If, however, they pertain to your daughter when she was in attendance at a school within the District, another statute, the Family Educational Rights and Privacy Act (20 USC §1232g; "FERPA"), would be relevant in determining rights of access.

I note that §89(6) of the Freedom of Information Law states that when records are accessible under a different provision of law, nothing in the Freedom of Information Law can be asserted to deny access to those records. FERPA, as you are aware, relates to education records identifiable to students and generally provides rights of access to those records to parents of students under the age of eighteen or to "eligible students", students who have reached the age of eighteen or are "attending an institution of postsecondary education" (34 CFR §99.3). "Education records" include those records that are "(1)Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution" However, the phrase "education record" excludes "Records that only contain information about an individual after he or she is no longer a student at that agency or institution" (34 CFR §99.3). If the records pertain to your daughter when she was in attendance at a school in the District, it appears that FERPA would grant rights of access

to those records. On the other hand, if they pertain to your daughter after she attended a school in the District, FERPA, in my view, would not apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Warren H. Richmond
Arlene Munson
William Brosnan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14296

41 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, 2003

Mr. Patrick Johnson
95-A-3972
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Johnson:

I have received your letter in which you explained that you requested and received your "hearing packet from a Tier III Misbehavior Report", but "everything that the other inmate [you] had the fight with was saying was blacked out."

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While I am unfamiliar with the contents of your "hearing packet", several grounds for denial may be pertinent to an analysis of rights of access.

First, it is possible that some aspects of those kinds 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."

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..."

The remaining ground for denial of apparent relevance would be §87(2)(b), which permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Insofar as the records include personal or intimate details, deletions might properly be made.

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-14297

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 21, 2003

Mr. Hans Carlson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Carlson:

I have received your letter in which you referred to an opinion addressed to you on September 4 in which it was advised that a portion of an agricultural assessment renewal form that included information relating to income might properly be withheld.

It was suggested that if the information pertained to an individual, as in the case of a family farm, a denial of access might be proper on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [Freedom of Information Law, §87(2)(b)]. If the record pertained to a commercial enterprise, it was advised that if disclosure would "cause substantial injury to the competitive position" of that enterprise, the portion involving income might be withheld under §87(2)(d). You wrote, however, that the information deleted from the form "does not represent the income of the applicant, who owns the farm", but rather that the farm "is rented to a tenant and the deleted information is the income of the tenant, who is not identified."

In consideration of the facts that you added, it seems unlikely that there would be a basis for a denial of access to the information that was deleted. If the income relates to the tenant, who is not identified, there would appear to be no implication regarding personal privacy. Similarly, without knowledge of the amount of rent paid by the tenant or the nature of the agreement between the tenant and the owner of the property, I cannot envision how disclosure could cause substantial injury to competitive position of a commercial enterprise. Again, the identity of that enterprise does not appear on the record.

In short, if my understanding of the matter based on the additional information that you provided is accurate, it does not appear that the information in question could validly have been withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Assessor, Town of Gallatin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14298

41 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 24, 2003

Mr. Earl Harrison
00-A-1307
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. Harrison:

I have received your letter in which you asked for guidance in obtaining "all [your] criminal records concerning [your] case."

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."

The records related to your criminal case would not be maintained by any one single entity. It is suggested that you direct requests for records to the applicable police department and/or district attorney's office involved in your case, as well as the court in which the proceeding occurred. Although the courts are excluded from the coverage of the Freedom of Information Law, records maintained by the courts are generally available under other provisions of law (see e.g., Judiciary Law, §255). When seeking records from a court, it is suggested that a request be made to the clerk, citing an applicable statute as the basis for the request.

When seeking records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency or agencies that you believe maintain the records of your interest. The records access officer has the duty of coordinating the agency's response to requests.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 in Moore v. Santucci [151 AD2d 677 (1989)], it was found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence" (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-14299

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 24, 2003

Mr. Thomas Dallio
88-T-2364
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. Dallio:

I have received your letter in which you asked whether the Upstate Correctional Facility should permit you to review "videotapes [you] purchased through Freedom of Information Law."

You wrote that Mr. Annucci, in response to your appeal of the policy that videotapes may be purchased but not reviewed, indicated that:

> "Each facility must determine how and if inmates may view personal videos. Due to the limitations of certain facilities, such viewing is not practical due to security considerations. The Freedom of Information Law (FOIL) does not address your issue directly and, therefore, we must defer to the facility determination."

In this regard, 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.

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."

While the Freedom of Information Law guarantees access to existing videotapes unless one of the grounds for denial is applicable, in my view, that statute does not guarantee the use of video equipment at your facility.

Analogous to the situation in my view is the decision rendered in Murtha v. Leonard [210 AD 2d 411, 620 NYS 2d 101 (1994)]. In that case, a small village with limited staff, space and facilities adopted rules prohibiting requesters from using their own photocopiers, and it was held that the rules constituted "a valid and rational exercise of the Village's authority under Public Officers Law §87(1)(b)" [id., 102]. In my opinion, the decision was based upon the reasonableness of the rules in view of attendant facts and circumstances. In situations in which a correctional facility does not have sufficient resources to permit the use of video equipment in a non-disruptive manner or if "such viewing is not practical due to security considerations", in my view a restriction regarding the use of the equipment may be reasonable. In such a circumstance, perhaps a copy could be made and sent to your representative, i.e., your attorney, for viewing.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14300

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 27, 2003

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 asked whether an agency can "refuse access to public records if an applicant has one open request and owes copy money amounting to a few dollars..."

In this regard, it has been advised that when an agency produces copies of records in response to a request but the applicant for the records has not paid the requisite fee, the agency can refuse to honor further requests until the fee is paid.

There is no judicial decision of which I am aware that is pertinent to the matter. However, when a request for copies of records is served upon an agency, both the agency and the applicant bear a responsibility. The agency is responsible for compliance with the Freedom of Information Law by retrieving the records sought and disclosing them to the extent required by law. The agency is also required to produce copies of records "[u]pon payment of, or offer to pay, the fee prescribed therefor" [see Freedom of Information Law, §89(3)]. Concurrently, if the applicant requests copies, I believe that he or she bears the responsibility of paying the appropriate fee.

If an agency has prepared copies of records in good faith and the applicant fails or refuses to pay the fee, I do not believe that the agency would be required to make available those copies that have been prepared. In my view, it follows that an agency should not be required to honor ensuing requests until the applicant has fulfilled his or her responsibility by tendering the fee for copies previously made.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Ciamarra
Peter Costa

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14301

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 27, 2003

Mr. Charles Hearon
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hearon:

I have received your letter in which you asked that I "look into the cost of a copy of a cd, of a voter list..." You indicated that Nassau County Board of Elections "wants to charge [you] $150.00 dollars."

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., electronic information), or any other fee, such as a fee for search or overhead costs. In addition,

it was confirmed judicially years ago that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. The most recent decision on the matter involved a provision in the Suffolk County Code that established a fee of twenty dollars for photocopies of police reports [Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS2d 214, 226 AD2d 339 (1996)]. The Appellate Division unanimously determined that the provision in the County Code was invalid. In short, it was determined an enactment of a municipal body is not a statute, and the County was restricted to charging a fee of twenty-five cents per photocopy for the records at issue.

Based upon the foregoing, a fee for reproducing information stored electronically generally would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or compact disk) to which data is transferred. If the duplication of the data involves a transfer of data from one disk to another, computer time may be minimal, perhaps a matter of seconds. If that is so, the actual cost may involve only the cost of a disk.

Lastly, based upon the terms of the Freedom of Information Law and its judicial interpretation, actual cost involves only reproduction of a record, not the monies expended in development of an information system or the purchase of hardware or software. I note, too, that although compliance with the Freedom of Information Law involves the use of public employees' time and other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Elections

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14302

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 27, 2003

Mr. David Cole
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cole:

I have received your letter in which you asked "[w]hat is the procedure when agencies fail to respond" to a request made under the Freedom of Information Law.

When it is contended that an agency has failed to comply with the Freedom of Information Law, a court, following the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules, is empowered to compel an agency to comply with law.

To put your question in perspective, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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-14303

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 27, 2003

Ms. Julie Broyles
5908 McKinley Parkway
Hamburg, NY 14075

The staff of the Committee 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. Broyles:

I have received your letters to which you referred by phone. In each, you wrote that, by sending copies to this office, you were thereby requesting advisory opinions. In all honesty, I neglected to focus on those portions of your correspondence. In the future, it is suggested that you indicate at the beginning of a letter addressed to the Committee on Open Government that you are seeking an advisory opinion.

In consideration of the contents of the letters, I offer the following remarks.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

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)].

In a recent judicial decision cited and confirmed the advice rendered by this office, 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, 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.

And third, the standard to be considered was referenced in the opinion addressed to you on June 12 concerning the Hamburg Village Code and is pertinent with respect to your request to Erie County concerning "snow-plow operations." As suggested in the response of June 12, the issue involves whether or the extent to which 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brian White
Edward J. Conboy, Jr.
David Fountaine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14304

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October 27, 2003

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.

Dear Ms. Black:

I have received your letter and the materials attached to it.

Having requested "a list of all teachers and administrators by name, title and most recent salary" from the Cheektowaga-Maryvale Union Free School District on September 22, you were informed that the records would be made available by November 1. Because "what [you] requested is required by law to exist", you contend that "it doesn't seem reasonable...that they need 38 (29 business) days to make it available..."

You have requested my view of the matter, and in this regard, I offer the following comments.

First, to put the matter into perspective, with certain exceptions, the Freedom of Information Law does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be "maintained" to comply with the Freedom of Information Law.

Second, if an agency complies with the Freedom of Information Law by maintaining the record of your interest, I do not believe that there would be any valid basis for delaying disclosure. That statute provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible.*" Therefore, if records are clearly available to the public under the Freedom of Information Law, which is so in this instance, and if they are readily retrievable, which should be so because the record at issue must be maintained, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public

> accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert J. Tauriello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14305

41 State Street, Albany, New York 12231
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October 27, 2003

Mr. Robert S. Risman, Jr.
Golden Sands Resort
P.O. Box 11
Diamond Point, NY 12824-0011

The staff of the Committee on Open 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 letter and the correspondence attached to it.

By way of background, following the inspection of a facility that you own, you sent a request to the Glens Falls office of the NYS Department of Health for the notes taken by the inspector. The receipt of the request was acknowledged, and you were informed that you would receive a response "as soon as possible." You have questioned the propriety of the response and asked whether the notes must be disclosed pursuant to the Freedom of Information Law.

In this regard, first, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

In consideration of 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, 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 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."

Based on the foregoing, I believe that the notes in question are "records" that fall within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In my view, the notes would constitute "intra-agency" materials that fall within §87(2)(g). That provision permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anita M. Gabalski
Robert LoCicero

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14306

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October 27, 2003

Ms. Nancy Daly
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Daly:

I have received your latest correspondence, which, as in the past, relates to requests made to the office of the Nassau County District Attorney pertaining to the arrest and conviction of your husband.

In a lengthy response by Deborah N. Abramson, Assistant District Attorney, reference was repeatedly made to "Rosario material", documents that were made available to your husband's attorney prior to your husband's trial. She denied access to those records pursuant to a holding in Moore v. Santucci [151 AD2d 677 (1989)]. You wrote, however, that you are interested in "Brady material" that was not made available. You also referred to a particular witness and sought her statement, as well as the statements of other witnesses or informants who did not testify. Those records were withheld pursuant to §87(2)(e)(iii) of the Freedom of Information Law

In this regard, and in consideration of certain other aspects of Ms. Abramson's response, I offer the following comments.

First, as she suggested, §89(3) of the Freedom of Information Law requires an applicant to "reasonably describe" the records sought. That being so, although a person requesting records is not required to identify the records of interest with particularity or specificity, he or she must provide sufficient detail to enable agency staff to locate and identify the records falling within the scope of a request.

Second, both Rosario and Brady relate to disclosure to a defendant in the context of a criminal proceeding. The courts have provided direction concerning the Freedom of Information Law as opposed to the use of discovery under the Civil Practice Law and Rules (CPLR) in civil proceedings, and discovery in criminal proceedings under the Criminal Procedure Law (CPL). The principle is that the Freedom of Information Law is a vehicle that confers rights of access upon the

public generally, while the disclosure provisions of the CPLR or the CPL, for example, are separate vehicles that may require or authorize disclosure of records due to one's status as a litigant or defendant.

As stated by the Court of Appeals, 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].

More recently, the Court of Appeals held that the CPL does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law [Gould v. New York City Police Department, 89 NY2d 267 (1996)].

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law or judicial decisions that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding. The standard for disclosure under Rosario and Brady is different from that under the Freedom of Information Law.

Third, with respect to the prior disclosure of Rosario material, I refer to the decision cited by Ms. Abramson. In that case, the matter involved 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, records introduced into evidence or disclosed prior to or 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).

Based on the foregoing, unless it can be demonstrated that neither you, your husband, nor his attorney any longer have copies of records previously disclosed, those records need not be disclosed to you again.

Lastly, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to an agency's authority to withhold "records or portions thereof" that fall within the exceptions to rights of access 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 required to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

In several areas of Ms. Abramson's response, reference was made to a denial of access to statements by or records relating to witnesses or informants who did not testify at your husband's trial. The basis for denial cited by Ms. Abramson, §87(2)(e)(iii), permits an agency to withhold records "compiled for law enforcement purposes and which, if disclosed", would "identify a confidential source or disclose confidential information relating to a criminal investigation."

In consideration of the kinds of records at issue, this office has in the past advised that §87(2)(e)(iii), as well as two other exceptions, may be pertinent in ascertaining rights of access or, conversely, an agency's authority to deny access. Those other exceptions are §87(2)(b) and (f), which respectively permit an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" or "could endanger the life or safety of any person."

In many instances, the deletion of names or other identifying details is sufficient to protect privacy and safety and to safeguard against the possibility of identifying a witness or informant. If that is so in the context of your request, I believe that the denial of access was overbroad and portions of the records should be disclosed following the deletion of personally identifiable details.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Deborah N. Abramson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14307

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October 27, 2003

Ms. Janet Stulpin
Records Access Officer
Fairport Central School District
38 W. Church Street
Fairport, NY 14450

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Ms. Stulpin:

I have received your letter of October 3 and the materials attached to it, as well as a letter from Susan N. Burgess. Ms. Burgess, an attorney, submitted a request pursuant to the Freedom of Information Law that is the subject of your request for an advisory opinion.

Ms. Burgess requested a record or records that include the "names and addresses of all residents of the Fairport Central School District", and you wrote that she "represents parents of children with disabilities and has represented parents of such children who reside in the Fairport School District." She also requested "[B]illing statements, redacted as legally appropriate" submitted by a named law firm "pertaining to all legal matters that involve the family of *** and ***, including matters pertaining to their [child], from September 1, 1999 to present."

The request for names and addresses was withheld based on your contention that the record or records would be used for a commercial purpose and that, therefore, disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §89(2)(b)(iii) of the Freedom of Information Law. The request for billing statements was denied because the request names the family that is the subject of the records. You wrote that "[r]edaction of identifying details would not protect disclosure of the student's identity since all of the requested records pertain solely to the student and/or the Family." For that reason, you considered the statements to constitute education records that cannot be disclosed absent the consent of a parent pursuant to the Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g).

Ms. Burgess indicated that she is seeking the names and addresses "to help facilitate"a free seminar. She wrote that she does "not know what a commercial purpose is" and that:

> "As an attorney, I cannot hold myself out as representing anyone at this seminar. I will not be signing a retainer agreement and entering into relationships with attendees for which I am paid a fee as a prerequisite to attendance. What I will be doing is seeking to educate parents and other residents about special education in their District, provide them with sample forms and letters and other handouts they can use, and generally help them to learn how to advocate for themselves and their children within the school setting. Whether there are legal problems that already exist and whether anyone will decide to contact any lawyer is speculative and something over which I have no control. I do not consider that a commercial, but an educational purpose, one of hundred of topics that can be imagined and about which people might seek to educate the public."

In my view, the denial of access to the list of names and addresses was consistent with law. While the phrase "commercial purpose" is not defined, it does not appear that Ms. Burgess' goals are purely eleemosynary. On the contrary, it would seem that the seminar would be held, at least in part, to encourage members of the public to seek her services as an attorney.

With respect to the Freedom of Information Law, by way of background, in general, 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 ordinarily irrelevant.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of

personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Federation of NYS Rifle and Pistol Clubs, Inc., v. New York City Police Department, 73 NY 2d 92 (1989); Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose of which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought.

In a decision cited earlier, Federation of NYS Rifle and Pistol Clubs, a not-for-profit corporation sought a list of names and addresses in order to send its circular, which included a statement of membership rates and a membership application. In that decision, the Court of Appeals held that membership solicitation constituted a fund-raising purpose and upheld the agency's denial on that basis.

While Ms. Burgess may be offering information and materials, with or without her name, address and phone number on those materials, implicit in the presentation would be her expertise and availability as an attorney to provide legal services to parents. In my view, that kind of activity is, at least in part, commercial, and therefore, the request is for a commercial purpose and may be denied.

With respect to the other request, Ms. Burgess wrote that:

> "District attorney billing statements do not belong in a child's educational file and cannot be shielded from disclosure by putting them in the educational file and referring to them as education records."

As I understand the regulations promulgated by the U.S. Department of Education pursuant to FERPA, that contention is inaccurate. There is nothing in the regulations pertaining to the location or placement of records in determining whether they are "education records" subject to FERPA. In 34 CFR §99.3, the phrase "education records" is defined to include those records that are:

"(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution."

In short, a billing record maintained by or for the District that is personally identifiable to a student would, in my opinion, constitute an education record falling within the coverage of FERPA that cannot be described without parental consent.

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.

In this instance, since the request was made in relation to a named student and/or family, the deletion of personally identifiable details would be meaningless; Ms. Burgess would know the identity of the student to whom the records pertain. That being so, I believe that records would be exempt from disclosure under FERPA and, thereby, under §87(2)(a) of the Freedom of Information Law concerning records that "are specifically exempted from disclosure by state or federal statute."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Susan N. Burgess

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 27, 2003

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.

Dear Mr. Nolen:

I have received your letter concerning the obligation of a county clerk to make copies of records available in an electronic storage medium, such as computer tapes or disks.

In this regard, as you are aware, county clerks maintain a variety of records, some of which are court records maintained in their capacities as clerks of courts. Insofar as the issues raised involve those persons as clerks of courts, they are beyond the advisory jurisdiction of the Committee on Open Government. Insofar as the issues pertain to other records maintained by county clerks, I believe that those records are subject to the Freedom of Information Law.

As the matter pertains to the Freedom of Information Law, several judicial decisions indicate, in brief, that if an agency has the ability to make records available with reasonable effort in the storage medium desired by the applicant, and if the applicant pays the requisite fee for copying, the agency is required to do so [see e.g., Szikszay v. Buelow, 436 NYS2d 558, 107 Misc.2d 886 (1981), Brownstone Publishers, Inc. v. New York City Department of Buildings, 550 NYS2d 564, aff'd 166 AD2d 294 (1990), New York Public Interest Research Group v. Cohen, 729 NYS2d 379, 188 Misc.2d 658 (2001)[.

The fee for copies of records other than photocopies, according to §87(1)(b)(iii) of the Freedom of Information Law, is based on the actual cost of reproduction, unless a different fee is prescribed by statute. A significant question in my view is whether a fee assessed by a county clerk for records made available in electronic media should be based on the actual cost of reproduction in accordance with the language of the Freedom of Information Law or §8019 of the Civil Practice Law and Rules (CPLR).

I know of no judicial determination that has considered the issue. However, from my perspective, the Freedom of Information Law may not be the governing statute.

As you may be aware, §§8018 through 8021 of the CPLR require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, I believe that they may exceed those permitted under the Freedom of Information Law. As stated in §8019, "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

Subdivision (f) of §8019, entitled "Copies of records", states in relevant part that:

> "The following fees, up to a maximum of thirty dollars per record shall be payable to a county clerk or register for copies of the records of the office except records filed under the uniform commercial code:
>
> 1. to prepare a copy of any paper or record on file in his office, except as otherwise provided, sixty-five cents per page with a minimum fee of one dollar thirty cents."

If a record subject to subdivision (f) is reproduced on paper, i.e., by means of a photocopy machine, it would be clear in my opinion that the Freedom of Information Law would not be applicable and that a county clerk could charge "sixty-five cents per page with a minimum fee of one dollar thirty cents..." If an equivalent record is no longer maintained on paper or is not reproduced onto a "page", that factor would not in my view transfer the basis for charging a fee to the Freedom of Information Law; rather, I believe that §8019(f) would continue to govern.

While I am unfamiliar with the legislative history of §8019, I would conjecture that the Legislature in enacting that and other sections within Article 80 of the CPLR, intended that county clerks, in their capacities as clerks of court and otherwise, carry out certain duties and assess certain fees for performing particular services. When those provisions were initially enacted in 1963, the advances in information technology that have become commonplace could not have been envisioned. Nevertheless, if my comment concerning legislative intent is accurate, a county clerk could charge "sixty-five cents per page" for reproducing records in media other than paper equivalent to the charge that would be assessed for a "page" reproduced on paper.

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-14309

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October 27, 2003

Mr. Bernard DeVeaux
78-A-3862
Orleans Correctional Facility
531 Gaines Basin Road
Albion, NY 14411-9199

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. DeVeaux:

I have received your letter in which you asked whether you may obtain certain information from the Administration for Children Services in New York City. You are interested in obtaining the address of a deceased mother indicated in a "child abuse case that originated in 1973." You wrote that you "need proof of the address for evidentiary purposes in a criminal court proceeding...to prove that [she] did not live with [you] when [you were] arrested in April of 1978."

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant to the matter is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §372 of the Social Services Law, which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4) of §372 states in relevant part that such records:

> "shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination or by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court or by a justice of the supreme court,

> or by a judge of the family court when such records are required for the trial of a proceeding in such court, after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information thus obtained without authorization so to do by the department, or by such judge or justice."

Based on the foregoing, I do not believe that records maintained by entities having duties relating to foster care can be disclosed, unless authorization to disclose is conferred by a court, or by the former Department of Social Services.

Similarly, §422 of the Social Services Law is a statute which pertains specifically to the statewide central register of child abuse and maltreatment and all reports and records included in the register. Subdivision (4) (A) of §422 states that reports of child abuse as well as information concerning those reports are confidential, and may be disclosed only under specified circumstances listed in that statute.

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-14310

41 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 27, 2003

Mr. Arthur Bean
02-A-4137
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. Bean:

I have received your letter in which you sought assistance in obtaining a copy of the minutes of your court case.

In this regard, the New York Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts 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 court, it is suggested that a request for records be made to the clerk of the court, citing the appropriate provision of law as the basis for the request.

If your inquiry involves minutes of a grand jury proceeding, I note that those records are confidential pursuant to §190.25(4) of the Criminal Procedure Law and may be obtained only through a court order.

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-14311

41 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 27, 2003

Mr. Teddy Lewis
79-B-0528
Wende Correctional Facility
3622 Wende Road
Box 1187
Alden, NY 14404

Dear Mr. Lewis:

I have received your letter of October 13, which reached this office on October 27.

You referred to a request for records of the New York City Police Department in which you were informed that 41 documents would be made available to you. However, it is your belief that 82 other known documents are "missing" and were withheld. Although you appealed what you consider to have been a denial of access to the Department's appeals officer, you had received no response as of the date of your letter to this office. Consequently, you appealed to the Committee on Open Government and requested an "index of all documents."

In this regard, the Committee is authorized to provide advice and opinions pertaining to the Freedom of Information Law. This office is not empowered to determine appeals or compel an agency to grant or deny access. Similarly, the Committee does not have custody or control of records.

If an agency has failed to respond to a proper appeal as required by §89(4)(a) of the Freedom of Information Law, the person seeking the records may consider such failure as a denial of the appeal and to have exhausted his or her administrative remedies. That being so, it has been held that he or she 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 (1982)].

Lastly, with respect to an index of documents within a file or index of those 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)].

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: Leo Callaghan, Appeals Officer
Lt. Michael Pascucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14312

41 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 27, 2003

Mr. Nathaniel Jay
[redacted]

Dear Mr. Jay:

I have received your letter and the attached material in which you requested "information concerning the procedure for appealing a decision by the grievance committee" for the Tenth Judicial District.

It is noted that the Committee on Open Government oversees the implementation of the Freedom of Information Law, which provides rights of access to agency records. This office has neither the expertise nor the authority to offer guidance related to the filing of complaints with a grievance committee. I point out that records pertaining to the discipline of attorneys fall within the coverage of §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 and 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 either 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.

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-14313

41 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 27, 2003

Mr. Ned Rauch
Press-Republican
170 Margaret Street
Plattsburgh, NY 12901

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rauch:

I have received your letter and the attached materials in which you questioned the propriety of a denial of access to records "pertaining to the Centers for Medicare and Medicaid Services' Survey report on policies and practices at Sunmount DDSO in Tupper Lake."

Mr. Paul R. Kietzman, General Counsel and FOIL Appeals Officer for the Office of Mental Retardation and Developmental Disabilities (OMRDD), responded "to your appeal of the denial of your request for a copy of the Federal Centers for Medicare and Medicaid Services (CMS) survey report regarding the Sunmount Development Center." In upholding the denial, Mr. Kietzman wrote that "[f]ederal regulations prohibit the report from being released to the public until the provider (OMRDD) has had an opportunity to comment on the report and those comments have been incorporated into the report (See, 42 CFR 431.115(h)). We are in the process of preparing a response to CMS regarding the survey report."

Since I was unfamiliar with the federal regulations and the law upon which the regulations are based, I consulted with an attorney at OMRDD in an effort to research the applicable provisions.

The section of the federal regulations cited by Mr. Kietzman, 42 CFR 431.115(h), pertains to evaluation reports on providers and contractors. In the context of the records of your interest, it my understanding that OMRDD is a "provider" operating a medicaid funded program. Paragraph (1) of 42 CFR 431.115(h) states in pertinent part, as follows:

> "Evaluation reports on providers and contractors. (1) If the Secretary sends the following reports to the Medicaid agency, the agency must meet the requirements of paragraphs (h) (2) and (3) of this section in

> releasing them...(iii) Program validation survey reports and other formal performance evaluations of providers, including the reports of followup reviews."

Paragraph (2) provides that:

> "The agency must not make the reports public until - - (i) the contractor or provided has had a reasonable opportunity, not to exceed 30 days to comment on them; and (ii) Those comments have been incorporated in the report."

Although the Freedom of Information Law is based upon a presumption of access, the first ground for denial, §87(2)(a), indicates that an agency may deny access when records are exempted from disclosure by state or federal statute. In my opinion, regulations may support a denial of records only to the extent that the statute upon which the regulations are based clearly exempts the records from public inspection. However, in this instance, the Social Security Act appears to impose restrictions on public inspection of the records of your interest. 42 U.S.C. 1306 (e) and (f), provide in pertinent part that "program validation survey reports...shall [not] be made public...until the contractor or provider of services whose performance is being evaluated has had a reasonable opportunity (not exceeding 60 days) to review such report and to offer comments, pertinent parts of which may be incorporated in the public report." Based on the language quoted in the preceding sentence, I believe that 42 U.S.C. 1306(f) requires OMRDD to deny access to a program validation survey report until it has had a reasonable opportunity to review and offer comments on the report.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

cc: Paul Kietzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14314

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 28, 2003

Mr. Nehemiah Nash
97-A-3995
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 information presented in your correspondence.

Dear Mr. Nash:

I have received your letter in which you asked about your ability to inspect your medical records.

In this regard, I offer the following comment

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. However, §89(6) states in part that nothing in the Freedom of Information Law may be asserted to withhold records available under a different provision of law.

One such provision, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1435

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 28, 2003

Ms. Julie Penny
Noyac Citizens Advisory Committee
3662 Noyac Road
Sag Harbor, NY 11963

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Penny:

I have received your letter and the materials attached to it concerning your efforts in gaining access to records from the Town of Southampton. In consideration of their contents, I offer the following remarks.

First, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Based on the foregoing, I believe that the records access officer has the duty of coordinating responses to requests.

Section 1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records.
> (5) Upon request, certify that a record is a true copy.
> (6) Upon failure to locate the records, certify that:
> (i) the agency is not the custodian for such records; or
> (ii) the records of which the agency is a custodian cannot be found after diligent search."

As stated above, the records access officer must "coordinate" an agency's response to requests. Therefore, I believe that requests may be made to 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, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." When you consider it worthwhile to do so, you may seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], a court did not accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search", and it was determined that a certification that records do not exist or could not be found was required to have been prepared by the person who actually conducted the search. However, that decision was overruled by the Court of Appeals, the state's highest court, in Rattley v. New York City Police Department [96 NY2d 873 (2001)]. In brief, it was held that the Freedom of Information Law does not specify the manner in which an agency must certify that records do not exist or cannot be found, and that the certification need not be prepared by the person or persons to whom a request was made or who conducted the search for the records. A certification in writing in which an agency official having the authority to do so asserts that a diligent search was made should be adequate to comply with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marietta Seaman
Diane Carpenter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14316

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 28, 2003

Mr. T. Gillette
95-A-4678
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. Gillette:

I have received your letter in which you asked for guidance in obtaining a copy of a consent form for the "release of medical, diagnosis or treatment" that you signed with a parole officer at Bare Hill Correctional Facility approximately two years ago. You wrote that the parole officer at Upstate Correctional Facility "told [you] that he cannot provide anything that does not exist in [your] file." You also asked about the procedure for filing a request and an appeal.

In this regard, I offer the following comments.

First, under the Freedom of Information Law, you may make your request in writing to the parole officer at your facility. It is suggested that you supply dates, titles or any other information that may help to locate the requested record.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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, 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 some assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14317

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 28, 2003

Mr. Jermaine Archer
01-A-3476
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. Archer:

I have received your letter in which you asked about the availability of records that might indicate "whether or not the prosecution paid a witness...to testify...in a criminal trial."

In this regard, you may direct a request for the records of your interest to the district attorney's office involved in the prosecution of the matter.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 may be pertinent in determining rights of access. For instance, an agency may deny access to records or portions thereof which if disclosed "could endanger the life or safety of any person" [§87(2)(f)]. Additionally, §87(2)(e)(iii) authorizes an agency to withhold records "compiled for law enforcement purposes and which, if disclosed, would...identify a confidential source or disclose confidential information relating to a criminal investigation."

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-14318

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 28, 2003

Mr. Benjamin Arnold
86-A-4777
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Arnold:

I have received your letter in which you explained that the senior parole officer at your facility has not responded to your requests "to know, what are the factors that are considered with regards to satisfying the residency requirements upon parole...and whether a parolee is permitted to stay with a family member...until the parolee can get a place of their own."

In this regard, I offer the following comments.

First, from my perspective, the inquiry as you described it concerning "factors" related to a parolee satisfying residency requirements would not be a request for records as envisioned by the Freedom of Information Law. That statute involves requests for existing records. It does not require agency staff to supply information in response to questions. In the future, it is suggested that you seek existing records.

Second, when a proper request is made, based on regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer at your facility is responsible for coordinating responses 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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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-14319

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 28, 2003

Mr. Jose Corea
02-A-3147
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. Corea:

I have received your letter and the attached material in which you requested assistance concerning your request to the Suffolk County District Attorney's Office for a variety of records related to your arrest and conviction.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While 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, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, an office of a district attorney cannot 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 "could 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-14320

41 State Street, Albany, New York 12231
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October 28, 2003

Mr. Tywan Price
94-A-3611
Woodbourne Correctional Facility
P.O. Box 1000
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Price:

I have received your letter in which you requested an advisory opinion related to your request for a variety of records concerning your arrest from the Kings County District Attorney's Office.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow-up reports (DD5's) and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to

> the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
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> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department,89NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, an office of a district attorney cannot 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:
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> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "could 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-14321

41 State Street, Albany, New York 12231
(518) 474-2518
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October 28, 2003

Mr. Tom Wessling
Blue Lagoon Resort
P.O. Box 305
Diamond Point, NY 12824

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wessling:

I have received your letter and the materials attached to it. You have sought assistance in relation to a denial of your request for a complaint received by the Adirondack Park Agency "from a motel owner neighboring the Blue Lagoon Resort", which is apparently your property.

The denial of access was based on §87(2)(e)(iii) of the Freedom of Information Law, which authorizes a government agency to withhold "records compiled for law enforcement purposes and which, if disclosed, would....identify a confidential source or disclose confidential information relating to a criminal investigation..." It is your view that the complainant could not be characterized as a confidential source, that the matter does not pertain to criminal law enforcement, and that, therefore, the provision cited as the basis for the denial of access is inapplicable.

While I am in general agreement with your contention concerning the applicability of §87(2)(e)(iii), it appears that a different exception to rights of access may be pertinent.

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 the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that there may be instances in which a single record includes both accessible and deniable information, and that an agency is required to review a record that has been requested to determine which portions, if any, may properly be withheld.

The exception to rights of access of primary significance, in my view, pertains to the protection of privacy, and §87(2)(b) permits an agency to deny access to records insofar as disclosure

would constitute "an unwarranted invasion of personal privacy." It has generally been advised that those portions of a complaint or other record which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my opinion, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of a member of the person who made the complaint is often irrelevant to the work of the agency, and in most circumstances, I believe that identifying details may be deleted.

If the identity of the complainant is known, the complaint might properly be withheld in its entirety if indeed, due to its contents, disclosure would constitute an unwarranted invasion of personal privacy. In that situation, for obvious reasons, the deletion of a name or other identifying details would not serve to protect privacy.

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: Brian M. Ford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14322

41 State Street, Albany, New York 12231
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October 29, 2003

Mr. Carlos Nunes
00-A-1100
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. Nunes:

I have received your letter and the attached materials in which you requested assistance concerning your request for "a copy of [your] Miranda warnings" from the Queens County District Attorney's Office.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my opinion, none of the grounds for denial would be applicable.

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 Office of the District Attorney does not maintain the records sought, 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."

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-14323

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 29, 2003

Mr. John Morgano
00-A-2093
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. Morgano:

I have received your letter in which you explained that the Westchester County District Attorney's Office has not responded to your request for records.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 requested, I have enclosed a copy of the FOIL-AO-10620.

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-14324

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 29, 2003

Mr. Patrick Houghtaling
97-A-6174
Woodbourne Correctional Facility
P.O. Box 1000
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Houghtaling:

I have received your letter in which you requested an advisory opinion related to your request for a variety of records concerning your arrest from the Richmond County District Attorney's Office.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow-up reports (DD5's) and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
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> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
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> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to

> the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
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> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department,89NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, an office of a district attorney cannot 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:
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>
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In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "could 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-14325

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October 29, 2003

Hon. Anna Knoeller
Village Clerk
Village of Freeport
Municipal Building
46 North Ocean Avenue
Freeport, NY 11520

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Knoeller:

I appreciate having received a copy of a resolution approved by the Board of Trustees of the Village of Freeport concerning an appeal made pursuant to the Freedom of Information Law by Elizabeth Moore, a reporter for *Newsday*.

By way background, you referred to an opinion addressed to Howard E. Colton on June 3 in which it was advised that since "certain fire and law enforcement officials perform functions related to emergency situations and...their cell phones must be free of interference to the greatest extent possible", and since disclosure of their cell phone numbers could enable "potential lawbreakers [to] call those numbers constantly, thereby precluding the effective use of the cell phones to the detriment of the public", the cell phone numbers could be withheld under §87(2)(f) of the Freedom of Information Law. That provision authorizes an agency to deny access to records insofar as disclosure could "endanger the life or safety of any person."

The appeal did not deal with the cell phone numbers, but rather with a denial of a request for the names of "all individuals to whom Freeport Fire Department cellular phones are assigned." In her appeal, Ms. Moore specified that she is not "seeking to identify non-published emergency telephone numbers", but rather merely "a list of names."

While I continue to believe that the cell phone numbers may be withheld, I do not agree with the determination or with portions of the resolution concluding that disclosure of the names "would violate the previously issued opinion of the Committee on Open Government" or "circumvent" that opinion. On the contrary, in my view, there would be no basis for withholding the names of those to whom cell phones have been issued.

To reiterate a key aspect of the earlier opinion, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 was stressed that a government agency is required to disclose its records, except to the extent that one or more the grounds for denial of access can justifiably be asserted. Again, as the Court of Appeals has indicated on several occasions:

> "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 NY2d, 567, 571 (1979); also Gould v. New York City Police Department, 87 NY2d 267, 275 (1996)].

From my perspective, disclosure of the identities of police or fire officials to whom cell phones have been assigned could hardly "endanger" their lives or safety. Moreover, judicial decisions in my view indicate that the names must be disclosed. Although §§87(2)(b) and 89(2)(b) authorize an agency to withhold records or portions of records when disclosure would constitute, "an unwarranted invasion of personal privacy", the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

When a public officer or employee uses a telephone in the course of his or her official duties, that fact is, in my opinion, relevant to the performance of that person's official duties. On that basis, I do not believe that disclosure of a name would result in an unwarranted invasion of personal privacy with respect to an officer or employee serving as a government official. Further, I believe that the use of a cell phone, i.e., the times and amount of time that cell phones are used, directly relates to the accountability of police and fire officials. In short, if a cell phone is overused, for example, the public in my view has the right to know that to be so. In another decision rendered by

the Court of Appeals, Capital Newspapers, supra, in which it considered the intent and utility of the Freedom of Information Law, it was found that that law:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of the state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence or abuse on the part of government officers" (id. at 566).

In sum, for the reasons expressed above, I disagree with the Board of Trustees' determination to withhold the names of those to whom cell phones have been assigned.

If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Elizabeth Moore

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14326

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October 29, 2003

Mr. Kristofer Surdis
99-R-1010
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 12733-0116

Dear Mr. Surdis:

I have received your letter in which you appealed a denial of your request by the Town of Ulster Police Department.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. The provision pertaining to the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 30, 2003

Mr. Arthur Springer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Springer:

I have received your letter in which you asked whether "a government agency is required to keep records of FOIL requests, including such information as the date a FOIL request was received, the date it was acknowledged and the date it was answered." You indicated that you raised the issue "because [you] once tried to FOIL such a record from a recalcitrant agency, only to be told that it did not exist."

In this regard, the Freedom of Information Law pertains to existing records; it does not include any general requirement concerning the preparation, maintenance or preservation of records. Other statutes, however, include direction concerning those matters, and in New York City, I believe that the agency having general oversight with respect to the preservation of records is the Department of Records and Information Services (DORIS). In brief, it is my understanding that the Department has the duty of developing schedules that indicate minimum retention periods for certain kinds of records, and that the length of the retention period is dependent on their significance. Some records might be destroyed instantly, while other might be required to be retained for six months, a year, two years, ten or more, again, depending on their significance.

While I would also guess that there may be no specific requirement that records be kept indicating the dates that FOIL requests are received, acknowledged or answered, there are other records associated with requests that are likely subject to retention schedules developed by DORIS. The requests themselves, letters prepared by agencies acknowledging their receipt, appeals and determinations of appeals would be among them. It is suggested that you contact the Records Management Division at DORIS to obtain additional information concerning the subject of your inquiry.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-14328

From: Robert Freeman
To: [redacted]
Date: 10/30/2003 12:33:52 PM
Subject: Dear Mr. Seifert:

Dear Mr. Seifert:

I have received your communication concerning "someone obtaining data on my [your] town/county taxes for the year 2003, from the town clerk's office in Henderson, NY and having it published in the local newspaper."

If I understand your comment accurately, you are referring to the disclosure of information concerning the payment of real property taxes. If that is so, records indicating the ownership, location, assessed valuation, and the payment or non-payment of real property taxes have long been accessible to the public under both the Real Property Tax Law and the Freedom of Information Law.

When those records are disclosed, there are no restrictions on the use of the records. That being so, if a newspaper finds the information to be newsworthy or to involve a matter of public interest, it is free to publish the information. Many newspapers, for example, publish lists that include the names of owners of parcels and their location, as well as the amount of unpaid taxes, prior to an auction of the property.

In short, if my interpretation of your comment is accurate, the records obtained from the Town would be accessible to the general public, and there would be no limitation on their publication by a newspaper. If I have misconstrued your remark, please so inform me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 3695
FOIL-AO- 14329

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October 30, 2003

Ms. Virginia Demjanenko
[redacted]

The staff of the Committee 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. Demjanenko:

As you are aware, I have received your letters and the materials attached to them. In short, you have raised issues concerning the implementation of the Freedom of Information and Open Meetings Laws by the Starpoint Central School District and its Board of Education.

The first letter related to a request for the "Starpoint High School Master Schedule showing all teachers' schedules and room assignments." Although certain records were disclosed, the District did not include records indicating "what courses each teacher is teaching." Nevertheless, you obtained a copy of a record from another source that contains the information that you requested. Consequently, it is your view that the District "violated FOIL" and you asked that this office initiate an investigation.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning public access to government information, primarily in relation to the Freedom of Information and Open Meetings Laws. The Committee does not have the resources to conduct an investigation, nor is it empowered to compel an entity of government to comply with those statutes. It is our hope, however, that advisory opinions, such as this communication, serve to educate, persuade and encourage compliance with law. With those goals in mind, I offer the following comments.

First, when an agency discloses some of the records sought but withholds others, both §89(3) of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that a denial of access be given in writing. Further, the regulations specify that the person denied access be informed of the right to appeal pursuant to §89(4)(a). That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the 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 a related vein, and I am not suggesting that they apply, §89(8) of the Freedom of Information Law and §240.65 of the Penal Law include essentially the same language, and the latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record after having made a diligent search.

And third, insofar as an agency, such as a school district, maintains records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, records indicating the courses taught by teachers and their schedules must be disclosed. In short, there is nothing secret about the contents of such records, and I do not believe that any of the grounds for denial of access could be asserted.

Your other letter referred to practices of the Board of Education in relation to its meetings, and during our conversation, you indicated that the Board routinely conducts executive sessions in advance of its meetings open to the public. In this regard, 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. Moreover, 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.

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 or conduct an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. 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.

Lastly, although you did not refer to the subject matter of executive sessions, I point out that, like the Freedom of Information Law, the Open Meetings Law is based on a presumption of

openness. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during executive sessions.

In an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be sent to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Steven Lunden, Records Access Officer
C. Douglas Whelan, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14330

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October 30, 2003

Mr. Garnell W. Whitfield, Jr.
Chief Administrator
City of Buffalo Fire Department
195 Court Street
Buffalo, NY 14202

Dear Mr. Whitfield:

I have received correspondence from Mr. Michael Kless in which he indicated that you were recently designated as the records access officer for the City of Buffalo Fire Department. He wrote that he does not know whether you are "expert in FOIL" and asked that I describe the "time frame involved" when requests for records are received.

In an effort to satisfy Mr. Kless and to assist you, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

If you have questions regarding the foregoing, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael A. Kless

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14331

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October 30, 2003

Mr. Robert Lawrence
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lawrence:

I have received your letter in which you asked whether a public employee may hold two positions. You referred to the Sullivan County Manager and a town clerk serving as "FOIL officer" and to an assistant county attorney and a town board serving as "FOIL Appeals Officer."

In this regard, the functions of a "records access" or "FOIL officer" or that of appeals officer are not generally full time positions; those positions are not civil service titles, and there is generally no restriction on who may carry out those functions.

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 (i.e., a county, city, town, village, school district, etc.) 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..."

In short, the records access officer must "coordinate" an agency's response to requests. Frequently the records access officer is an agency officer or employee who has familiarity with an agency's records. For example, the town clerk is designated as records access in the great majority of towns, for he or she, by law, is also the records management officer and the custodian of town records.

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 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).

In consideration of the foregoing, it is clear that a town board, for example, is authorized to determine appeals, or that the head or governing body of an agency may designate a person or body to carry out that function.

I hope that the previous commentary serves to clarify your understanding 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-14332

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October 30, 2003

Mr. Anthony M. Campolito
82-C-0884
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. Campolito:

I have received your letter in which you indicated that you had not received a response to your request to the Superintendent of your facility for an "itemized list of all personal effects...taken from [you] by your staff...with the claim of alleged investigation."

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)].

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 grounds for denial are pertinent to an analysis of rights of access to the records of your interest.

Section 87(2)(g) of the Freedom of Information Law enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The other ground 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."

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 your facility does not maintain "an itemized list" containing the information sought, 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."

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. 14333

41 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 30, 2003

Mr. T. Loper
99-A-0853
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Loper:

I have received your letter in which you sought assistance in obtaining videotapes of events occurring at 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, 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 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)].

Lastly, the Freedom of Information Law pertains to existing records. If your facility does not maintain or has not preserved a videotape, the Freedom of Information Law would not apply, and it has consistently been advised that an agency is not required to honor an ongoing or prospective request for records that do not yet exist. 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."

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-14334

41 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 30, 2003

Mr. Joseph Santos Goncalves, Jr.
98-B-2093
Collins Correctional Facility
Box 340
Collins, NY 14034-0340

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Goncalves:

I have received your letter in which you asked this office to assist you in obtaining a "Hearing Officer's Manual." You explained that the Inmate Records Coordinator at your facility denied your request and that you have appealed the denial.

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 leading decision dealing with law enforcement manuals and similar records detailing investigative techniques and procedures is Fink v. Lefkowitz [47 NY2d 567 (1979)] 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)], in my opinion, a denial of access would be appropriate.

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-14335

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 31, 2003

Mr. Frank Choromanskis
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Choromanskis:

I have received your letter in which you referred to a request made under the Freedom of Information Law delivered to the Monroe County Records Access Office on August 4 and described a series of delays and extensions.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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)].

Further, the advice rendered by this office was confirmed in Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), in which 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, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, or if the estimated date is unreasonable, 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."

Lastly, I note that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles Turner
Records Access Officer

FOIL-AO-14336

From: Robert Freeman
To: Tara Moncheck
Date: 10/31/2003 10:38:25 AM
Subject: Re: Hi Tara - -

Hi Tara - -

Your ability to gain access is dependent on the kind of tax and perhaps whether payment has been made.

If you are referring to income taxes, those kinds of records that are submitted to the IRS or State Department of Taxation and Finance are confidential; statutes in both instances prohibit their disclosure. However, there is a case involving the State Department of Tax and Finance concerning a list of persons who failed to file returns, and the court held that the names on the list were public. The point was that the tax secrecy law involved records submitted by taxpayers and related materials based on those records that are prepared by the Department. An indication that a person has failed to file a return would not involve the disclosure of a record submitted by that person.

If you are referring to real property tax, municipalities routinely maintain and disclose records identifying the owners of real property, the location of the property, the assessed valuation and whether the owners have paid their taxes, whether they paid taxes on time, or whether they are late or have failed to pay the amount due.

I hope that the foregoing will be useful to you. If you would like to discuss the issue or have questions, please feel free to call.

Happy Halloween to you, too!
>>> "Tara Moncheck" <tara.moncheck@wten.com> 10/31/03 10:26:02 AM >>>
Hi Bob,

Is there any way I can use a FOIL to see if someone is paying their taxes?
Happy Halloween!

Tara

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-14337

41 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 31, 2003

Hon. Dean G. Skelos
Member of the Senate
55 Front Street
Rockville Centre, NY 11570

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Senator Skelos:

I have received your letter and the materials attached to it. A constituent, Mr. Mark Jackson of the City of Long Beach, referred to a request made pursuant to the Freedom of Information Law and that the City's Corporation Counsel "verbally recognizes and admits one of the documents [he] seek[s] does not exist", but "refuses to acknowledge that fact in writing." You have sought my views on the matter in order to respond to Mr. Jackson.

In this regard, I have spoken with Mr. Jackson concerning this and other issues. In short, I believe that the Freedom of Information Law requires that a government agency, such as the City of Long Beach, must acknowledge in writing that a record sought does not exist. Section 89(3) of that statute provides in part that, in response to a request for a record, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

I note that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], the Appellate Division did not accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search", and it was determined that a certification that records do not exist or could not be found was required to have been prepared by the person who actually conducted the search. However, that decision was overruled by the Court of Appeals in Rattley v. New York City Police Department [96 NY2d 873 (2001)]. In brief, it was held that the Freedom of Information Law does not specify the manner in which an agency must certify that records do not exist or cannot be found, and that the certification need not be prepared by the person or persons to whom a request was made or who conducted the search for the records. A certification in writing in which an agency official having the authority to do so asserts that a diligent search was made should be adequate to comply with law.

I hope that I have been of assistance. Should any questions arise regarding the foregoing, please feel to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14338

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 31, 2003

Mr. John Harris
01-A-2891
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. Harris:

I have received your letter in which you complained that various entities have not responded to your requests for "data concerning [your] bail receipt, agreement and contract." You asked for assistance in "requiring those individuals to address and respect the 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.

First, 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, private organizations and 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. I note that although other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable. When seeking records from a state supreme court, it is suggested that a request for records be made to the clerk of the court, citing §255 of the Judiciary Law as the basis for the request.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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.

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-14339

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 3, 2003

E-Mail

TO: Hugh Gershon [redacted]

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gershon:

I have received your letter in which you questioned the propriety of fees ranging from twenty-five to fifty dollars for copies of certificates of occupancy.

From my perspective, assuming that copies of existing certificates of occupancy are requested, an agency can charge no more than twenty-five cents per photocopy.

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., 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, unless a fee of higher than twenty-five cents per photocopy is authorized by a statute other than the Freedom of Information Law, I do not believe that an agency may charge a fee in excess of that amount. Further, I know of no such other statute that would permit an agency to charge to more than twenty-five cents per photocopy in response to requests for certificates of occupancy.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14340

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 3, 2003

Mr. Joseph Spina
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Spina:

I have received your letter in which you requested an advisory opinion concerning a request made under the Freedom of Information Law to the Charlotte Valley Central School District.

According to your letter, allegations were made concerning the consumption of alcoholic beverages by District administrators and chaperones during a senior prom. In response to the allegations, the Board of Education retained an investigator, who submitted his findings to the Board. Your request for the investigator's report was denied because "it is not a final agency document" and "it is covered by attorney-client privilege."

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, it is likely that three of the grounds for denial of access are pertinent to an analysis of rights of access.

First, it appears that the investigator is an attorney, and if that is so, it is possible, depending on the nature of the tasks performed and the content of the report, that the report might justifiably be withheld in whole or in part. The first ground for denial, §87(2)(a), enables an agency to withhold records that are "specifically exempted from disclosure by state or federal statute." One such statute, §4503 of the Civil Practice Law and Rules (CPLR), codifies the attorney-client privilege. In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Without additional information concerning the nature of the report, its contents and the purpose for which it was prepared, I cannot advise with certainty as to whether or extent to which the attorney-client privilege might properly have been asserted.

Second, that report is not a "final agency document" is not in my view determinative of rights of access. However, that kind of contention has been raised in relation to another exception, §87(2)(g), which pertains to internal communications between and among government officials and to communications between government agencies and consultants retained by those agencies. It is assumed that the investigator may be characterized as a consultant and that §87(2)(g) is applicable.

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, 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).
>
> "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, and the possibility.

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 does not represent "a final agency document" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" (id., 276-277).

The third exception of likely significance is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the

performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

If there was no determination to the effect that a public employee engaged in misconduct, I believe that a denial of access based upon considerations of privacy would be consistent with law. Again, conversely, while the report in question might be withheld in whole or in part in consideration of the factors discussed in the preceding commentary, a final determination indicating a finding of misconduct, or an admission of misconduct, would, in my opinion, be accessible under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jerome J. Zack

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14341

41 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 3, 2003

Mr. Steven DeCapua
89-C-0502
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403-3600

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. DeCapua:

I have received your letter in which you explained your difficulty in obtaining your medical records under the Freedom of Information Law from the "Medical Group of Western New York."

In this regard, it is noted that the Freedom of Information Law is applicable to "agency" records, and §86(3) of that statutes defines the term "agency" to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, 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 a private organization, such as the "Medical Group of Western New York."

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-14342

41 State Street, Albany, New York 12231
(518) 474-2518
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November 3, 2003

Mr. Clarence Cobo
99-A-4273
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cobo:

I have received your letter in which you asked for assistance in obtaining records from various federal and city agencies that have not responded to your "FOIL/PA 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, I offer the following comments.

First, it is noted that the federal Freedom of Information and Privacy Acts (5 U.S.C. §§552 and 552a) apply only to federal agencies. This office oversees the implementation of the New York Freedom of Information Law and has neither the authority nor the expertise to offer guidance on matters concerning those laws.

Second, with respect to your requests sent to a variety of city entities, 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."

Based on the foregoing, the Freedom of Information Law applies to records of entities of state and local government in New York. It does not apply to private organizations.

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

FOIL-AO-14343

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November 3, 2003

Mr. John R. McPhillips
President
Unit 9200
CSEA Local 860
112 E. Post Road - 4th Floor
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 information presented in your correspondence.

Dear Mr. McPhillips:

I have received your letter concerning a request for records that have been made available in the past by the Westchester County Finance Department. Most recently, however, you were apparently informed that the records at issue are no longer maintained by the Department.

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."

In a related vein, and I am not suggesting that they apply, §89(8) of the Freedom of Information Law and §240.65 of the Penal Law include essentially the same language, and the latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure

of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record after having made a diligent search.

Lastly, based on a decision rendered by the Court of Appeals, the state's highest court, I believe that time and attendance records, including those portions indicating the use and category of leave time, are accessible under the Freedom of Information Law [Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562 (1986)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-14344

From: Robert Freeman
To: [redacted]
Date: 11/5/2003 9:54:15 AM
Subject: Dear Bob and Sue:

Dear Bob and Sue:

I have received your inquiry involving your ability to gain access to "the judgments made by a NYS Supreme Court Justice in Buffalo for the past 9 years."

You are correct in your understanding that the Freedom of Information Law is inapplicable in the context of your question. In short, that statute excludes the courts from its coverage. However, I believe that a standard present in that statute is pertinent in determining whether or the extent to which you may gain access to the records of your interest.

Section 89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. It has been held that whether or the extent to which that standard is met is often dependent on the nature of an agency's filing or recordkeeping systems. Although the records in question may be available to the public, if they not filed or retrievable by means of a judge's name, for instance, there may be no way of locating the records except by reviewing thousands of documents individually. There likely have been several Supreme Court judges in Erie County over a period of nine years. Assuming that "judgments" (a term that may be subject to a variety of interpretations) are filed chronologically, by case name, or by docket or index number, for example, rather than by means of a judge's name, there would be no easy or efficient means of locating and retrieving the records. On the other hand, if there is an index, manual or electronic, that permits the retrieval of judgments on the basis of a judge's name, the process may be relatively simple.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
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STATE OF NEW YORK
DEPARTMENT OF STATE
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November 5, 2003

Mr. William A. Hurst
McNamee, Lochner, Titus
& Williams, P.C.
P.O. Box 459
Albany, NY 12201-0459

The staff of the Committee on Open 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:

I have received your letter and the materials attached to it. You indicated that Ms. Karen Deyo, a member of the Greene County Legislature, has asked the Association for Efficient Government (AEG), which appears to be your client, to seek an advisory opinion from this office concerning compliance with the Freedom of Information and Open Meetings Laws by the Greene County Industrial Development Agency (IDA).

The initial issue that you raised relates to Ms. Deyo's requests made under the Freedom of Information Law from March to June. Some of the records were made available promptly; others were missing from the category of those provided or simply not disclosed. I use the phrase "not disclosed" because the IDA has not suggested that the records would be withheld in accordance with any ground for denial of access appearing in §87(2) of the Freedom of Information Law. In most instances, the receipt of the requests was acknowledged and Ms. Deyo was informed by the records access officer for the IDA that he "expect[ed] to be able to respond to [her] request within ten (10) business days." When more than ten business days had passed, Ms. Deyo appealed, contending that her requests had been constructively denied. The attorney for the IDA wrote to her, indicating that due to the volume of the request and the small size of the IDA's staff, two persons, the records would be available within sixty to ninety days of the date of his responses. He added that he did not believe that the delays in disclosure constituted a constructive denial of access. As of the date of your letter to this office, more than ninety days had passed since the IDA attorney's response, and the IDA, in your words, "has still neither produced the requested records nor denied the FOIL requests."

You have questioned "the propriety of the...4-6 month delay." In consideration of the nature of the request, the expressed intent of the Freedom of Information Law, and judicial decisions, I believe that Ms. Deyo's requests that have not resulted in any determination to grant access to or withhold the records may be characterized as having been constructively denied.

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.

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, the advice rendered by this office was confirmed in Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), in which 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, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, or if the estimated date is unreasonable, 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."

I point out, too, that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

While I am not suggesting that such a step be taken, one court found in a similar circumstance that the person seeking the records could initiate an Article 78 proceeding. In a situation in which the applicant met with a series of delays and extensions, the court found 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)."

In the situation that you described, the applicant was initially informed that the request would be granted or denied within ten business days of the date of acknowledgment. Then, following a contact by the applicant contending that the request was constructively denied, the IDA's attorney disputed that claim and extended the time for response another sixty to ninety days. And again, even though that period has expired, the applicant still has neither been granted nor denied access to many of the records sought.

From my perspective, there is little about the items requested that could be characterized as complex. In a small agency, I would conjecture that locating and retrieving the records would not be an onerous task. I am mindful of the difficulties involved in having a small staff; this office has a staff of three, including myself. Nevertheless, we respond annually to approximately 7,000 telephone and hundreds of email inquiries, prepare more 800 written advisory opinions and provide dozens of presentations before organizations of all kinds. While I am somewhat sympathetic, I believe that the delays and extensions encountered by the applicant cannot be justified and that the outstanding requests may be considered to have been constructively denied.

Your remaining questions relate to the sufficiency of minutes of IDA meetings and the description and substance of executive sessions.

With respect to the detail reflected in the minutes, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents. Specifically, §106(1) states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Based on the foregoing, at a minimum, minutes of open meetings must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. Having reviewed the minutes that you enclosed, it appears that their contents are consistent with the standard imposed by §106(1).

The motions for entry into executive session are, however, in my view, inadequate. Moreover, it is questionable whether or the extent to which the executive sessions were properly held.

Prior to entry into an executive session, the Open Meetings Law requires that a procedure be accomplished, during an open meeting. Section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

You referred to executive sessions held to discuss "personnel issues", "legal issues", and "contracts" or "contract negotiations."

I emphasize 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 <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. Matters of policy that affect personnel, consideration of the budget or the creation or elimination of positions, for example, typically cannot validly be considered in executive session.

It has been advised that a motion describing the subject to be discussed as "personnel" or in a similar manner 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)]

With respect to "legal issues", nearly anything discussed by a public could involve a legal issue, and the exception most related to that kind of phrase is §105(1)(d), which 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 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 my view, only to the extent that a public body discusses its litigation strategy could an executive session be properly held under §105(1)(d).

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].

Next, the only direct reference in the Open Meetings Law to "contract negotiations" pertains to collective bargaining negotiations. Specifically, §105(1)(e) permits a public body to enter into executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article Fourteen of the Civil Service Law is commonly known as the "Taylor Law", and it deals with the relationship between public employers and public employee unions. In short, not all negotiations involve collective bargaining, and the application of §105(1)(e) is limited. I point out that the §105(1)(f), which was discussed in detail earlier, may be applicable in relation to matters involving the contracting or negotiation process, for it includes reference, for instance, to discussions involving the financial or credit history of a "particular person or corporation".

Lastly, in several requests, Ms. Deyo expressed the belief that "as a member of the Greene County Legislature, it is [her] right as an elected public official to receive this information without any fee." Unless there is some local enactment or rule that confers such a right upon her, I do not believe that she would be entitled to a waiver of fees for copies. It has been advised that when a member of a public body seeks records under the Freedom of Information Law unilaterally, absent direction or approval provided by a majority of that body, he or she is acting, in essence, as a member of the public. In that capacity, I believe that he or she may be treated in the same manner as a member of the public, and that an agency may assess the appropriate fees for copies of records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Karen A. Deyo
Alexander Mathes, Jr.
Willis Vermilyea
Paul J. Goldman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 5, 2003

Scott F. Chatfield, 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. Chatfield:

I have received your letter in which you questioned the extent to which the attorney/client privilege may be asserted as a basis for excluding the public from meetings and withholding records of a town zoning board of appeals.

First, with respect to the Open Meetings Law, 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, and 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 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. In the context of the situation that you described, it does not appear that any basis for entry into executive session would be or have been pertinent or applicable.

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 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.

With regard to the assertion of the attorney-client privilege, relevant 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, and legal advice may be requested even though litigation or possible litigation is not an issue. In that instance, while the litigation exception for entry into executive session [see §105(1)(d)] 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 stops 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.

While it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies. In the case of the latter, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. It has been suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to an executive session.

Second, as the matter relates to the Freedom of Information Law, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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/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. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

I believe that the same kinds of considerations are pertinent in relation to determining the application of the privilege in relation to the Freedom of Information Law as those discussed in relation to the Open Meetings Law. In short, the communication from the attorney must involve the rendition or use of legal expertise, a service that could be rendered only by an attorney, in order to assert the attorney/client privilege.

Even if the letters in question are not subject to the attorney/client privilege, a different exception would in my view be relevant. Section 87(2)(g) authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
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November 6, 2003

Ms. Bonnie Barkley
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Barkley:

I have received several communications from you, as well as a variety of related materials.

By way of background, you wrote that you have been a substitute teacher in the Penn Yan Central School District for several years, but that your services were terminated one week after incurring a work related injury, apparently in May of 2002. This year you were elected to the Board of Education and took office in July. Since you filed your petition to seek to run for the Board, you indicated that the Superintendent and two board members "have made things difficult" for you and attempted "to discredit [you] and cast [you] in a negative light in the public eye." Further, your request made under the Freedom of Information Law was apparently denied, and you learned that the District does not have an appeals officer. According to your letter:

> "They held a Foil Hearing in reference to [your] request on September 15th in the School District Office. They made this meeting Public. This meeting should not have been made public. This was an illegal meeting. They divulged very private, personal, privileged and confidential information at this meeting. They released [your] medical information and work related injuries in this meeting. They gave out information about [your] work history with the school district, they supplied information about the complaints [you] filed against the school district. They gave FALSE, incorrect, inaccurate, and misleading information to the media. Two straight weeks, two local newspaper printed false information in news articles that was given to them by the Superintendent of the Penn Yan Central School District. This was done to force [you] to resign from [your] position on the BOE. This is libel, slander, invasion of [your] privacy,

> defamation of character. They have ruined [your] reputation, and future employability. The FOIL Hearing should have only had information related to the FOIL request."

In consideration of the foregoing, you have sought assistance, and in this regard, I offer the following comments.

First, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation is the Board of Education. That being so, the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

When a request is denied, it may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee state that:

> "(a) The governing body of a public corporation...shall hear appeals or shall designate a person...to hear appeals regarding denial of access to records under the Freedom of Information Law.

In consideration of the foregoing, I believe that a board of education has general responsibility concerning the implementation of the Freedom of Information Law in a school district and that the Board may determine appeals or designate a person to do so on its behalf.

Second, with respect to the disclosures of information pertaining to you, 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. 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, with or without identifying details, 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 characterized as "confidential", it is unlikely that there is a bar regarding disclosure. 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 Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

In the context of the situation that you described, with one possible exception, I do not believe that the Board or the District would have been prohibited from disclosing information pertaining to you. If the information was false and you consider it to have been slanderous or libelous, there may be legal avenues available to you to seek redress. I cannot, however, offer advice in that realm. Otherwise, again, with the exception of the matter to be discussed in the ensuing

remarks, neither the Open Meetings Law nor the Freedom of Information Law would have forbidden disclosure.

You referred to the disclosure of "medical information" by the District. While the meaning of the quoted phrase is unclear, I note that §18 of the Public Health Law pertains to patient information. In brief, that statute generally provides the subjects of patient information with rights of access to the information; concurrently, it authorizes disclosure in limited circumstances; disclosure to the public at large would not be among them, unless the subject of the information consents to disclosure. The phrase "patient information" is defined to include:

> "...any information concerning or relating to the examination, health assessment including, but not limited to, a health assessment for insurance and employment purposes or treatment of an identifiable subject maintained or possessed by a health care facility or health care practitioner who has provided or is providing services for assessment of a health condition including, but not limited to, a health assessment for insurance and employment purposes or has treated or is treating such subject..."

As I understand §18, if patient information falling within the coverage of that statute was disclosed without the consent of the patient, the person or entity that engaged in the disclosure would have failed to comply with law. To obtain additional information on the subject, it is suggested that you contact the Access to Patient Information Program, NYS Department of Health, Hedley Park Place, Suite 303, 433 River Street, Troy, NY 12180.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Gene Spanneut
Marc H. Reitz

FOIL-AO-14348

From: Robert Freeman
To: [redacted]
Date: 11/10/2003 7:53:28 AM
Subject: Dear Ms. Nichols:

Dear Ms. Nichols:

I have received your letter in which you indicated that you "filed a FOIL request for a duplicate copy of the tape recording of a small claims proceeding." The judge denied the request, indicating that "courts are not subject to FOIL."

The judge is correct; the courts are beyond the coverage of FOIL. However, other statutes pertain to court records, and in general, unless court records have been sealed or are confidential by statute, they must be made available upon payment of the proper fee. The general law dealing with access to court records is §255 of the Judiciary Law, which requires court clerks to search for and make available copies of court records. If the court in question is a town or village justice court, §2019-a of the Uniform Justice Court Act requires that records of those courts be made available, unless a separate statute applies that retricts rights of access.

It is suggested that you resubmit your request, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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November 10, 2003

Mr. David Brooks
89-A-4087
P.O. Box 4000
Stormville, NY 12583-0010

Dear Mr. Brooks:

I have received your letter and, as requested, have enclosed a copy of the supplement to the latest report of the Committee on Open Government.

With respect to your question, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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, 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, although the supplement is being made available at no charge, please note 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 [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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November 10, 2003

E-Mail

TO: Christine Hogan <cmh1@westchestergov.com>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Hogan:

I have received your letter in which you indicated that you were the victim of a crime and would like to "get a copy of the 911 call [you] made" in order to seek an order of protection.

In this regard, a request should be made to the police department that maintains the record. Whether a tape recording or transcript of your call must be disclosed would be dependent on the nature of the police department. In general, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant 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."

Based on the foregoing, "records...of calls" means either a recording or a transcript of the communication between a person making a 911 emergency call, and the employee of the municipality who receives the call. Records of that nature are, in my view, exempted from disclosure by statute.

I note although the term "municipality" most often would include a town, city or village, that is not so in this context. Section 301 of the County Law contains a series of definitions for application in Article 6, and subdivision (1) defines "municipality" to mean "any county except a county wholly contained within a city and any city having a population of one million or more persons." That being so, §308(4) applies only to counties outside of New York City and does not apply to a city, town or village police department.

If §308 does not apply because the 911 call was made to a police department other than a county agency, the Freedom of Information Law governs rights of access. In that event, since you could not invade your own privacy, I do not believe that there would be any basis for withholding the record in question from you.

Lastly, even if §308 of the County Law is applicable, I do not believe that §308(4) can 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.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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November 13, 2003

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 Sir/Madam:

I have received your letter concerning your inability to receive information from a village. You indicated that you have asked questions at meetings and in writing, but that Village officials have not responded.

In this regard, first, there is no obligation on the part of village or other government officials to answer questions at meetings. They may choose to do so, but there is no requirement that they must. Similarly, I note that the title of the Freedom of Information Law may be misleading, for that statute is a vehicle under which any person may request existing records. Further, §89(3) of the Law indicates that a government agency, such as a village, is not required to create records in response to a request for information. Therefore, the Village is not required to prepare a new record in order to answer your questions.

In the future, it is suggested that you seek existing records and that you transmit any request for records to the Village's "records access officer." The records access officer has the duty of coordinating an agency's response to requests. In most villages, the clerk is so designated. I note, too, that the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records.

Second, when a proper request is made, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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:jm

FOIL-AO- 14352

From: Robert Freeman
To: [redacted]
Date: 11/14/2003 3:44:24 PM
Subject: Dear Ms. Cunningham:

Dear Ms. Cunningham:

I have received your letter concerning your attempt to develop statistical information pertaining to the height and weight of children in Geneva in order to calculate the "Body Mass Index" of students. You have asked whether there are "any legalities" concerning the collection of the data and stressed that you "plan to keep the whole process completely anonymous."

In this regard, the most significant provision of law to consider is the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). In brief, that statute provides parents of minor students with rights of access to records maintained by or for an educational agency that pertain to their children. Concurrently, it prohibits the disclosure of personally identifiable information pertaining to a student without the consent of a parent.

In consideration of FERPA, I do not believe that you or your colleagues would have the ability to weigh and measure students without parental consent. If you were to conduct those activities, the students' identities would in many instances be made known, and again, that being so, parental consent in my view would be necessary. If, however, weighing and measuring the students is conducted by the school district, and if the data is made available in a manner in which a student's identity would not, in the words of the federal regulations, be "easily traceable", FERPA would not serve as an impediment to your collection of the data.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-14353

From: Robert Freeman
To: [redacted]
Date: 11/14/2003 4:29:25 PM
Subject: Dear Barnbuffsoph:

Dear Barnbuffsoph:

I have received your letter and will attempt to offer clarification.

First, under the FOIL, although an agency may accept an oral request for records, it is not required to do so. Section 89(3) states that an agency may require that a request be made in writing and that the request must "reasonably describe" the records sought. Second, again, FOIL pertains to existing records, and it does not require an agency to supply information by answering questions. Similarly, agency is not required to create a record in response to a request.

If, for example, an applicant wants to know the total spent to heat the town hall last year, and there is no record that reflects a total, the town would not be obliged to review its records and prepare a total. If, however, the applicants seeks the bills indicating payments for heat, the bills, individually, would clearly be available, and the applicant could prepare his/her own total.

In short, a request should involve existing records rather than "information."

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14354

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November 19, 2003

Mr. Ernest Hutchins
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hutchins:

I have received your letter and apologize for the delay in responding. It was misplaced and only recently found.

You referred to the absence of responses to your requests for records of the Town of Colton. In this regard, I offer the following comments.

First, in consideration of your requests, I note that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create a record in response to a request.

One of your requests involves "the Town of Colton's deliberations" concerning the opening of certain roads. If there are records, i.e., tape recordings or transcripts of "deliberations", those materials would constitute "agency records" subject to rights conferred by the Freedom of Information Law. If, however, no such records exist, the Freedom of Information Law would not apply.

Second, insofar as records sought exist, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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: Town Board
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14355

41 State Street, Albany, New York 12231
(518) 474-2518
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November 19, 2003

Mr. Allen Valerio
03-A-0441
Adirondack Correctional Facility
P.O. Box 100
Raybrook, NY 12977-0110

Dear Mr. Valerio:

I have received your letter in which you requested the "policy procedures of the New York City Police Department" or the table of contents of the Department's manual."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have possession or control of records generally, and we do not possess the records of your interest.

When seeking records, a request should be made to the "records access officer" at the agency that maintains the records. The records access officer has the duty of coordinating an agency's response to requests. In this instance, a request might be directed to the Records Access Officer, New York City Police Department, FOIL Unit, One Police Plaza, New York, NY 10038.

It is also noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records. It is suggested that you attempt to describe in greater detail the nature of the "policy procedures" or manual of your interest.

I hope that I have been of assistance..

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3707
FOIL-AO-14356

41 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 19, 2003

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, unless otherwise indicated.

Dear Ms. O'Bradovich:

I have received your correspondence of October 10. In the first, you sought an opinion concerning compliance with the Open Meetings Law by the Village of Tuckahoe Board of Trustees and whether "it is incumbent on the Village Attorney to advise the mayor and the board when and if they are in violation of the Open Meetings Law."

With respect to the duties of the Village Attorney, your question is beyond the authority or jurisdiction of the Committee on Open Government. In short, although this office is permitted to offer advice and opinions pertaining to the Open Meetings and Freedom of Information Laws, it has no authority to do so in relation to the conduct of a municipal attorney.

As your remarks pertain to the Board of Trustees and its meetings, you wrote that:

> "By local law, this meeting is held on the first Tuesday of the month at 8:00 PM. For the last few months, on the night of this monthly meeting the mayor and the full board have met in the mayor's office to conduct Village business before convening the televised meeting at 8:00 PM. There are usually members of Village staff in attendance as well...
>
> "The last time this occurred was Tuesday, October 7. Some residents who arrived early came upon this 'pre-meeting' while it was in progress. One resident inquired if it was open to the public. The mayor and one trustee said no, another trustee said yes, the Village Attorney and the rest of the trustees did not respond. The resident was permitted to observe the end portion of the meeting, noting that the discussion covered agenda items for the 8:00 televised meeting. Later

> that evening the resident questioned a Village staff member about this 'pre-meeting' practice and was told that 'they always do it'."

In an effort to learn more of the matter, I contacted the Village Attorney, who described the situation somewhat differently. He wrote as follows:

> "By Village Code & resolution the Tuckahoe Village Board meets on the second MONDAY of the month not Tuesday as noted in the O'Bradovich note. The meetings are noticed for 8 PM & as you know people don't just materialize & start a meeting at 8 PM. Normally, the Mayor, Trustees & staff gather in the Mayor's office while waiting for all Board members to arrive. While waiting they sometimes go through the agenda or discuss who will introduce items on the agenda or may add items to the agenda. They have occasionally stayed in the office until after 8 PM while waiting for a quorum to arrive. The door to the office is left open & members of the public have walked in & sat down on chairs around the room.
>
> "If they do plan to really 'meet' before an 8 PM scheduled Board meeting, proper notices are posted. They have done this a few times at 7 PM or 7:30 PM as those times are convenient for Westchester County Planning Dept. representatives and the Village's labor counsel.
>
> "Please note that both the Mayor & I believe that Ms. O'Bradovich's characterizations of the conversations are inaccurate and that no mention of excluding the public prior to 8 PM was made on October 7, 2003."

In consideration of the foregoing, the pertinent provision, in my view, is §102(1) of the Open Meetings Law, the definition of the term "meeting." A meeting is a gathering of a majority of a public body for the purpose of conducting public business, collectively, as a body. Unless and until a quorum is present, a gathering does not constitute a "meeting" and the Open Meetings Law would not apply. If there is an intent to convene and conduct public business as a body, and if a quorum is present, any such gathering in my opinion would constitute a meeting, and I believe that notice of the time and place would be required to be given in accordance with §104 of the Open Meetings Law. The Village Attorney indicated that when there is an intent on the part of the Board to convene, as a body, to conduct public business prior to 8 p.m., i.e., "if they do plan to really 'meet' before an 8 PM scheduled meeting", notice is given.

Assuming that the Village Attorney's description of events and actions is accurate, it does not appear that the Open Meetings Law was contravened.

Your second letter pertains to the implementation of the Freedom of Information Law by the Village, whether records must be "FOILed" in every instance, and whether the Village may treat its residents differently when responding to requests for records.

In this regard, as a general matter, the Freedom of Information Law does not distinguish among applicants for records. The courts have held, in short, that records accessible under the Freedom of Information Law should be made equally available to any person without regard to one's status or interest [see Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976); see also M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)].

Second, although the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) authorize agency staff to accept oral requests, there is no statutory requirement that they do so. Section 89(3) of the Freedom of Information Law provides in part that an agency may require that a request be made in writing. Further, since the Freedom of Information Law pertains to all agency records [see definition of "record', §86(4)", an agency may require written requests in relation to any or all agency records.

I note too, that an agency may but need not accept requests transmitted via fax machine or email. Specifically, §5(1) of the State Technology Law provides that:

> "In accordance with rules and regulations promulgated by the electronic facilitator, government entities are authorized and empowered, *but not required*, to produce, receive, accept, acquire, record, file, transmit, forward, and store information by use of electronic means" (emphasis added).

Based on the foregoing, an agency may choose to accept a request under the Freedom of Information Law made by means of fax or email, but as indicated above, it is "not required" to do so. Similarly, §105(1) specifies that an agency would not be required to "transmit" records via fax or email sought under the Freedom of Information Law.

Lastly, as inferred earlier, the Committee on Open Government has promulgated regulations that govern the procedural aspects of the Freedom of Information Law pursuant to §89(1). In turn, §87(1) requires the governing body of a public corporation, such as a village, to promulgate similar rules and regulations consisting with those adopted by the Committee and consistent with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Les Maron, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14357

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 19, 2003

Mr. Peter M. Rayhill
Counsel
Oneida-Herkimer Solid Waste Authority
1600 Genesee Street
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, unless otherwise indicated.

Dear Mr. Rayhill:

I have received a copy of your letter of October 21 addressed to Ms. Sandra Richards, Ava Town Clerk, concerning a request made under the Freedom of Information Law. You wrote that "[[b]y copy of this letter", you sought my assistance concerning the Town's duty to comply with the Freedom of Information Law.

Following the receipt of your letter, I contacted Ms. Richards on October 28 for the purpose of offering guidance. At that time, she indicated that the records sought were being gathered for the purpose of being disclosed.

Although the responsibility to respond to requests in a timely manner was discussed, for future reference and for the purpose of clarity, 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)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be sent to Ms. Richards.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Sandra Richards

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14358

41 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 19, 2003

Mr. Hans Carlson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Carlson:

I have received your letter in which you referred to real property transfer records and cited §574(1) of the Real Property Tax Law. That provision states that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall be made available for public inspection or copying in accordance with rules promulgated by the state board."

You asked whether it is "possible the Legislature intended that records concerning sales price shall be made available for public inspection and copying."

From my perspective, it is not only possible; it is clear that the Legislature so intended. Until 1994, the same provision stated that those records were available in limited circumstances. However, an amendment that went into effect on July 1 of that year specified that those records are available for public inspection and copying.

I note, too, that §89(6) of the Freedom of Information Law states that nothing in that statute can be asserted to deny access to records that are available under a different provision of law. Stated differently, the records described in §574(5) of the Real Property Tax Law are accessible to the public, notwithstanding the provisions 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-14359

41 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, 2003

Mr. Robert J. Spence
Spence & Davis, LLP
666 Old Country Road, Suite 300
Garden City, NY 11530

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Spence:

I have received your letter and the materials attached to it. You wrote that you represent COMPS, Inc., which requested a copies of assessment records and inventory data from the Nassau County Department of Assessment and offered to pay a fee based on the standard appearing in §87(1)(b)(iii) of the Freedom of Information Law, the actual cost of reproduction. However, you were informed by the Department that it "must abide by Ordinance #570-1990 for the fees it is charging", which, as I understand the matter, would result in a charge of more than ten thousand dollars for the records sought.

In this regard, based on the legislative history of the Freedom of Information Law and its judicial interpretation, I believe that the Department is bound by that statute, not the County ordinance.

By way of background with respect to fees, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy or the actual cost of reproduction unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute',

> thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it was confirmed judicially more than a decade ago that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. The most recent decision on the matter involved a provision in the Suffolk County Code that established a fee of twenty dollars for photocopies of police reports [Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS2d 214, 226 AD2d 339 (1996)]. The Appellate Division, Second Department, unanimously determined that the provision in the County Code was invalid. In short, it was determined an enactment of a municipal body is not a statute, and the County was restricted to charging a fee of twenty-five cents per photocopy for the records at issue.

Based upon the foregoing, a fee for reproducing electronic information generally would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or compact disk) to which data is transferred.

Lastly, it is noted that although compliance with the Freedom of Information Law involves the use of public employees' time and other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James Davis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14360

41 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, 2003

Mr. Michael A Kless
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kless:

With respect to your letter concerning the nature of mail delivery of records sought under the Freedom of Information Law, as suggested in previous correspondence, if you provide a stamped self-addressed envelope to an agency with the proper postage, it would be unreasonable, in my view, for the agency to choose a different means or vehicle for sending the records to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14361

41 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, 2003

Mr. F. Lawrence Coon
[redacted]

Dear Mr. Coon:

I have received your letter concerning a "FOIL request" for a copy of an "audio tape of a trial" conducted in the Town of Richmond Justice Court. When you were told that a transcript of the proceeding would be available upon payment of $5.25 per page, you requested a copy of "the actual tape", but the clerk refused the request. You have questioned the "legality" of that response.

In this regard, it does not appear that the Freedom of Information Law would apply in the situation that you described. That statute pertains to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

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, fees, etc.) would not ordinarily be applicable.

With respect to fees for copies of court records, the statute that deals generally with that subject is §255 of the Judiciary Law, which states that:

> "A clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed by a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts, or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

To obtain additional information concerning the fees that may be charged by a county clerk for a similar service, it is suggested that you contact the office of your county clerk or the Office of Court Administration.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rose Mary K. Luther

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14362

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 21, 2003

Mr. Fred J. Pirelli
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pirelli:

I have received your letter in which you complained with respect to delays in the disclosure of records by the Village of Newark and asked that its "administration be brought into compliance with the FOIL law."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law; it is not empowered to compel an agency, such as a village, to disclose records or comply with law. It is our hope, however, that opinions rendered by this office are educational and persuasive and that they serve to enhance compliance with law. With those goals, I offer the following comments.

As you suggested, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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)].

In a judicial decision 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."

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
John T. Trickey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14363

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November 21, 2003

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.

Dear Mr. Nolen:

I have received your letter in which you asked whether the following request made to a county clerk would "comply with the requirements of specificity" imposed by the Freedom of Information Law:

> "...records that exist in your office [] county clerk which are kept and maintained on computer that relate to any judgments, liens, assumed business name certificates, pistol permits, and any other records (as that term is defined in the New York State Freedom of Information Law) which are contained on compute [sic]."

In consideration of a request of that nature, you wrote that "[t]he very narrow issue is, can a requestor request copies of any and all records which are contained on a computer of a county clerk (forgetting about fees, exemptions, etc which is a separate issue) and does such a request 'reasonably define' a record sufficient for the agency to comply."

In this regard, the Freedom of Information Law does not require that an applicant for records must refer to "specific" records when making a request. Section 89(3) of that statute states that an applicant must "reasonably describe" the records sought." From my perspective, it is doubtful that a court would determine that your request meets that standard. A computer, as you are aware, may and often does contain a variety of records, information, data and e-mail concerning an array of subjects. In many instances, various aspects of the contents of those materials may be deniable under the Freedom of Information Law or perhaps other statutes. I would conjecture that a court would determine that a request for the contents of a computer or of all the computers used in the office of a county clerk is not a request for records and that it does not reasonably describe a record or record series.

The decision that appears to be factually most similar to the hypothetical request to which you referred involved a "massive" request denied by the New York City Department of Health in which the court sustained the agency's denial of the request, finding that it "transcends a normal or routine request by taxpayer" (Fisher & Fisher v. Davison, Supreme Court, New York County, October 6, 1988).

In my view, your hypothetical request would essentially involve all of the records maintained by a county clerk; it would be equivalent to a request for all the books in a library. That being so, in short, I do not believe that a request for all of the information stored within a computer is, in actuality, a request for a record or records or that it would reasonably describe records in a manner envisioned in by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-14364

From: Robert Freeman
To: mcintoshj@uhls.lib.ny.us
Date: 11/26/2003 8:22:22 AM
Subject: Dear Ms. McIntosh:

Dear Ms. McIntosh:

I have received your inquiry. The regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) indicate that the public should have the ability to request and gain access to records during "regular business hours", i.e., 9 to 5 on weekdays. I do not believe that requests made under the Freedom of Information Law for the business/administrative records of a library must be honored during all hours the library is open. Again, doing so during regular business hours would, in my view, be consistent and in compliance with law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14365

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November 26, 2003

Mr. John Bly
[redacted]nue
[redacted]

The staff of the Committee 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. Bly:

I have received your correspondence and the materials attached to it. In addition, the Division of State Police separately forwarded copies of your appeal and its determination as required by §89(4)(a) of the Freedom of Information Law.

You have characterized your letter to the Committee on Open Government as an "appeal" following a denial of your administrative appeal by William J. Callahan of the Division of State Police. Your request involved two reports prepared by the State Police, one of which was prepared pursuant to an order issued by Governor Dewey in 1953 concerning the death of John Acropolis, a Westchester County labor leader in 1952; the other consists of findings relating to the matter prepared at the request of the Westchester County District Attorney in 1956. Although three pages of documentation were provided, the remainder of the records sought were withheld. Mr. Callahan wrote that the records:

> "...would constitute an unwarranted invasion of personal privacy of others concerned if they were disclosed. These records were compiled for law enforcement purposes and would interfere with a law enforcement investigation if they were disclosed. Additionally, these records are considered to be inter-agency material for which an exemption is provided."

You suggested to the Division that personally identifying details might be deleted prior to disclosure in order to protect privacy and contended no law enforcement agency "is currently and actively investigating this fifty-one year old murder case." To bolster that point, you referred to a passage found in the materials made available stating that:

> "Inasmuch as no additional requests for assistance have been made by either the District Attorney's Office or the Yonkers Police Department; title case is being closed with assistance rendered."

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to provide advice and opinions; the Committee is not empowered to determine appeals or compel an agency to grant to deny access to records. While the ensuing remarks are advisory and not binding, it is our hope that they will encourage the Division of State Police to reconsider its determination. With those goals, 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, 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)" [Gould v. New York City Police Department, 89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), one of the exceptions referenced 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 Division of State Police has engaged in a denial of access in a manner which, in my view, is likely inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the Division for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

With respect to the nature of the records sought, it appears that they clearly were compiled for law enforcement purposes and that §87(2)(e) is pertinent. That provision authorizes an agency to withhold records that:

> "...are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;"

In view of the fact that more than fifty years have passed since the murder, it is inconceivable that significant aspects of thee records relating to the murder would, if disclosed, interfere with an investigation. That is particularly so if indeed no investigative activity has recently occurred or is

in any way ongoing. The less such activity has recently occurred, the less is the ability, in my view, to contend that disclosure would interfere with an investigation. If the case has effectively been closed, it might be contended that disclosure at this juncture would neither have an effect on nor interfere with the investigation.

Other grounds for denial might be relevant, even if the case is closed. For instance, as suggested by Mr. Callahan, those portions of records identifying witnesses, suspects or persons interviewed might be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)] if those persons remain alive. If they are deceased, the ability to justify a denial of access based on a claim that disclosure would result in an unwarranted invasion of personal privacy, in my opinion, diminishes or disappears.

Many of the records prepared in relation to the investigation would likely fall within §87(2)(g), the provision upon which the Court of Appeals focused in Gould in its consideration of certain police reports. That exception 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 Court stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or

not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in

> the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department,89 NY2d 267. 276-277 (1996); emphasis added by the Court].

In sum, as indicated by the Court of Appeals, to comply with the Freedom of Information Law, I believe that the Division of State Police is obliged to review the records sought to determine with portions may be withheld with justification and in a manner consistent with law. In an effort to encourage the Division to do so, a copy of this opinion will be forwarded to Mr. Callahan.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William J. Callahan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 26, 2003

Mr. Anthony Casale
Thurston, Casale & Ryan, LLC
6715 Joy Road
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. Casale:

I have received your letter of October 27 and the materials attached to it. It appears that you have received inconsistent responses from municipalities in relation to your requests for "GIS data" and the fees they seek to charge for duplicating and disclosing the data. Although you are familiar with advisory opinions rendered by this office concerning the issue, you have sought "a decision...from the State level [that] would relieve the current repetitive process which is to inquire/debate with every different municipality regarding the applicability of releasing or fair pricing of similar GIS data."

In consideration of your goal, it is noted at the outset that the Committee on Open Government is not empowered to render a "decision" that is binding on agencies. The Committee is authorized to render advisory opinions, and it is our hope that they are educational and persuasive, and that they serve to enhance compliance with and understanding of the Freedom of Information Law. As a means offering general guidance and statements of principle, I offer the following comments.

First, the Freedom of Information Law includes all municipal records within its coverage, including information stored or maintained electronically. Specifically, §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it constitutes a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes 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.

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 the creation of 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, particularly if that effort involves less time and cost to the agency than engaging in manual deletions, I believe 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).

Also 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, 729 NYS2d 379 (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" (id., 380).

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" (id., 381).

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" (id., 382).

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" (id., 382, 383).

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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I point out that there are numerous situations in which some aspects of a record are public, while others fall within an exception. In those instances, the agency is required to review the record in its entirety to identify those portions that may be withheld and to disclose the remainder.

It is emphasized that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals, the State's highest court, more than two decades ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate

> particularized and specific justification and, if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (id., 565-566).

As in other situations in which records are requested under the Freedom of Information Law, the contents of the records and the effects of disclosure are the key factors in determining whether or the extent to which one or more exceptions to rights of access might validly be asserted. It appears that your primary interest involves "tax map parcel data", which has long been accessible to the public, for none of the grounds for denial of access would be applicable or pertinent.

Lastly, 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, the fee for reproducing electronic information generally would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape, a disk or cd) to which data is transferred.

It is emphasized that although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 26, 2003

Ms. Cynthia Allen
[redacted]

Dear Ms. Allen:

I have received a copy of a letter addressed "To Whom It May Concern" which pertains to the propriety of a response to a request made under the Freedom of Information Law by the Code Enforcement Officer of the Town of Hastings.

In an effort to offer general guidance, I offer the following comments.

By way of background, first, §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. There is no requirement that the records access officer respond personally to every request.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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.

If any agency fails to respond to a request within five business days of the receipt of a request or to include an approximate date for response as required by §89(3) of the Freedom of Information Law, I believe that such failure may be viewed as a denial of access that may be appealed [see DeCorse v. City of Buffalo, 659 NYS2d 604, 239 AD2d 948 (1997), Newton v. Police Department, City of New York, 585 NYS2d 5, 183 AD2d 621 (1992)]. 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

cc: Mark Bombardo
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3711
FOIL-AO-14368

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November 26, 2003

Hon. Judith M. Cornick
Clerk-Treasurer
Village of Clayton
P.O. Box 250
Clayton, NY 13624

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cornick:

I have received your letter of October 30 and the attached proposed "Policies and Procedures" relating to requests made under the Freedom of Information Law, as well as the Open Meetings Law. You indicated the Village of Clayton Board of Trustees favors their adoption, but prior to taking action, you asked that I review them.

In this regard, first, your interest in compliance with open government laws is gratifying and appreciated.

Second, it is suggested that some aspects of the draft be eliminated or modified. It is suggested generally that portions of the proposal that reiterate or seek to reiterate provisions within the Open Meetings and Freedom of Information Laws are unnecessary. Moreover, should amendments to those statutes be enacted, the Village's policy and procedure would become outdated and perhaps inconsistent with law. With those considerations in mind, I offer the following comments and suggest that my intent is not be overtechnical.

Section I would define "meetings", "public body" and "executive session." Since those terms are defined in the Open Meetings Law itself, there is no need to include them in a statement of policy. Further, some elements of the definition are inconsistent with the language of the Open Meetings Law.

In Section II concerning notice, subdivision (1) indicates that notice will be "advertised" in the official newspaper. Here I point out that §104 of the Open Meetings Law requires that notice be "given" to the news media and posted. A public body is not required to pay to advertise or place a legal notice to comply with the Open Meetings Law.

Subdivision (1) of Section III is unnecessary. Again, the law itself deals with the matters expressed in that provision. Further, it might be interpreted as suggesting that "proceedings of the courts" may be closed. That is not so, even though those proceedings fall beyond the coverage of the Open Meetings Law.

In subdivision (5), there is a requirement that a person willing to address the Board must give his or her name and address. I do not believe that the privilege of speaking can validly be conditioned on providing one's name and address. Situations have arisen in which doing so (i.e., in the case of a battered spouse) might jeopardize a person's safety. To be sure, I believe that the Board may *ask* for a person's name and address; I do not believe, however, that it can *require* that information to be given.

Other than subdivision (4), it is suggested that the entirety of Section IV entitled "Executive Sessions" be eliminated, for it merely reiterates the language of the Open Meetings Law. Section VI concerning "Enforcement" should in my opinion be eliminated for the same reason.

With respect to the draft policy concerning the Freedom of Information Law, Section I should in my view be removed.

In Section II, subdivision (4) should be removed because it does not, in my opinion, clearly reflect judicial interpretations of the Freedom of Information Law.

Section III, subdivision (1) requires that "All FOIL requests must be submitted in writing." While the Village may clearly impose that requirement, it diminishes the flexibility of Village officials. I would conjecture that many requests are made verbally and honored quickly and informally, i.e., when a resident enters your office and asks to review minutes of a recent meeting. It is suggested that the policy might indicate that the Village may require that requests be made in writing, but that Village officials may in appropriate circumstances accept oral requests.

In subdivision (2) reference is made to the "Records Management Officer." That title is used in the Arts and Cultural Affairs Law. The term "records access officer" is used in the regulations promulgated by the Committee on Open Government to identify a person designated to coordinate an agency's response to requests (see 21 NYCRR Part 1401).

Section V concerning "Records Exempt from FOIL" should be eliminated. Only the State Legislature through the enactment of a statute can determine the extent to which records are exempt from disclosure.

Enclosed are copies of the regulations promulgated by the Committee on Open Government, as well as model regulations. By filling in the blanks as appropriate in the model, the Village Board can readily adopt procedures consistent with the Freedom of Information Law.

Again, I hope that you do not consider the preceding remarks to be unnecessarily critical or technical; my only goal is to offer guidance and assistance. If you would like to discuss any matter relating to the Freedom of Information Law or the Open Meetings Law, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 26, 2003

Mr. Neil Turner
[redacted]

The staff of the Committee on Open 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 sought my views concerning your request for records made to the Town of Glenville.

The request involved invoices for work performed for the Town by Spectra Engineering, P.C. ("Spectra") and the "'work product' or deliverables produced by Spectra for the Town..." Although the Town disclosed the invoices, you were informed that the "work product, or deliverables produced by Spectra are not in possession of the Town" and could be inspected at Spectra's premises. You were also told that a Spectra employee would be present while you inspect the records and that "it would be required that Spectra be reimbursed for that person's time."

It is your view that the records of your interest "should be available...under the usual FOI procedures" to residents.

In this regard, I offer the following comments.

First, the Freedom of Information Law is expansive in its scope, for it pertains to all agency records, including records maintained by a private person or entity on its behalf. 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."

Based on the foregoing, 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 that they are "agency records", even if they are maintained apart from an agency's premises. Further, the Freedom of Information Law includes records maintained on paper and electronically within its coverage.

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 more importantly, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Based on the foregoing, insofar as the records sought are maintained for the Town, I believe that the Town would be required to direct the custodian of the records, i.e., Spectra, to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you or any other applicant to the extent required by law.

Second, with respect to procedure, 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, i.e., the County, 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..."

In consideration of the foregoing, again, the records access officer must "coordinate" an agency's response to requests. Therefore, I believe that when you requested records maintained for the Town by Spectra, the records access officer should have directed Spectra to prepare copies if you wanted copies or acquired the records to enable you to inspect them at Town offices.

Lastly, when records are available in their entirety, no fee may be assessed for their inspection. When copies are requested, the Freedom of Information Law limits the fees that can be charged. Section 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)."

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 the context of your remarks, I do not believe that you or any member of the public could be charged for the time of a Spectra employee. Again, inspection of accessible records in my view should be free, and the fee for photocopies up to nine by fourteen inches cannot exceed twenty-five cents per photocopy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Linda C. Neals

FOIL-AO-14370

From: Robert Freeman
To: [redacted]
Date: 11/26/2003 1:59:33 PM
Subject: Dear Ms. Knowlton:

Dear Ms. Knowlton:

I have received your correspondence concerning access to adoption records. To clarify, it was agreed among those present at yesterday's gathering that there appears to be no judicial decision that has considered whether the confidentiality requirements imposed by section 114 of the Domestic Relations Law were intended to be prospective when they were initially enacted in 1938 or retroactive. It is noted that I also attempted to find the original statute pertaining to adoption that was enacted in 1909 without success.

Having reviewed the summaries of judicial decisions rendered in relation to disclosure, it seems clear that a court order is necessary to unseal the records, and that "good cause" must be demonstrated before a court will consider so doing. Several cases suggest that good cause can be demonstrated upon a showing of psychological trauma, medical need or religious identity crisis [see Alma Soc. v. Mellon, 601 F.2d 1225 (1979)] or when there is a realistic possibility of some genetic or hereditary factor in a person's background that might foretell a problem [Re Chattman, 57 AD2d 618 (1977)].

In short, it appears that an attempt to obtain a court order to unseal the records based on a showing of good cause would likely serve as the best or perhaps the only method of attempting to gain access.

I regret that I cannot be of greater assistance and wish you a happy holiday.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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December 1, 2003

Hon. Elizabeth A. Neville
Town Clerk
Town of Southold
53095 Main Road
Southold, NY 11971

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Ms. Neville:

I have received your note and a variety of material relating to it. You have sought my opinion concerning requests made under the Freedom of Information Law relating to an issue that has been considered by the both the Town of Southold Ethics Board and the Town Board.

One request, which was submitted by Ms. Melanie Norden, involved the original complaint filed by a named individual relative to a Town Board member, tapes of all meetings during which the complaint was discussed, and "all written decisions by any/all members" of the Ethics Board. A second request involved similar materials. You received a letter from the Secretary to the Ethics Board in which she wrote that a member of the Board advised that the persons seeking the records "may not have what is so broadly requested on their forms", and Ms. Norden has questioned the propriety of that response.

Based on a review of the materials that you submitted and discussions with Patricia Finnegan, Assistant Town Attorney, and in consideration of the unusual facts relating to the matter, I offer the following comments, some of which are intended to offer clarification and general guidance.

First, it is likely that you, not the Secretary to the Ethics Board or a member of the Board, have the authority to determine rights of access in response to a request made under the Freedom of Information Law.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the Town Board, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. If you, as the Town Clerk, have been designated records access officer, I believe that you have the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information. In addition, as you are aware, §30(1) of the Town Law indicates that the town clerk is the legal custodian of all town records. Therefore, even if records are in the physical possession of the Ethics Board or a member of the Board, I believe that you have legal custody of those records.

Second, Ms. Norden indicated in testimony that the Town Ethics Code makes no reference to the ability of the Ethics Board to conduct executive sessions, and she questioned whether the Board has the authority to do so. I do not believe that the authority to conduct executive sessions need be mentioned in the Town Code, for it exists in the Open Meetings Law. That point was, in fact, offered to the other person who requested records, Ms. Jody Adams, in an advisory opinion addressed to her in 1996, copies of which were sent to the Town Board and the former Town Attorney. To reiterate, 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."

An ethics board or committee is a creation of law, and it clearly conducts public business and performs a governmental function for a public corporation, a town. That being so, I believe that it has the same obligations as a governing body, such as the Town Board, regarding openness and the provision of notice of meetings, for example, as the Town Board, as well as the same authority to conduct executive sessions when it is appropriate to do so. Section105(1) of the Open Meetings Law specifies and limits the grounds for entry for entry into executive session.

Relevant to the duties of a board of ethics is §105(1)(f) of the Law, which permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

If the issue before a board of ethics involves a particular person in conjunction with one or more of the subjects listed in §105(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, §105(1)(f) could in my opinion be cited for the purpose of entering into an executive session.

Third, for purposes of general guidance, I note that both the Open Meetings Law and its companion statute, the Freedom of Information Law, are permissive. Under the former, a public body, such as the Town Board or the Ethics Board, *may* conduct executive sessions in accordance with §105(1) of the Open Meetings Law, but it is not *required* to do so. Similarly, the Freedom of Information Law provides that an agency, such as the Town, *may* withhold records in circumstances specified in that statute, but it is not *required* to do. Whether it is wise, ethical or in the public interest to discuss matters in public that may be considered in executive session or to disclose records that may be withheld under the Freedom of Information Law is, in my view, largely irrelevant to the authority to do so.

While I believe that the Ethics Board and the Town Board clearly have the ability to enter into executive under §105(1)(f) to discuss certain matters relating to a "particular person", again, in my view, there is no obligation to do so. In like manner, while certain records pertinent to the matter may in my opinion have been withheld under the Freedom of Information Law, I do not believe that there would have been any obligation to do so.

If my understanding of the Town Code is accurate, the Ethics Board does not have the authority to decide or make binding or final determinations. Section 10-20 of the Code entitled "Powers of Ethics Board" states that Board is authorized "to render advisory opinions on any matter

of ethical conduct of town officials and employees..." Relevant to that provision is §87(2)(g) of the Freedom of Information Law, 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.

Applying the foregoing to the matters at issue, an advisory opinion prepared by the Ethics Board could in my view be withheld, except in two circumstances. If an opinion was rejected or modified, I believe that it would be deniable under both §87(2)(b) as an unwarranted invasion of personal privacy and under §87(2)(g), for it consists of a recommendation to the Town Board that is not final or binding. One situation in which the opinion of the Ethics Board would be public would involve the case in which the Town Board clearly adopts the opinion as its own, thereby making the opinion a final determination, and finds that an officer or employee engaged in misconduct (see e.g., Miller v. Hewlett-Woodmere Union Free School District, Supreme Court, Nassau County, NYLJ, May 16, 1990, in which recommendations were uniformly adopted as the agency's final determination). The other would involve a situation in which a local law requires disclosure. Having reviewed the Town Code as it relates to the matter, the extent to which the Code may require disclosure is, in my view, unclear and subject to a variety of possible interpretations.

Also relevant, as inferred above,is §87(2)(b), which authorizes an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

With respect to disclosure of the identity of a person who made a complaint to the Ethics Board, it has generally been advised that those portions of a complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party

> and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of a member of the person who made the complaint is often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be deleted.

In this instance, however, it is my understanding that the name of the complainant has been disclosed by himself and others. If that is so, there would appear to be no basis for withholding those portions of the complaint that indicate his identity.

As records pertain to public officers or employees, the courts have provided substantial direction. 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 persons 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 a public official's duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which final determinations indicating the imposition of some sort of disciplinary action pertaining to particular public officials 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.

In consideration of the preceding commentary, in the typical situation in which the Freedom of Information Law determines rights of access, opinions offered by the Ethics Board or its members may be withheld, unless and until an opinion is adopted by the Town Board or a local enactment requires disclosure. Similarly, if the Open Meetings Law was followed, discussions following a

complaint concerning the conduct of a Town Board member could, in my opinion, have occurred during executive sessions.

What in fact occurred is unclear, but whether meetings and discussions of the matter were conducted in public or in executive session would affect rights of access to the tape recordings that were requested. Insofar as a tape recording captured commentary made during a public proceeding, I do not believe that there would be any basis for a denial of access, and it was held years ago tape recordings of open meetings are accessible under the Freedom of Information Law (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978). On the other hand, the contents of tape recordings of executive sessions reflecting the deliberative process of either the Town Board or the Ethics Board would consist of "intra-agency material" falling within the scope of §87(2)(g). Moreover, since there appears to have been no final determination by the Town Board indicating misconduct or imposing a penalty regarding the subject of the complaint, it appears that any such tapes could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Ethics Board
Patricia Finnegan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 1, 2003

Mr. Peter Melnick
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Melnick:

I have received your letter in which you referred to a request for a bid document from the Director of Central Services for Dutchess County, Mr. Donald C. Miller. You wrote that Mr. Miller "refused to provide the document, and directed [you] to a commercial third party provider, where [you] could register and then access the counties [sic] bid documents." You added that:

> "The third party provider, BidNet, states that they provide access for free to vendors who register, however when registering users are obligated to accept the BidNet user agreement which claims a proprietary interest in the counties public documents by requiring users to accept additional and restrictive terms and conditions not originally attached with the public document. Additionally the vendor registration process is limited in scope and requires repeated registration as an inducement to utilize the BidNet value added services for a significant fee. Under separate cover is a copy of the BidNet User Agreement. Registration requires that I provide a social security number."

Attached to your letter is a copy of the "BidNet User Agreement." In the context of your remarks, I believe that a "supplier", ordinarily a person or entity that sells goods and services, would be a person or entity seeking access to records, and BidNet is the "service." In this regard, one of the conditions of the agreement indicates that: "The contents of the Service are intended for the sole use of the subscribing Supplier, and may not be resold or redistributed or assigned for commercial purposes." The agreement also states that BidNet may, at its sole discretion, terminate or suspend the Supplier's access to all or part of this Service, for breach of this agreement."

You have raised a variety of questions in relation to the foregoing, and I will attempt to address them in the following commentary.

Although your request involved a record maintained by BidNet, a private entity, as I understand the facts, it is an agency record in the legal custody of the County. The Freedom of Information Law is expansive in its scope, for it pertains to all agency records, including records maintained by a private person or entity on its behalf. 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."

Based on the foregoing, 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 that they are "agency records", even if they are maintained apart from an agency's premises. Further, the Freedom of Information Law includes records maintained on paper and electronically within its coverage.

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 more importantly, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In short, insofar as the records sought are maintained for the County, I believe that the County would be required to direct the custodian of the records, i.e., BidNet, to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you or any other applicant to the extent required by law. Stated differently, insofar as the terms and conditions of the agreement between the County and BidNet are inconsistent with the Freedom of Information Law, I believe that the agreement is invalid. Further, there are several elements of the agreement which in my view are inconsistent with law.

First, if, for example, BidNet maintains records, and the duplicates of the same records are maintained within County offices, I believe that the County would be required to accept requests, disclose records, and permit the inspection of records at the location designated in its rules adopted pursuant to the Freedom of Information Law.

I note by way of background that §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., the County, 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 County legislative body 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 agency official, an agent of an agency, receives a request, he or she, in accordance with the direction provided by the records access officer,

must respond in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

Further, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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)].

One aspect of the Committee's regulations, §1401.3, requires that an agency in its regulations must identify the locations where records may be requested, obtained and inspected.

Second, contrary to the agreement, any person, not only a subscriber, may request agency records. As a general matter, the status or interest of a person seeking records is irrelevant to that person's rights of access, and was determined in Burke v. Yudelson [51 AD2d 673 (1976)] that records accessible under the Freedom of Information Law, must be made equally available to "any person, without regard to status or interest. Further, once a person has obtained records accessible under the Freedom of Information Law, he or she may do with the records as he or she may see fit. Contrary to the terms of the agreement, once records are disclosed pursuant to the Freedom of Information Law, they may be disseminated, distributed or used for commercial purposes without restriction.

When records are available in their entirety, no fee may be assessed for their inspection. When copies are requested, the Freedom of Information Law limits the fees that can be charged. Section 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)."

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ian MacDonald, County Attorney
Donald C. Miller

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14373

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December 1, 2003

Mr. David A. Schulz
Levine Sullivan Koch & Schulz, L.L.P.
230 Park Avenue, Suite 1160
New York, NY 10169

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Schulz:

I have received your letter of November 5 and the correspondence attached to it. In addition, as required by §89(4)(a) of the Freedom of Information Law, the New York City Department of Correction ("DOC") sent copies of your appeal and the determination thereon to this office.

You wrote that you represent Rapsheets.com, a company that "conducts background checks of potential employees, applicants for apartment leases and volunteers for employers, apartment managers, not-for-profit agencies, youth sports leagues and churches." The background checks are conducted, according to your letter, "in compliance with the Fair Credit Reporting Act using database technology that accesses criminal records that it acquires, updates and otherwise maintains directly from state and county government sources."

Earlier this year, your client requested "identifying information in electronic form about detainees held by DOC, including name, date of birth, admission date, release date, and a description of the offense." Although DOC agreed to provide much of the information sought, it denied access to dates of birth on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §§87(2)(b) and 89(2) of the Freedom of Information Law. DOC denied your appeal, citing the same provisions as the basis for its determination.

You have requested an advisory opinion concerning the propriety of the denial of access, and 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.

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)" (id.).

Second, the only ground for denial of significance in my view is that cited by DOC, §87(2)(b). Again, that provision confers authority upon an agency to deny access to records insofar as disclosure would constitute an unwarranted invasion of personal privacy. Section 89(2) provides a series of examples of unwarranted invasions of personal privacy, and DOC referred to §89(2)(b)(iv) concerning:

> "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."

While the provisions pertaining to unwarranted invasions of privacy might serve to enable an agency to withhold dates of birth or perhaps the ages of persons in some circumstances, I believe that an agency would be required to disclose those items in others.

For example, in situations in which requests have been made for a list of senior citizens or children participating in a city or town recreation or similar program, disclosure would identify a class of persons by means of a single characteristic, their age, and those classes of persons may be particularly vulnerable. In those instances, it has been advised that the lists identifying people whose identities are included solely to due to their ages may be withheld because disclosure would constitute an unwarranted invasion of personal privacy.

With respect to requests involving records pertaining to public employees, numerous judicial decisions suggest that, as a general rule, items found in 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 held that disclosure would indeed constitute an unwarranted invasion of personal privacy (see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; also Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981). In a manner consistent with the general thrust of those decisions it has been advised that the age of a public employee may be withheld under §87(2)(b), for that item is largely irrelevant to the performance of one's official duties.

With regard to the area of your interest, statutes, judicial decisions and common practice indicate that inmates enjoy a lesser degree of privacy than others. The judicial process and court records are generally open in their entirety, and frequently information available to the public through that process or the review of court records includes a variety of personal information that would be beyond public rights of access in other contexts. As you pointed out, §500-f of the Correction Law concerning a record of commitments to and discharges from county jails has long required the disclosure of several items of personal information, such as age, trade or occupation, and secular and religious education. Those items, in my view, could be withheld from the public in other contexts. 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)].

The Court also 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.). Those latter kinds of information that could be withheld involve intimate matters or those that could result in personal hardship to the individuals depicted.

For reasons considered in the preceding commentary, I believe that a person's age or date of birth may be withheld from many records on the ground that disclosure would constitute an unwarranted invasion of personal privacy. However, from my perspective, those reasons are not so compelling in relation to the dates of birth of inmates that a denial of access would be justifiable. With respect to common practice, I note that the New York State Department of Correctional Services maintains a website from which any person may gain access to records pertaining to inmates currently housed in a Department facility, as well as those who have been incarcerated in those facilities within the past several years. Those records include inmates' dates of birth.

The State Department of Correctional Services is subject to both the Freedom of Information Law and the Personal Privacy Protection Law, Article 6-A of the Public Officers Law. The latter applies only to state agencies; it does not apply to municipal entities, such as DOC. In brief, the Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of that statute, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves a situation in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter." Section 89(2)(b) of the Freedom of Information Law includes examples of unwarranted invasions of personal privacy, and §89(2-a) states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter." Therefore, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law. By including inmates' dates of birth within the records available on its website, the Department has effectively determined that the disclosure of dates of birth is not so intimate or likely to cause hardship as to rise to the level of an unwarranted invasion of personal privacy, and I know of no instance in which its routine disclosure of dates of birth has been questioned or challenged. Enclosed are copies of inmate records acquired here via the Department's website that include an inmate's date of birth; copies will also be sent to DOC.

In sum, based on the preceding remarks, I do not believe that DOC can demonstrate that disclosure of the dates of birth of its "detainees" would constitute an unwarranted invasion of personal privacy, and that, therefore, it is required to disclose those items to the public pursuant to the Freedom of Information Law.

In an effort to encourage DOC officials to reconsider its determination, copies of this opinion will be forwarded to DOC.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Florence A. Hutner
Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14374

41 State Street, Albany, New York 12231
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December 1, 2003

Ms. B.J. Phillips
Ithaca Journal
123 West State Street
Ithaca, NY 14850

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Phillips:

I have received your letter of November 5 and the materials attached to it. You have asked that I review "the City of Ithaca's Freedom of Information Law policies and processes in response to a written request."

In response to your written request for a certain agreement between the City and Cornell University, as well as correspondence between the parties relating to the agreement, you received a memorandum from the City Clerk indicating that the City had "developed new Freedom of Information request forms." To be "consistent in the processing of requests", you were asked to resubmit your request on the form. You objected in writing and contended that your request was made in a manner consistent with law. In response to that communication, Khandikile M. Sokoni, Associate Attorney for the City, wrote to you to advise that the forms are "intended to help stream line the FOIL process and [that] by asking the public to fill out a separate request for each record the City Clerk's Office is better able to provide you with those documents that are readily available right away without having to wait until all records requested have been gathered." She added that "we will require at least six weeks to gather the responsive documents." You have contended that "[p]lacing the burden of identifying documents, individually and in specific terms, on FOIL petitioners makes it possible for government organizations to answer requests in the narrowest terms possible, omitting ancillary or explanatory documents that may not be specifically described in the form."

In this regard, I offer the following comments.

First, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not

meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals, 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)]. In short, I do not believe that the City may require that those seeking records must name or identify each record of their interest individually.

In a related vein, I do not believe that an agency, such as the City, can require that separate requests be made for each record sought. One of the issues in Konigsberg involved the volume of material, some twenty-three hundred pages of documentation, produced in response to a single request. In another decision that cited that case, it was concluded that an agency "cannot....evade the broad disclosure provisions in FOIL by merely asserting that compliance could potentially require the review of hundreds of records" [Ruberti, Girvin & Ferlazzo v. Division of State Police, 218 AD2d 494 (1006)].

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)].

In a judicial decision that cited and confirmed the advice rendered by this office, 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, I do not believe that an agency can require that a request be made on a prescribed form. As indicated previously, §89(3) of the law, 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. 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.

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, notwithstanding the foregoing, the Freedom of Information Law does not require that an agency provide information sought by phone or respond to an individual's questions; it may do so, but it is not required to do so. That statute pertains to requests for records. While an agency may choose to accept and respond to a request made orally [see regulations, §1401.5(a)], it may, based on §89(3), require that requests for records be made in writing.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Julie Holcomb, City Clerk
Khandikile M. Sokoni

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14375

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December 3, 2003

Mr. Robert Vazquez
95-A-6961
Greenhaven 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. Vazquez:

I have received your letter addressed to Ms. Mary O. Donohue at the Department of State. Please be advised that Ms. Donohue is the Lieutenant Governor, and in that position, serves as a member of the Committee on Open Government. Further, as indicated above, the staff is authorized to respond and offer opinions concerning the Freedom of Information Law on behalf of the Committee.

As I understand the matter, you requested a "legal mail receipt" that you must sign in order to receive your "legal correspondence." In response, you received a receipt with the your signature, the signature of a correction officer and that person's "comments" deleted. You have sought an opinion and information concerning the "leading decision" relating to the propriety of the deletions.

In this regard, I know of no judicial decision that focuses on a situation analogous to that described. However, if my understanding of the situation is accurate, there would likely have been no basis for the deletion of signatures, and rights of access to the "comments" would be dependent on their content.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 that might have been pertinent with respect to the deletion of the signatures is §87(2)(b). That provision authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." You cannot invade your own privacy, and I do not believe that your own signature could justifiably have been deleted. With respect to the signature of the correction officer, since he/she signed the

have been deleted. With respect to the signature of the correction officer, since he/she signed the receipt in the performance of his/her official duties, and since the signature is not in my view an item that could be characterized as intimate, it is doubtful that its deletion can be justified.

I am unaware of the content of the "comments" to which you referred. However, it appears that they would fall within the scope of §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.

Lastly, when a request for records is denied in whole or in part, the person denied access has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Greenhaven Correctional Facility

FOIL-AO-14376

From: Robert Freeman
To: Nancy Swietek
Date: 12/3/2003 12:59:34 PM
Subject: Re: Good morning - -

Hello again - -

If you acquire transcripts with grades, the actual grades may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Resumes and applications are likely available in part. It has been advised, and the courts have agreed, that when there are certain criteria that must be met to be eligible to hold a position, those portions of a resume or application that indicate that the person hired has met those criteria must be disclosed; without disclosure, the public would be unable to ascertain whether the employee is qualified. It has also been held that one's general educational background is available and that references to a person's prior public employment, i.e., with another public school district, must be disclosed. On the other hand, resumes and applications may also include largely unrelated personal information, such as a home address, social security number, marital status, hobbies, etc., that are irrelevant to the position. To that extent, the records may be withheld as an unwarranted invasion of privacy.

Performance evaluations, like resumes, are available in part. Purely factual information, such as a description of one's duties, would be accessible; a supervisor's subjective opinion regarding how well or poorly the employee has carried out those duties may be withheld; if there is a final rating (i.e., outstanding, average, poor), it has been advised that it is accessible.

Payroll information indicating wages, time sheets and similar materials are generally available.

To obtain more detailed explanations of the issues, our website includes advisory opinions rendered under the FOIL that are accessible in full text.

I hope that I have been of assistance.
>>> "Nancy Swietek" <NSWIETEK@Briarcliffschools.org> 12/3/03 11:24:25 AM >>>
Hi,

On the form our district uses it say: "I hereby apply to inspect the following record:"

The parent just wrote the name of the teacher.

What does exist on this teacher is her personnel file consisting of an application, resume, copy of her certification, observations, courses taken, thank you letter for coaching from superintendent, payroll information.
We don't have her transcripts in her file - we should - when we get them are they FOILable?

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-14377

From: Robert Freeman
To: [redacted]
Date: 12/3/2003 5:05:17 PM
Subject: Dear Mr. McCarthy:

Dear Mr. McCarthy:

I have received your letter concerning the propriety of a fee of $5.00 for a photocopy made available by the Clifton Park Town Court. It is your understanding that the fee should have been limited to twenty-five cents per photocopy.

In this regard, the twenty-five cent limitation pertains to copies of records made available by agencies pursuant to the Freedom of Information Law. However, that statute does not apply to the courts. Consequently, the courts are not bound by the Freedom of Information Law or the provisions pertaining to fees found in that statute.

In general, if no fee is expressly allowed by law for a court record, I believe that the clerk of clerk is authorized by section 255 of the Judiciary Law to charge at the rate that would be allowed for a similar service performed by a county clerk. That being so, you might contact the clerk of the Town Court to question the basis of the fee, or contact the County Clerk's office to ascertain the fee that it would charge for a similar service.

I hope that I have clarified your understanding of the matter and have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14378

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 4, 2003

Mr. Dirk C. Vanderwerker
[redacted]

The staff of the Committee 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. Vanderwerker:

I have received your letter concerning your attempts to gain access to records relating to a hearing held by the Village of Kinderhook Zoning Board of Appeals, as well as its procedure concerning the content and posting of notices of hearings.

In this regard, please be advised that the jurisdiction of Committee on Open Government is limited to matters involving the Freedom of Information and Open Meetings Laws. Matters pertaining notice of hearings are governed by other statutes.

As your remarks dealt with access to records, I spoke to the Village Clerk soon after you contacted me. She indicated that you left the Village office before she had the opportunity to communicate with the Village staff person who had possession of the records of your interest, and that if you had remained there for a brief additional time, the records would have been retrieved and made available to you.

In effort to offer general guidance, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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. The advice rendered by this office was confirmed in Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), in which 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, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, or if the estimated date is unreasonable, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

As 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: Nicole Heeder, Village Clerk
Inez Jacklin, Secretary, Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1437

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December 4, 2003

Cheryl L. Kates, Esq.
121 N. Fitzhugh Street
Suite 300
Rochester, NY 14164

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Kates:

I have received your letter in which you referred to a request for "copies of the attorney log from Auburn Correctional Facility and the Department of Correctional Services for the past five years." You indicated that the Department responded by indicating that the request had been forwarded to the facility. However, as of the date of your letter to this office, you had not received the records, and "it has been an excessive amount of time." You have asked the Committee on Open Government to "intervene and assist" you in obtaining the records.

In this regard, I note that the Committee is authorized to offer advice and opinions concerning the Freedom of Information Law; it is not empowered to "intervene" or compel an agency 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..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 to determine appeals at the Department of Correctional Services is Anthony J. Annucci, Counsel to the Department.

With respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I am unaware of whether there is a particular record characterized as an "attorney's log", whether the log is kept in plain sight, whether attorneys sign or register in a log along with other visitors, or whether entries in such a log are maintained chronologically or accessible only through the use of an inmate's name. If the log is kept in plain sight, and if any person who signs or registers can view its contents, I do not believe that there would be any basis for a denial of access. If the log is not kept in plain sight and ordinarily cannot be viewed, and if it includes the names of all visitors, it could, in my opinion, be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. In short, the identity of those with whom a person associates is, in my view, generally nobody's business. If you represent an inmate and that person has consented to disclosure of those entries pertaining to him, I believe that the facility would be obliged to disclose.

Assuming that your interest involves a particular inmate or inmates, 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.

Again, I am unaware of the means by which the record of your interest is kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors, it would likely be easy to retrieve that information, and the request would reasonably describe the records. On the other hand, if there are chronological logs of visitors and each page would have to be reviewed in an effort to identify visitors of a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent, Auburn Correctional Facility

FOIL-AO-14380

From: Robert Freeman
To: Veronica Howley
Date: 12/4/2003 3:33:46 PM
Subject: Re: Video Tapes

Hi Ronnie - -

Your view, in my opinion, is consistent with the law. An agency cannot factor in its overhead costs in establishing a fee for copies of records. Municipalities purchase photocopiers for their governmental and routine use, irrespective of whether a request for a record is ever made under the Freedom of Information Law. If and when a person does make a request, the municipality would not be able to consider the purchase price of the machine in assessing a fee; it is limited to twenty-five cents per photocopy. In the context of your question, the law, §87(1)(b)(iii), limits the fee to the actual cost of reproduction. I note that case law involving the reproduction of an audio tape recording indicates, as you suggested, that the actual cost involves the cost of a cassette. I believe that the same conclusion must be reached when a copy of a video recording is requested.

I hope that I have been of assistance.
>>> "Veronica Howley" <vhowley.TONSPO.TONSDOM1@northsalemny.org> 12/4/03 3:13:26 PM >>>
Hi Bob,
We always have FOIL requests for copies of our Town Board Meeting videos. In the past I have taken the tapes to a video store, had them copied and charged whatever the store charged. Because of all the requests we get we just purchased a VCR copier. I plan on charging just whatever the tape cost the town (free if they bring me a blank tape) and my Supervisor wants to know if we could charge extra to offset the cost of the equipment purchase.

Thank you,
Ronnie

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-1438

From: Robert Freeman
To: [redacted]
Date: 12/5/2003 9:08:10 AM
Subject: Dear Mr. Goris:

Dear Mr. Goris:

The law has not changed. The maximum that can be charged by an agency for a photocopy up to nine by fourteen inches is twenty-five cents, unless a different fee is prescribed by statute. I note that the term "statute" has been found by the courts to mean an enactment of the State Legislature. Therefore, a local law or policy cannot validly enable a local government agency, such as a town, to increase the fee referenced in the Freedom of Information Law [see section 87(1)(b)(iii)].

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-1438?

41 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, 2003

Mr. Julio Arce
92-A-9982
Clinton Correctional Facility
Box 2001
Dannemora, NY 12929

Dear Mr. Arce:

I have received your letter in which you requested DD-5's and related materials concerning an incident that occurred more than ten years ago.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee does not have custody or control of records generally. In short, I cannot make the records of your interest available, because this office does not possess them.

A request 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. Since "DD-5's" are prepared by the New York City Police Department, it appears that your request should be made to the records access officer at that agency and sent to One Police Plaza, New York, NY 10038.

I note, too, that §89(3) of the Freedom of Information Law requires that a request must "reasonably describe" the records sought. In my view, your letter to this office would not have met that standard. When seeking records, it is suggested that you include sufficient detail to enable staff at an agency to locate and identify the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14383

41 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 8, 2003

Mr. John F. Jennette
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jennette:

I have received your letters of November 6 and 13 and will attempt to address your questions and the issues that you raised.

I serve as executive director of the Committee on Open Government. The Committee was created in 1974 as part of the Freedom of Information Law. Its staff consists of four persons, and our primary function involves providing advice and opinions to any person who might have questions relating to the Freedom of Information, Open Meetings and Personal Privacy Protection Laws. Advice is given and written opinions are rendered in response to inquiries made by the public, state and local government officials and the news media. Our goal is to offer the correct response under the law, irrespective of the source of the question or the motivation of the person who raises it. In consideration of our statutory authority and resources, we do not have the ability to "investigate" or "demand" that an agency comply with law. It our hope, however, that the advice given by this office is educational and persuasive, and that it enhances compliance with law.

You stated that the law requires that an agency respond to a request within thirty days. That is not so; the only reference to that period in the law pertains to the time to appeal a denial of access. Nevertheless, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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. The advice rendered by this office was confirmed in Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), in which 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, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, or if the estimated date is unreasonable, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

It has been advised and held that an agency may require payment in advance of the preparation of copies of records (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982). Since the Freedom of Information Law is silent with respect to the cost of mailing, it has also been advised that an agency may choose to charge for postage if a person seeking records asks to have the records mailed to him or her. Lastly, if a person has offered to pay the fees for copying, there is no requirement that the records be made available within five days. As suggested above, the agency's ability to make records available may be dependent on the volume of the request, the need to search or review records, etc. That being so, while agencies are encouraged to make records available "wherever and whenever feasible", there is no specific time within which an agency must make them available following an offer to pay the requisite fee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Mary L. Herringshaw, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14384

41 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 8, 2003

Mr. Blake Wingate
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wingate:

I have received your letter in which you requested assistance in obtaining "minutes from a preliminary hearing" held at the Long Island City Court House "on or about the 22nd day of May 2003."

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 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-14385

41 State Street, Albany, New York i2231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 8, 2003

Mr. Tommy Tam
92-A-6349
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. Tam:

I have received your letter in which you asked for assistance in obtaining a variety of records from the New York City Police Department related to your arrest.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning DD5's and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to

> the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, an office of a district attorney cannot 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 "could 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-14386

41 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 8, 2003

Mr. Joseph LoRusso
96-A-0015
Cayuga Correctional Facility
Box 1186
Moravia, NY 13118

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. LoRusso:

I have received your letters in which you asked this office to "investigate" your facility's handling of your mail and Mr. Anthony Annucci's failure to respond to your Freedom of Information Law 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. Since this office oversees the Freedom of Information Law and has no authority concerning procedures regarding other matters at your facility, my comments will only address issues relating to the Freedom of Information 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)].

It is noted that subsequent to the receipt of your letters, this office received copies of two letters sent to you by Mr. Annucci that appears to address your Freedom of Information Law appeals.

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-14387

41 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, 2003

Mr. Larry Tomlin
85-A-7396
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. Tomlin:

I have received your letter and the attached material in which you requested this office to "look into" a response you received from the Office of Children & Family Services indicating that records you had requested were destroyed "in accordance with State law and regulation."

In this regard, it is noted that 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." 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-14388

41 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, 2003

Mr. Robert Diaz
99-A-5599
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. Diaz:

I have received your letter in which you requested advice "on how to go about getting the New York City Department of Corrections to disclose whether or not a certain person was housed in the 'Queens House of Detention for Men'" for a specific period of time in 1997.

In this regard, I offer the following comments.

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 city, to adopt rules and regulations consistent with those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing from doing so."

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

In short, the records access officer has the authority and duty to "coordinate" an agency's response to requests. As such, it is suggested that you direct your request to Thomas Antenen, the records access officer for the New York City Department of Correction.

Lastly, §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 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-14389

41 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, 2003

Mr. Victor Gonzalez
01-R-0960
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. Gonzalez:

I have received your letter in which you requested assistance in obtaining a search warrant related to your arrest. You wrote that you have been informed by the New York City Police Department and the New York County Supreme Court that they do not maintain the record 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, 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.

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 right to appeal a denial or request a certification) would not ordinarily be applicable.

Since neither the Police Department nor the court appears to possess the record in question, you might want to request it from the office of the district attorney that handled the prosecution.

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-14390

41 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, 2003

Mr. Sanford C. Hayes III
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hayes:

I have received your letter and the correspondence attached to it relating to requests for records of the Town of St. Armand. In consideration of your comments and the content of the materials, I offer the following remarks.

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 intended use of the records and your motivation are, in my opinion, irrelevant.

Second, as you may be aware, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the 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.

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 needed 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.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I note that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, it appears that the many of the records sought are the same in substance as certain records required to be maintained and made available by town officials. Specifically, §29(4) of the Town Law states that the supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

Additionally, subdivision (1) of §119 of the Town Law states in part that:

> "When a claim has been audited by the town board of the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Cindy Woodson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1439

41 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, 2003

Mr. Robert Vasquez
95-A-6961
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. Vasquez:

I have received your letter in which you explained your difficulties in obtaining records from your correctional facility and requested assistance from 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, 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)].

It is noted that the person designated by the Department of Correctional Services to determine appeals is Counsel to the Department, Anthony J. Annucci.

Lastly, you asked how you can obtain "F.O.I.L. request forms" for your family. In this regard, there is no particular form that must be used to request records. 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 written request that reasonably describes the record sought within five business days of the receipt of a request. As such, neither the Law nor the regulations refers, 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-14392

41 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, 2003

Mr. Timothy Frazier
90-T-4084
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. Frazier:

I have received your letter and the attached material in which you explained your difficulty in obtaining a variety of records from St. Luke's Hospital.

In this regard, I offer the following comments.

The Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, 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 hospital.

However, §18 of the Public Health Law deals specifically with access to patient records. In brief, that statute prohibits disclosure of medical records to all but "qualified persons." Subdivision (1)(g) of §18 defines the phrase "qualified person" to mean:

> "any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law, or a parent of an infant, a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other

> legally appointed guardian of an infant who may be entitled to request access to a clinical record pursuant to paragraph (c) of subdivision two of this section, or an attorney representing or acting on behalf of the subject or the subjects estate."

If you are not a "qualified person", I believe that the medical records of your interest would be exempt from disclosure. To obtain additional information regarding access to patient information, it is suggested that you contact Mr. Peter Farr, NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

FOIL-AO-14393

From: Robert Freeman
To: [redacted]
Date: 12/10/2003 8:39:56 AM
Subject: Dear Mr. Noid:

Dear Mr. Noid:

I have received your inquiry. If you submit 50 requests under the Freedom of Information Law to a village, you asked whether the village "must give the information on all of them within 5 day[s]."

In short, the village is not required to do so. Pursuant to §89(3) of the Freedom of Information Law, an agency, such as a village, is required to respond to a request within five business days of the receipt of the request by (1) granting access to the records; (2) denying a request in whole or in part in writing and informing the applicant of the right to appeal; or (3) acknowledging the receipt of the request in writing, thereby extending the time to grant or deny access. When an agency does so, it must include an approximate date indicating when it believes it will be able to grant or deny a request.

I hope that the foregoing serves to clarify your understanding of the law and that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14394

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December 10, 2003

Ms. Ruth A. Vezzetti
Chairwoman
Orangetown Republican Committee
Contempra Circle #G1
Tappan, NY 10983

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Vezzetti:

I have received your letter in which you described difficulty in gaining access to records in a timely manner from the Town of Orangetown. You also referred to executive sessions held by the Town Board prior to accomplishing a procedure required by the Open Meetings Law. In this regard, I offer the following comments.

First, by way of background,§89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., 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."

In short, I believe that the Town Board has the responsibility to adopt and ensure compliance with procedural rules and regulations, and that the records access officer has the duty of coordinating responses to requests.

Section 1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

Based on the foregoing, again, the records access officer must "coordinate" an agency's response to requests. Therefore, I believe that when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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. In a judicial decision 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."

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 have retrieved the opinion pertaining to the Open Meetings Law to which you referred, which dealt with the Town of Orangetown. In an effort to enhance compliance with and

understanding of that statute, as well as the Freedom of Information Law, a copy of that opinion will be forwarded to the Town Board with this response. Additionally, a copy of this opinion will be sent to the Town Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Charlotte Madigan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1395

41 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, 2003

Mr. Victor Hardy
92-T-0435
Wende Correctional Facility
P.O. Box 1187
Alden, NY 14004

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hardy:

I have received your letter in which you complained that the Inmate Records Coordinator at your facility informed you that records of your interest do not exist.

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." 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-14396

41 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, 2003

Ms. Diana LaMattina
The Ithaca Journal
123 W. State Street
Ithaca, NY 14850

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Ms. LaMattina:

I have received your letter and the materials pertaining to it concerning your request for an incident report and related documents involving an assault that occurred on November 9 on the grounds of Cornell University. The University denied access based on its contention that the University, as a general matter, is not subject to the Freedom of Information Law.

In describing the rationale for its contention, the Deputy Director of the Cornell News Service wrote that:

> "Cornell's denial of your request was based upon the well-established legal precedent that, in matters of administration of its private functions, Cornell is not an agency of government subject to the New York Freedom of Information Law. See Stoll v. New York State College of Veterinary Medicine at Cornell University, 94 N.Y.2d 162 (1999). The determinative test under Stoll is not whether the administrative activity fulfills some governmental function, but whether the activity has been delegated by statute to Cornell's private discretion, as it has with the appointment of peace officers authorized in New York Education Law section 5709. Thus, although the county sheriff makes the actual appointments as 'special deputy sheriffs,' peace officers are appointed and removed at the request of Cornell from those nominees selected by the president of Cornell, and they are classified by statute as employees of Cornell throughout their periods of appointment. Their records are confidential records of the university and have been maintained that way for many years. Cornell Police incident reports and other investigative materials prepared in Cornell's private discretion are not subject to disclosure under the New York Freedom of Information Law."

I am mindful of the decision rendered by the Court of Appeals in Stoll. However, that decision in my view did not deal with the matter at issue. In that case, a line of demarcation was drawn between records of or pertaining to Cornell's statutory colleges, extensions of the State University, that are unique to the functions of those entities, and others that may be used or

applicable on a University-wide basis. In this instance, the issue in my opinion involves Cornell University acting, in essence, as a governmental entity in carrying out statutory powers through its Police Department, and performing a governmental function. From my perspective, in consideration of a review of §§5708 and 5709 of the Education Law and other statutes, the records of the Department concerning its law enforcement functions are subject to rights of access conferred by the Freedom of Information Law. Any other conclusion would suggest that there is no accountability required of an entity that has substantial power and authority of a governmental nature over any person who enters the grounds of Cornell University and its facilities.

Subdivision (1) §5708 provides that:

> "For the purpose of providing for the safety of its students, faculty, employees and visitors, Cornell university is hereby authorized and empowered through its board of trustees: a. To adopt, make applicable and enforce, upon the streets, roads and highways owned, controlled or maintained by said university within the grounds of said university and constituting a part of the educational and research plant or plants owned or under the supervision, administration, and control of said university, such provisions of the vehicle and traffic law, and such rules of the state department of transportation as control or regulate vehicular or pedestrian traffic, and parking.
>
> b. To adopt and enforce such additional rules and regulations for the control of the use of the streets and roads described in the foregoing subdivision as local authorities are empowered to adopt and enforce pursuant to said vehicle and traffic law.
>
> c. To adopt and enforce rules and regulations not inconsistent with law, controlling parking of vehicles and pedestrian traffic over, along and upon the lands and premises of said university or the streets and highways therein, and to control or prohibit thereon or therein vending, hawking, loitering and trespassing.
>
> d. To erect, operate and maintain at the entrance or entrances to any such grounds and at other appropriate points thereon or therein control lights, signs and signals."

Subdivision (2) states that any violation of the Vehicle and Traffic Law or rule of the State Department of Transportation applicable through the operation of paragraph (a) of subdivision (1) "shall be a misdemeanor or traffic infraction" and that any violation under paragraph (b) "shall be....punishable as provided in the state vehicle and traffic law." Subdivision (3) provides that a violation of the rules and regulation of the University adopted under paragraph (c) "shall constitute a misdemeanor punishable by fine not exceeding fifty dollars or by imprisonment not exceeding six months, or both." Subdivision (4) requires that notice of any such rules or regulations must be made known in some manner and filed in the office of the municipality where they may be enforced.

In short, the University has the power to create and enforce laws and to punish those who violate them. I know of no entity other than a government that possesses similar authority.

Section 5709 in subdivision (1) provides that a sheriff of a county within which any part of the grounds of Cornell University is situated "shall appoint and remove at the request of Cornell university such number of special deputy sheriffs as shall be recommended" by the president of the University..." Although those special deputy sheriffs "shall be employees of the university and subject to its supervision and control", those persons "shall have the powers of peace officers as set

forth in section 2.20 of the criminal procedure law..." Subdivision (2) requires that every special deputy sheriff "take and subscribe the oath of office prescribed by article thirteen" of the state constitution and file the oath with the appropriate county clerk. I note that peace officers, in this context, Cornell's special deputy sheriffs, have the following powers pursuant to §2.20, as well as others:

> "(a) The power to make warrantless arrests pursuant to §140.25 of this chapter.
> (b) The power to use physical force and deadly physical force in making an arrest or preventing an escape pursuant to section 35.30 of the penal law.
> (c) The power to carry out warrantless searches whenever such searches are constitutionally permissible and acting pursuant to their special duties."

Many colleges, universities, private companies and facilities such as office buildings, employ security forces or firms. Those entities do not have the kind of authority conferred upon peace officers and their personnel are not required to be deputized by a government agency or file oaths of office. They may contact law enforcement officers to make an arrest or use "deadly physical force"; I do not believe, however, that they may, on their own initiative or independently, assert authority or power of that nature. Only those with governmental authority may do so.

The Freedom of Information Law applies to agencies, and the term "agency" is defined in §86(3) to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In consideration of the statutory authority conferred upon Cornell University, which, again, includes the authority to make and enforce laws, and to impose punishment for violation of those laws, and particularly in consideration of the power and authority over the public that their special deputy sheriffs enjoy, I believe that Cornell University constitutes an "agency" insofar as its records pertain to its law enforcement functions. To that extent, Cornell University is, in my view, a governmental entity that performs a governmental function and, therefore, constitutes an "agency" required to comply with the Freedom of Information Law.

Assuming the accuracy of that conclusion, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, rights of access to the records that you requested would be dependent on their specific contents and the effects of their disclosure, and several of the grounds for denial may be pertinent to an analysis of those rights.

Section 87(2)(b) enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." You indicated by phone that it is your belief that a person was arrested following the incident, but that he/she has not yet been indicted. In this regard, historically, secret arrests are rare in the United States, and there would appear to be no reason for secrecy, i.e., concern for national security, in this instance. Further, as a general matter, it has been held that the identities of those arrested are accessible, unless and until records have been sealed following the dismissal of charges in favor of the accused [see Johnson Newspaper Corp. v. Stainkamp, 61 NY2d 958 (1984); Criminal Procedure Law, §160.50]. If there has been an arrest,

the identity of the person arrested, must, in my opinion, be made available. However, there may be privacy considerations pertaining to others, such as witnesses, informants and the like. There may also be an indication of the medical condition or injuries suffered by the victim. Those entries could likely be withheld on the ground that disclosure, at this juncture, would result in an unwarranted invasion of personal privacy.

As suggested in the response by the University, pertinent 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."

Only to the extent that the harmful effects of disclosure described in subparagraphs (i) through (iv) may §87(2)(e) be properly asserted.

Also relevant 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.

Lastly, I note that the Court of Appeals, the State's highest court, has stressed that the Freedom of Information Law should be construed expansively. For instance, in Gould v. New York City Police Department [87 NY 2d 267 (1996)], the Court reiterated its general view of the intent of the Freedom of Information Law, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for

> exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that "complaint follow up reports" could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). 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.).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Simeon Moss

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14397

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 10, 2003

Mr. Isidro Abascal
97-A-2554
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Abascal:

I have received your letter in which you complained about the Department of Probation's denial of your request for your pre-sentence report.

In this regard, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law.

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-14398

41 State Street, Albany, New York 12231
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December 10, 2003

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 complained about the Westchester County District Attorney's Office denial of your request for photographs of you that were used as exhibits during your trial.

As indicated in my letters to you dated November 15th, 2002 and October 8th, 2003, if a record was previously made available to you or your attorney, an agency may require you to demonstrate that neither you nor your attorney possess the record in order for you to successfully obtain a second copy [Moore v. Santucci, 151 AD2d 677 (1989)]. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the Office of the District Attorney.

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-14399

Committee Members

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December 10, 2003

Mr. Willard Chandler
94-B-1737
Wende Correctional Facility
Wende Road, Box 1187
Alden, NY 14004-1187

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Chandler:

I have received your letter in which you complained that neither The Legal Aid Bureau of Buffalo, Inc. nor Legal Services for the Elderly, Disabled, or Disadvantages of Western New York, Inc. have provided records you requested under the Freedom of Information Law.

In this regard, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law applies, in general, to records of entities of state and local government in New York. It would not apply to private organizations such as the Legal Aid Bureau of Buffalo, Inc. or Legal Services for the Elderly, Disabled, or Disadvantages of Western New York, Inc.

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 - 14400

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 11, 2003

Mr. Keith Pierce
[redacted]

The staff of the Committee on Open 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 in which you sought an advisory opinion concerning two matters.

First, "[i]f the promotional test battery was used as the basis for establishing an eligible list for an open competitive examination", you asked whether "the score of the promotional test candidate(s) that were subsequently placed on an eligible list [is] foilable." I discussed the question with an expert in the area of the civil service examination process, and both of us were confused by your question. Typically, a promotional exam or test battery is given to incumbents in an area of classification; it is not "open competitive." If you can clarify, perhaps I can offer a response.

Second, "[i]f candidates applied for an open competitive exam, but were determined to be ineligible", you asked whether "the candidates names [are] foilable."

In this regard, first, §71.3 of the regulations promulgated by the State Department of Civil Service, which is entitled "Publication of eligible lists", states in relevant part that:

> "Eligible lists may be published with the standing of the persons named in them, but under no circumstances shall the names of persons who failed examinations be published nor shall their examination papers be exhibited or any information given about them..."

Based upon the foregoing, an eligible list identifies those who passed an exam and, therefore, are "eligible" for placement in a position.

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 §89(6) states that records available under other provisions of law remain available, notwithstanding the exceptions appearing in §87(2), an eligible list, in my view, is clearly accessible.

However, if an eligible list can be compared with a list or records identifying those who applied to take an exam, it could be known who failed the exam or was otherwise found to be ineligible. That being so, it has consistently been advised that disclosure of a list or similar record identifying those who took or applied to take an exam may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-14401

From: Robert Freeman
To: [redacted]
Date: 12/11/2003 3:32:03 PM
Subject: Dear Mr. Sarasky:

Dear Mr. Sarasky:

I have received your inquiry concerning the possibility of locating information relating to an uncle who operated a package store in Brooklyn during World War II. The issue, in my view, involves whether or the extent to which records of your interest exist.

In this regard, the Freedom of Information Law pertains to existing records. If the records at issue have been destroyed, that statute would not be applicable. To the extent that they exist, all records of a state or local government agency fall within the coverage of the law.

In brief, the Freedom of Information Law is based on a presumption of access. Stated differently, government records must be disclosed, except to the extent that an exception to rights of access appearing in §87(2) of the law may properly be asserted. In this instance, insofar as records exist, it is likely that none of the grounds for denial of access would be pertinent.

I am unaware of the law that applied during World War II to licensees. However, it is suggested that you might consider three possible sources of records: the State Liquor Authority, whose public information office is located at 11 Park Place, New York, NY 10007 and can be reached by phone at (212)417-4192; the New York State Archives, Cultural Education Center, Albany, NY 12230, (518)474-8955; or perhaps the New York City Municipal Archives, 31 Chambers Stree, Suite 103, New York, NY 10007, (212)788-8580.

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 - 14402

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 11, 2003

Mr. Dwayne Chapman
92-A-5516
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. Chapman:

I have received your letter and the attached material in which you complained that the New York County District Attorney's Office denied your request for records related to charges that were dismissed on December 16, 1992. The records appeals officer, despite your assertion that you are entitled to the records because you were the defendant acting under an alias, denied access because the criminal action was dismissed and sealed.

In this regard, I offer the following comments.

When criminal charges are dismissed in favor of an accused, the records relating to the arrest ordinarily are sealed under Criminal Procedure Law, §160.50. In those instances, the records would be exempt from disclosure by statute [see Freedom of Information Law, §87(2)(a)]. The pertinent portion of §160.50 states that:

> "1. Upon termination of a criminal action or proceeding against a person in favor of such person...the record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding shall be sealed. Upon receipt of notification of such termination and sealing...(c) all official records and papers, including judgments and orders of a court but not

> including published court decisions or opinions or records and briefs on appeal, relating to the arrest and prosecution...shall be sealed and not made available to any person or public or privacy agency..."

As I interpret §160.50(1)(c), sealed records remain sealed and are not available "to any person" unless the court unseals them. I believe that only a court would have the authority to direct that sealed records be made available to you.

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 - 1414/03

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 12, 2003

Mr. Fred Van Gorder
98-B-1978
Groveland Correctional Facility
Rt. 36, Sonyea Road
Sonyea, NY 145556-0001

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. Van Gorder:

I have received your letter in which you asked for assistance in obtaining records from several agencies that have not responded to your requests for records.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of 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 acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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-1404

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 12, 2003

Mr. Derrick Corley
90-T-1984
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 12733-0116

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Corley:

I have received your letter in which you questioned the propriety of the Department of Correctional Service's new policy "allegedly under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which requires prisoners to not only pay the $0.25 they would pay per copied page [of their own medical records] pursuant to FOIL, but have to pay up to $13.00 per hour for the person doing the copying (with 1/4 hour being the minimum they could be charged for)."

You contend that "HIPAA does not require the fee that the Department is now charging; it only allows a "covered entity" to charge a copying fee."

According to the U.S. Dept. of Health & Human Services, Office of Civil Rights, "[T]he [HIPAA] Privacy Rule permits the covered entity to impose reasonable, cost-based fees. The fee may include only the cost of copying (including supplies and labor) and postage, if the patient requests that the copy be mailed. If the patient has agreed to receive a summary or explanation of his or her protected health information, the covered entity may also charge a fee for preparation of the summary or explanation. The fee may not include costs associated with searching for and retrieving the requested information. See 45 CFR 164.524" [www.hhs.gov.ocr/hipaa/, Health Information Privacy Frequently Asked Questions, Answer ID #353].

Thus, it appears that covered entities may, but are not required, to charge cost-based fees for copying medical records requested by patients under the HIPAA. It is also noted that the fee may not include costs for searching or retrieving the information.

Notwithstanding the foregoing, it is my understanding that the Department has changed its policy concerning fees relating to medical records. Under the new policy, which appears to be consistent with both HIPAA and §18 of the Public Health Law, the Department charges a fee of fifty cents per photocopy for medical records; no additional fee is charged.

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-1414/05

41 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, 2003

Mr. Theodore Howard
76-A-2921
Woodbourne Correctional Facility
Box 1000
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Howard:

I have received your letter in which you requested that this office issue an advisory opinion reflecting your assertion that the Division of Parole, in its Policy and Procedures Manual, has waived its ability to "rely upon exemptions under the FOIL", when responding to requests for certain records.

I respectfully disagree with the substance of your contention. In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, the Division of Parole's Policy and Procedures Manual serves as a guide to Division staff and does not have the weight or force of law. As such, the manual, in my opinion, neither increases nor diminishes the Division's ability to withhold records.

I hope that the foregoing services to enhance your understanding of the matter.

Sincerely,

for Theo

David Tr
Assistant L

DT:jm

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 1414/06

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 15, 2003

Ms. Elizabeth Moore
Newsday
235 Pinelawn Road
Melville, NY 11747

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Moore:

I have received your letter of November 18 and related materials pertaining to your request to the East Meadow Fire District to inspect and/or copy "the voter history from [the] district's most recent bond referendum." When referring to "voter history", you indicated that the request is intended to include the names and home addresses of all voters who participated in the bond referendum.

In response to the request, the Chairman of the Board of Fire Commissioners denied access on the ground that disclosure would result in "an unwarranted invasion of personal privacy" pursuant to §89(2)(b)(iii) of the Freedom of Information Law. He also made reference to an amendment to the Education Law, Chapter 29 of the Laws of 2000, and supported his conclusion by indicating that the amendment "eliminated the requirement that a list of absentee voters be posted at the election site in order to enable persons to challenge them."

From my perspective, it is clear that your request should have been granted. In this regard, I offer the following comments.

First, §175 of the Town Law, which pertains to fire districts, states in subdivision (2) that "Every elector of the town who shall be a registered voter and shall have resided in the district for the period of thirty days next preceding any election at which a proposition shall be submitted, shall be qualified to vote upon such proposition." Section 175-a of the Town Law entitled "Registration for voters" makes reference to a "register" and directs inspectors of elections to "adopt, use or copy from, the registration list certified and supplied by the county board of elections the names appearing thereon of all persons residing in the fire district and qualified to vote in such forthcoming...election..."

Second, the provision in the Freedom of Information Law to which the Chairman alluded is, in my view, inapplicable. Section 89(6) of that statute states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

As such, if records are available as a right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access [see e.g., Szikszay v. Buelow, 436 NYS 2d 558, 583 (1981)].

Relevant in this instance is §5-602 of the Election Law, entitled "Lists of registered voters; publication of", which states that voter registration lists are public. Specifically, subdivision (1) of that statute provides in part that a "board of elections shall cause to be published a complete list of names and residence addresses of the registered voters for each election district over which the board has jurisdiction"; subdivision (2) states that "The board of elections shall cause a list to be published for each election district over which it has jurisdiction"; subdivision (3) requires that at least fifty copies of such lists shall be prepared, that at least five copies be kept "for public inspection at each main office or branch of the board", and that "other copies shall be sold at a charge not exceeding the cost of publication." As such, §5-602 of the Election Law directs that lists of registered voters be prepared, made available for inspection, and that copies shall be sold. There is no language in that statute that imposes restrictions upon access in conjunction with the purpose for which a list is sought or its intended use.

Since §5-602 of the Election Law confers unrestricted public rights of access to voter registration lists, in my opinion, nothing in the Freedom of Information Law could be cited to restrict those rights. Further, as a general matter, I believe that a statute pertaining to a specific subject prevails over a statute pertaining to a general subject. A statute in the Election Law that pertains to particular records would in my view supersede a statute pertaining to records generally, such as the Freedom of Information Law.

Additionally, in a provision dealing with absentee ballot applications, Election Law, §8-402, subdivision (7) states that:

> "The board shall keep a record of applications for absentee ballots as they are received, showing the names and residences of the applicants, and their party enrollment in the case of primary elections, and, as soon as practicable shall, when requested, give to the chairman of each political party or independent body in the county, and shall make available for inspection to any qualified voter upon request, a complete list of all applicants to whom absentee voters' ballots have been delivered or mailed, containing their names and places of residence as they appear on the registration record, including the election district and ward, if any..."

Similarly, §3-220(1) of the Election Law states in part that: "All registration records, certificates, lists and inventories referred to in, or required by, this chapter shall be public records..." Registration records include voters' residence addresses.

Based on the foregoing, it is clear that voter registration lists identifying those who voted by name and address, as well as the names and addresses of applicants for absentee ballots must be made available, and that the same or equivalent records maintained by a fire district are, in my opinion, equally accessible.

Lastly, the inference in the Chairman's letter suggesting that the names and addresses of applicants for absentee ballots are exempt from disclosure, if that is his contention, is inconsistent with law. Perhaps a list of those who sought absentee ballots need not be posted by a school district. However, the actual language of the provision of law to which he alluded specifies that it is accessible to the public. Specifically, §2018-b(7) of the Education Law states in relevant part that:

> "The clerk of the school district or designee of the trustees or school board shall make a list of all persons to whom absentee voter's ballots shall have been issued and maintain such a list where it shall be available for public inspection...."

Moreover, §175-b of the Town Law, entitled "Absentee ballots for fire district elections; special provisions", contains similar language in subdivision (6), stating that:

> "The secretary of the fire district shall make a list of all persons to whom absentee voter's ballots shall have been issued and keep a list on file in the fire office where it shall be available for public inspection...."

That provision also states that the list must be posted during the election in a "conspicuous place or places."

In sum, at suggested at the outset, it is clear in my opinion that records indicating the names and addresses of those who voted during fire district elections, including a bond referendum, must be disclosed. In an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be sent to the Chairman.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Neill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14407

41 State Street, Albany, New York 12231
(518) 474-2518
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December 15, 2003

Mr. Edmond Pena
02-R-2369
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 facts presented in your correspondence.

Dear Mr. Pena:

I have received your letters and attached material in which you requested assistance in obtaining a variety of records related to your prosecution.

The New York County District Attorney's office responded to your request over one year ago by informing you that the records you seek are "in a case investigated or prosecuted by the Special Narcotics Courts" and that your request was "referred to that office for assignment to a records access officer who will contact you shortly." The letter directed you to address any further correspondence on the matter to the Special Narcotics Courts. You wrote that despite "several requests as to the status" of your request, you have not received a response from that office.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, based on a review of the correspondence, I offer the following comments.

First, it is assumed that the reference to the "Special Narcotics Courts" pertains to the Office of the Special Narcotics, which is located at the address given by Mr. Galperin.

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)].

Third, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the appropriate office.

Lastly, with respect to requesting records from a court, 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 resubmit requests to the Office of the Special Narcotics, as well as the clerk of the court in which your proceeding was conducted, citing applicable provisions of law as the basis for your requests.

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-14408

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 15, 2003

Mr. Vincent Terio
[redacted]

Dear Mr. Terio:

I have received your letter of November 18, and it appears that you may have misinterpreted my earlier communication with you.

It appears that you believe that I advised that "if paper records have been discarded and the records at issue [are kept] only on microfilm, Mr. Terio may seek a certification to that effect." In this regard, if a paper copy of a record has been discarded, but a microfilm copy of the same record continues to exist and can be found, I do not believe that an agency would be required to prepare a certification to comply with §89(3) of the Freedom of Information Law. In short, whether it is maintained on paper or microfilm, the record in that instance would continue to exist, and the agency would be required to permit the public to inspect and copy the record. The requirement that an agency prepare a certification is operable in my opinion only when an agency does not possess the record, or when an agency cannot locate an existing record, even though it has performed a diligent search.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert J. Bondi
Dennis J. Sant
George Michaud

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14409

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 15, 2003

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 communication in which you transmitted a response to a request made under the Freedom of Information Law to the Town of Greenburgh. In short, you were advised that such requests "were no longer being accepted by email" and that "[t]hey must be filed on our FOIL form."

While I do not believe that the Town is required to accept requests transmitted via email, it cannot, in my opinion, require that you complete a prescribed form in order to request records. In this regard, I offer the following comments.

First, a relatively new provision of law, §105 of the State Technology Law, states in relevant part that:

> "In accordance with rules and regulations promulgated by the electronic facilitator, government entities are authorized and empowered, *but not required*, to produce, receive, accept, acquire, record, file, transmit, forward, and store information by use of electronic means" (emphasis added).

Based on the foregoing, an agency may choose to accept a request under the Freedom of Information Law made by means of email, but as indicated above, it is "not required" to do so. Similarly, §105(1) specifies that an agency would not be required to "transmit" records via email sought under the Freedom of Information Law.

Second, with respect to the use of a form, by way of background, an agency may, pursuant to §89(3) of the Freedom of Information Law, require that a request be made in writing. The same

provision states that an applicant must "reasonably describe" the records sought and includes direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 suggested at the outset, I do not believe that an agency can require that a request be made on a prescribed form. Again, §89(3) of the law, 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. 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.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Joan M. Dudek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1414/0

41 State Street, Albany, New York 12231
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December 15, 2003

Mr. Leon F. Henry
#11456-052 C/B
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

Dear Mr. Henry:

I have received your "FOIA/FOIL" request in which you sought information "relating to changes in laws, and the recent operation of the Fed./State Drug Task Force."

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the New York Freedom of Information Law. This office is not similar to a library or legal services organization, and it does not possess information, expertise or knowledge concerning the subject of your interest.

Second, even if this agency had responsibilities, expertise or knowledge concerning the subject, your letter, in my view, would not have constituted a proper request under the Freedom of Information Law. I note that the title of that statute may be misleading, for it is not a vehicle that pertains to information *per se* or that requires an agency to provide information in response to questions. Rather, it serves as a means by which a person may request existing records from an agency.

Lastly, I am unaware of which agency might have the information that you are seeking, and it is suggested that you might discuss the matter with your facility librarian.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14411

41 State Street, Albany, New York 12231
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December 16, 2003

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 Rangerstark:

I have received your inquiry of November 18. You referred to a request made to a school district for records regarding those who have been "paid 4 mileage from the school." Although the superintendent apparently provided information concerning one employee, he requested the names of others in whom you are interested. You asked whether it is the responsibility of the district indicate the names, or whether that burden rests with you. You also wrote that the district sends surveys to employees for the purpose of evaluating the superintendent's performance and asked whether the results would be public.

In this regard, I offer the following comments.

First, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when that statute was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the District's recordkeeping systems, assuming that records concerning reimbursement for mileage sought can be located with reasonable effort, I believe that your request would have met the requirement that you "reasonably describe" the records. On the other hand, if a review of hundreds or thousands of records individually would have to be undertaken to locate those of your interest, the request, in my opinion, would not meet the standard of reasonably describing the records.

Second, with respect to the survey and rights of access to records, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent is §87(2)(g), which permits an agency, such as a school district, to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In the context of your inquiry, expressions of opinion by employees concerning how well or poorly the superintendent has performed his or her duties could, in my view, be withheld. If, however, a statistical compilation was prepared based on survey responses (i.e., a document indicating the number or percentage of employees who rated the superintendent as excellent, fair or poor), a document of that nature would likely be available under §87(2)(g)(i).

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14412

41 State Street, Albany, New York 12231
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December 16, 2003

Mr. Edwin Rodriguez
00-A-3034
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

Dear Mr. Rodriguez:

I have received your letter and the attached appeal made to this office concerning your request made pursuant to the Freedom of Information Law to the Division of Parole.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records.

Second, based on the dates to which you referred in your correspondence and the recipients, it is unclear whether you have properly construed the law. For the purpose of clarification, 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 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 Division of Parole is Terrence X. Tracy, Counsel to the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1414/13

41 State Street, Albany, New York 12231
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December 16, 2003

Hon. Christopher G. Boryk
Assessor, Town of Kent
531 Route 52
Administrative Offices
Kent Lakes, 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 facts presented in your correspondence.

Dear Mr. Boryk:

I have received your letter of November 18. Please note that this office is located at 41 State Street and that I am employed by the Department of State and not the Office of Real Property Services.

You have sought an opinion concerning the duty to disclose copies Agriculture Assessment Renewal Applications, which are also known as RP-305-r forms, under the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, 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. 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 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

Second, as I understand the matter, the only exception that would be pertinent is §87(2)(d), and the extent to which it would serve as a valid basis for denial is questionable. That provision permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In my opinion, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise.

From my perspective, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" [(Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise"(id., 419-420).

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421).

In the context of your inquiry, impairment of the government's ability to acquire the records at issue or similar materials in the future does not appear to be a consideration. Similarly, attracting a business or industry to the Town does not appear to be pertinent. Perhaps most importantly, the figures in item 3 of the form involve gross sales value; they do not indicate income, profit or profitability. It may be possible in rare instances to conclude that disclosure of the figures could result in "substantial injury to the competitive position of a commercial enterprise." However, if I understand the nature of the form and the utility of the figures, it would be an exceptional circumstance in which §87(2)(d) could properly and justifiably be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1414

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December 16, 2003

Mr. Richard T. Fisher
[redacted]

Dear Mr. Fisher:

I have received your letter concerning the propriety of responses to your requests made pursuant to the Freedom of Information Law for records directed to "a not-for-profit agency that receives taxpayer dollars", Citizens Against Violent Acts, Inc. Although the correspondence attached to your letter suggests that the entity in question supplied the information sought, you asked that this office "investigate" the reason for what you consider to be a denial of your request.

In this regard, the receipt of taxpayer dollars does not necessarily bring an organization within the coverage of the Freedom of Information Law, and I do not believe that the organization in question is required to disclose its records to the public. That statute pertains to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally applies to governmental entities, such as units of state or local government; it ordinarily does not apply to private or not-for-profit corporations. That Citizens Against Violent Acts, Inc. may have a relationship with one or more government agencies does not make it a government agency. My understanding is that it is an independent corporate entity separate from government, and if that is so, it would not be subject to the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding of the application of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3720
FOIL-AO-1441S

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December 17, 2003

Mr. George Yourke
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Yourke:

I have received your letter of November 18 and the materials attached to it.

As you surmised, the advisory jurisdiction of the Committee on Open Government is limited to matters relating to the Freedom of Information and Open Meetings Laws. That being so, I cannot offer guidance concerning SEQRA or other matters that do not involve the application of those statutes. Insofar as the issues raised pertain to the Freedom of Information and Open Meetings Laws, I offer the following comments.

First, 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 or planning 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 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.

Second, although the notice required by §104 must include the time and place of a meeting, there is nothing in the Open Meetings Law or any other law of which I am aware that deals specifically with agendas. While many public bodies prepare agendas, the Open Meetings Law does not require that they do so. Similarly, the Open Meetings Law does not require that a prepared agenda be followed. However, a public body on its own initiative may adopt rules or procedures concerning the preparation and use of agendas.

Third, §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.

And lastly, you referred to a situation in which an applicant in a proceeding "hired a stenographer to transcribe [a] hearing", and that a copy of the transcript was forwarded to a regional office of the Department of Environmental Conservation. Here I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) of that statute defines the term "record" 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 provision quoted above, once the transcript came into the possession of the Department, I believe that it constituted an agency 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. Since the transcript reflects comments offered during a public hearing, none of the grounds for denial of access would, in my view, be applicable or pertinent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board
Hon. Ruth Mazzei, Town Clerk
Michael Merriman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1414/6

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December 18, 2003

Mr. Tom Kackmeister
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kackmeister:

I have received your letter of November 18 and the materials attached to it. Once again, your remarks pertain to your efforts in obtaining information from the Greece Central School District. You have asked that I "step in and try make the district finally comply with [your] requests."

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to compel an agency, such as a school district, to comply with law or to grant or deny access to records. Further, several of the matters to which you referred were addressed in opinions previously rendered. In an effort to offer guidance, however, I offer the following comments.

First, it is reiterated 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. Based on a review of the materials, it is unclear whether or the extent to which the information sought exists. For instance, based on the response to your request for "summary data" concerning "employee absenteeism", you were informed that the data had not yet been compiled and that:

> "[a]s part of the annual employee performance review process, supervisors will review each employee's absenteeism record. For example, the Assistant Superintendent of Elementary Schools would review the attendance records for all Elementary Principals. The Principal of Apollo Middle School would review attendance records of the Apollo teachers, etc."

Unless I have misinterpreted the District's response, there may not be or have been "summary data". If that is so, because the Freedom of Information Law pertains to existing records, that law would

not have applied. As indicated in previous correspondence, the Freedom of Information Law states in §89(3) that an agency is not required to create a record in response to a request.

Second, and perhaps most significantly in the context of your requests, the specificity of a request is not determinative of its adequacy. The same provision as that cited above states that an applicant must "reasonably describe" the records sought. According to the state's highest court, the Court of Appeals, whether or the extent to which a request meets that standard may be dependent on the nature of an agency's filing, indexing or record keeping system [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. By means of example, if the Monroe County telephone book were a school district record and you requested all the listings for persons whose last name is Kackmeister or perhaps Smith, the request would reasonably describe the records; whether there are five Kackmeisters or five thousand Smiths, the request would have been made in manner consistent with the indexing system used in the phone book, i.e., by last name in alphabetical order. If you then requested those portions of the phone book identifying those persons whose first name is Thomas, the request would be specific, and unquestionably, there would be many such entries. However, because they do not appear and are not published in alphabetical order, locating the Thomases would involve a search, one by one, of each listing; in essence, it would involve the search for a very few needles in a very large haystack. Despite the specificity of the request and the fact that there are entries for persons whose first name is Thomas, the request would not reasonably describe the records.

Lastly, one of the requests, according to the correspondence that you enclosed, involves:

> "Any data or records which would demonstrate that FOIL requests referred to 'Legal' cost an average of $500 each (or any other figure). Also any data or records which show how many FOIL requests have been referred to legal."

In my view, the foregoing is not a request for records; it is a request for an analysis or computation. If no existing records indicate the average cost of a request made under the Freedom of Information Law, or if there is no tabulation of the number of such requests forwarded to "Legal", I do not believe that the District would be required to engage in developing new records or analyses in order to satisfy your request.

Insofar as your requests relate to existing records, the District, in my opinion, is required to disclose them to you to the extent required by law in a timely manner as suggested in previous correspondence. However, it is reiterated that the Freedom of Information Law pertains to existing records and does not require that an agency create records.

I hope that the foregoing serves to clarify your understanding of the law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald O. Nadolinski
Ruth Ranzenbach

STATE OF NEW YORK
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December 18, 2003

Ms. Carol W. LaGrasse
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. LaGrasse:

I have received your letter in which you questioned the propriety of an "administrative fee" sought to be imposed by the Village of Ellenville, in addition to a fee for photocopying. The fee, according to the Village Attorney, is intended to "cover the time taken away from the searching officer's attention to its other daily duties."

From my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, searching for records or charging more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed. In this instance, I know of no statute that would authorize the Village to do so.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
>
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

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: Board of Trustees
Philip M. Cataldi

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-1414/8

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December 19, 2003

Mrs. Patricia Rozwood
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mrs. Rozwood:

I have received your letter in which you asked a variety of questions relating to the Open Meetings and Freedom of Information Laws. In consideration of the previous correspondence, it is assumed that your questions related to the Global Concepts Charter School and its Board of Trustees. Because charter schools and their boards are subject to the Freedom of Information and Open Meetings Laws, in the following remarks, the school and its board will be treated as an "agency" for purposes of the Freedom of Information Law and a "public body" for purposes of the Open Meetings Law.

First, with respect to the legality of a meeting held on a Sunday, a holiday or when school is closed, again, the Open Meetings Law is silent on the matter. Although §24 of the General Construction Law enumerates certain days as "public holidays", I an unaware of any statute or judicial decisions that deal specifically with the issue of a public body's authority to conduct a meeting on a holiday or a weekend day. I have found a summary of an opinion rendered by the State Comptroller in which it was advised that a town is not legally obligated to close its offices on the holidays designated in §24 of the General Construction Law, and that a town board has discretionary authority to close town offices in observation of those holidays (see 1985 Opinion of the State Comptroller, 85-33). In my view, due to the absence of specific statutory guidance, it appears that a public body may in its discretion conduct meetings on public holidays or weekends, so long as it complies with the applicable provisions of law, such as the Open Meetings Law. I point out, too, that many public bodies conduct organizational meetings on January 1, which is a public holiday.

Second, every meeting must be preceded by notice indicating the time and place, and §104 of the Open Meetings Law states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and

> shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such 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.
>
> 4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

Based on the foregoing, the Open Meetings Law imposes a dual requirement, for notice must be posted in one or more designated, conspicuous, public locations, and in addition, notice must be given to the news media. The term "designated" in my opinion involves a requirement that a public body, by resolution or through the adoption of policy or a directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a school district's administrative offices has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held.

With respect to notice to the news media, subdivision (3) of §104 specifies that the notice given pursuant to the Open Meetings Law need not be legal notice. That being so, a public body is not required to pay to place a legal notice prior to a meeting; it must merely "give" notice of the time and place of a meeting to the news media. Moreover, when in receipt of notice of a meeting, there is no obligation imposed on the news media to publish the notice.

I believe that every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In that vein, to give effect to intent of the Open Meetings Law, I believe that notice of meetings should be given to news media organizations that would be most likely to make contact with those who may be interested in attending. Similarly, for notice to be "conspicuously" posted, I believe that it must be posted at a location or locations where those who may be interested in attending meetings have a reasonable opportunity to see the notice.

Third, §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."

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.

When a government officer or body fails to carry out a duty required to be performed, or in this instance, a charter school, a member of the public may initiate a judicial proceeding under Article 78 of the Civil Practice Law and Rules in Supreme Court in the proper county. In such a proceeding, the court may compel the officer or body to perform its duty and comply with law. Nevertheless, it is my hope that the preparation of an advisory opinion such as this, which can be shared with an entity, will encourage compliance and obviate the need to commence litigation.

Next, with respect to the procedural implementation of the Freedom of Information Law, I note by way of background that §89(1) 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, i.e., a board of trustees, 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 a board of education 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. If a different 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.

Again, if an agency fails to implement the law or regulations, an Article 78 proceeding may be initiated.

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: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1414/19

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December 19, 2003

Mr. Christopher Esposito
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Esposito:

I have received your letter in which complained with respect to the proposed delay in responding to your request for records of the Orange County Sheriff's Department. You wrote that "it will take approximately 3-6 months to gather the records requested", which include employee time sheets and phone bills, "car history reports and vendor changes."

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.

In a judicial decision that cited and confirmed the advice rendered by this office, 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: Records Access Officer

STATE OF NEW YORK
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December 19, 2003

Mr. Clifford E. Wexler
Board of Directors
Valatie Volunteer Rescue
P.O. Box 242
Valatie, NY 12184

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wexler:

As you are aware, I have received your letter of November 27 in which you questioned the status of the Valatie Volunteer Rescue Squad, a not-for-profit corporation, in relation to the Freedom of Information and Open Meetings Laws. You wrote that the Rescue Squad "provide[s] emergency medical services in an ambulance district" in certain towns pursuant to agreements with those municipalities.

Based on judicial decisions, it appears that the Rescue Squad is subject to both of those statutes. In this regard, I offer the following comments.

First, by way of background, 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)].

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 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. Since the situation of the Rescue Squad appears to be similar, it appears that it would fall within the coverage of the Freedom of Information Law.

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 the Rescue Squad performs its functions exclusively for municipalities, I believe that it would be found that it conducts public business and performs a governmental function for those municipalities and that, therefore, the meetings of its governing body would be subject to the Open Meetings Law.

If I have misconstrued the facts, please so inform me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

1/4/21

From: Robert Freeman
To: [redacted]
Date: 12/22/2003 10:43:25 AM
Subject: Dear Mr. Eskenazi:

Dear Mr. Eskenazi:

I have received your inquiry, and I believe that recourse may avalilable in the situations that you described, those in which an agency "habitually" fails to respond to requests made under the Freedom of Information Law or "responds incompletely or haphazardly." In this regard, I offer the following brief comments.

First, §89(3) of that statute requires that an agency respond to a request within five business days of the receipt of the request. If an agency fails to do so, the applicant may consider the request to have been constructively denied and, therefore, may appeal the denial. When an appeal is made, §89(4)(a) requires that the head or governing body of the agency or a person designated by that person or body must, within ten business days of the receipt of the appeal, fully explain in writing the reasons for further denial or make the records available. If an agency fails to determine the appeal within the statutory time, the appeal may be deemed to have been denied, and the applicant would have exhausted his or her administrative remedies. That being so, he or she could initiate a judicial proceeding under Article 78 of the Civil Practice Law and Rules to seek review of the denial of access.

Second, if any aspect of a request is denied, the applicant has the right to appeal. Consequently, if a request is made for a variety of records and some are disclosed, but there is no reference to the others, the applicant may consider those to which no reference is made to have been denied. He or she would have the right to appeal the denial.

Third, when an agency indicates that records do not exist or cannot be found, the applicant may, pursuant to §89(3), seek a certification in writing to that effect.

Next, it is appropriate, in my view, to contact and speak with an agency's records access officer. Often problems can be resolved by so doing.

Lastly, this office has the authority to offer guidance through the preparation of advisory opinions. While the opinions are not binding, it is our hope that they are educational and persuasive, and that serve to enhance compliance with and understanding of the Freedom of Information Law.

If you would like to discuss the matter, please feel free to contact me.

I hope that I have been of assistance.

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-14422

41 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 22, 2003

Mr. Jerome D. Schad
Hodgson Russ
One M&T Plaza, Suite 2000
Buffalo, NY 14203-2391

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Schad:

I have received your letter of November 26 in which you raised an issue concerning access to a certain record.

You wrote that your firm represents a school district that participated in special education mediation pursuant to §4404-a of the Education Law, and that the parents and the district entered into a settlement agreement that resolved all claims. Some two months following the execution of the settlement, the parents' former attorney, citing the Freedom of Information Law, requested "a copy of the Settlement Agreement entered into by the district on [date] with [parents] as a result of mediation in which [a different lawyer] represented the district." It is the district's position that it is "prohibited from providing a copy of the settlement agreement, even in redacted form, to the requesting party."

I agree with the district's contention, and 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.

Relevant in the context of the facts presented is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, as you suggested, is the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). In brief, that statute generally forbids public disclosure of personally identifiable information pertaining to a student without the consent of a parent of the student.

The regulations promulgated by the U.S. Department of Education to implement FERPA define the phrase "education records" to include those records that are:

> "(1) Directly related to a student; and
>
> (2) Maintained by an educational agency or institution or by a party acting for the agency or institution."

From my perspective, the settlement agreement clearly constitutes an education record.

Further, the regulations 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.

In this instance, since the request was made in relation to a named student and/or family, the deletion of personally identifiable details would be meaningless; the former attorney would know the identity of the student to whom the records pertain. That being so, I believe that records would be exempt from disclosure under FERPA and, thereby, §87(2)(a) of the Freedom of Information Law. Additionally, since the record at issue relates to a student with a disability, aside from FERPA, I believe that the record may properly 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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14123

41 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 22, 2003

Mr. Gene D. Mentzer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Mentzer:

I have received your letter of November 24. You referred to a delay in response to your request for records made to the New York State Teachers' Retirement System.

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)].

In a judicial decision 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."

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 Cardillo, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14424

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 22, 2003

E-MAIL

TO: Robert Reninger [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. Reninger:

I have received your letter in which you referred to an opinion rendered on December 15 in which it was advised, based on §105 of the State Technology Law, that the Town of Greenburgh is not required to accept requests for records sought pursuant to the Freedom of Information Law that are made by email. You contend that §105 does not apply to the Town, and upon a closer reading of the State Technology Law, I must agree.

Sections 101 through 109 of the State Technology are denominated as Article 1 of that chapter. Section 105(1) states in part that "government entities" may, but are not required, to accept information by use of electronic means. Section 102(5) defines "governmental entity" to mean:

> "...any state department, board, bureau, division, commission, committee, public authority, public benefit corporation, council, office, or other governmental entity or officer of the state having statewide authority, except the state legislature, and any political subdivision of the state."

Based on the foregoing, political subdivisions, such as towns and other municipalities, are beyond the coverage of §105.

From my perspective, if a request is clearly and properly made under the Freedom of Information Law and is transmitted by means of email to an entity that is not subject to §105 of the State Technology Law, it must be accepted. Section 89(3) of the Freedom of Information Law provides that an agency may require that a request be made in writing and that it must reasonably describe the records sought. In consideration of the widespread use of the internet and email within

society in general, I believe that it would be unreasonable for such an entity to choose not to accept and honor a request made by email that reasonably describes the records or to treat it differently from the traditional written request made on paper. While state agencies, by statute, are not required to accept such requests, I believe that municipalities, must do so.

The foregoing is not intended to suggest that an agency must provide access to records by means of email. While an agency may choose to do so, there is nothing in the Freedom of Information Law or judicial interpretation of that statute that requires that the agency must do so.

In an effort to correct the error made in the opinion of December 15, copies of this response will be forwarded to the Greenburgh Town Board and the Town Clerk.

Please accept my apologies for the oversight.

RJF:tt

cc: Town Board
Hon. Alfreda A.Williams

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14425

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 23, 2003

Mr. John F. Fitzgerald
[redacted]

Dear Mr. Fitzgerald:

As you are aware, I have received your letter of November 27 and the materials attached to it. You characterized the letter as an appeal concerning the failure of Easter Seals of New York to grant your request for records sought under the Freedom of Information Law. Easter Seals is in partnership with the Valhalla Union Free School District concerning the operation of a day care and pre-school program in a vacant school building.

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, an agency is an entity of state or local government that performs a governmental function; a private entity, such as Easter Seals, is not governmental in nature and, therefore, does not constitute an agency that is required to give effect to the Freedom of Information Law. That an entity receives funding from government or has a relationship with government would not change its nature; if it is not a governmental entity, again, it would not be subject to the Freedom of Information Law.

Lastly, I point out that the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. Even when that statute is clearly applicable, the Committee is not empowered to enforce its provisions or to compel an agency to grant or deny access to records.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kalvin Kamien
Thomas M. Kelly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1414

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 23, 2003

Mr. Leonard M. Kohen, Esq.
Waxman & Waxman, P.C.
386 Park Avenue South
Suite 1905
New York, NY 10016-8804

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kohen:

I have received your letter of November 25 and the materials attached to it. You have sought an advisory opinion relating to a request made under the Freedom of Information Law for records of the Town of Southampton.

By way of background, your request arose "from protracted litigation commenced in 1996 by [your] client against the Town of Southampton." A stipulation of settlement was reached in 2001 in which the Town agreed to "implement certain corrective work." You wrote that the Town has done little to implement the agreement, and on September 3, your firm requested drainage plans relating to the premises, any agreements with a church concerning the use of its property to implement the drainage plan, executed work orders, and agreements with contractors to implement the plan. It appears that the Town responded to neither the request nor the ensuing appeal.

In this regard, I offer the following comments.

First, as we discussed, that you or your client might be or have been involved in litigation with the Town is irrelevant in relation to your request made under the Freedom of Information Law. As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction

between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Assuming that a drainage plan has been adopted, although it would it appear to constitute "intra-agency material" falling within the coverage of §87(2)(g), I believe that it would be accessible. The cited 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.

From my perspective, if the plan has been adopted or approved, it would be available under either subparagraph (i) of §87(2)(g) as factual information or subparagraph (iii) as a final agency determination.

With respect to the other records sought, agreements with the church or contractors, none of the grounds for denial of access would, in my view, be applicable or pertinent.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

In consideration of 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)].

In a judicial decision that cited and confirmed the advice rendered by this office, 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 response will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J, Freeman
Executive Director

RJF:tt

cc: Town Board
Diane Carpenter
Town Attorney
Thomas C. Sledjeski

FOIL-AO-14427

From: Robert Freeman
To: hdavis@buffnews.com
Date: 12/26/2003 9:18:29 AM
Subject: Dear Mr. Davis:

Dear Mr. Davis:

I attempted to reach you by phone soon after receiving your email message concerning access to "hand-written notes [prepared] by nursing home inspectors that appear to be have been used to fill out the final statements of deficiency."

In this regard, first, the Freedom of Information Law ("FOIL") is applicable to all agency records, and §86(4) 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 of your interest, in my view, clearly constitute agency records that fall with the coverage of the FOIL.

Second, as a general matter, FOIL is based on a presumption of access. Stated differently, all records are accessible, except those records or portions of records that fall within a series of exceptions to rights of access appearing in §87(2).

Pertinent in the context of your question is §87(2)(g) concerning "inter-agency or "intra-agency materials." The notes would consist of intra-agency materials, and their contents would serve as the key factor in determining the extent to which they must be disclosed, or conversely, may be withheld. In essence, those portions consisting of advice, opinion, recommendation, conjecture and the like may be withheld; other aspects of the notes consisting of statistical or factual information, in whatever form (i.e., numerical, tabular or perhaps narrative) would be accessible, assuming that no other exception would be applicable.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14428

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December 29, 2003

E-Mail

TO: Carol Thompson [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. Thompson:

I have received your letter of December 7 concerning a request made to the Town of Schroeppel for "department reports of the town's highway superintendent" covering the period of April, 2000 to the present.

You received six reports, but the Superintendent indicated that the reports for April, 2000 through December, 2002 "were done verbally at the meetings." However, based on a search of minutes of Town Board meetings, you found that there was "no verbal or written report given on 20 such occasions." You have questioned whether a response as you described it is appropriate or whether "one is to assume that the records exist but are being withheld." You have sought guidance in the matter, and in this regard, I offer the following comments.

First, the Freedom of Information Law is expansive in its scope, for it pertains to all records maintained by or for an agency, such as a town. Section 86(4) defines the term "record" to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of the foregoing, any writing prepared by or for the Superintendent or any other Town official, whether in the form of notes or more formal documentation, would constitute a "record" that falls within the coverage of the Freedom of Information Law.

Second, however, that statute pertains to existing records, and §89(3) states in part that an agency need not create records in response to a request or to comply with law. If indeed information was communicated verbally and no record or records 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.

RJF:jm

cc: Highway Superintendent
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1414 29

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December 29, 2003

Mr. Desmond C.B. Lyons
Lyons McGovern, LLP
37 Main Street
Tarrytown, NY 10591

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lyons:

I have received your letter of December 1 which you characterized as a complaint and in which you sought my intervention.

In brief, you wrote that you represent the "minority owner" of a parcel in the central business district in Yonkers, the site of a proposed minor league baseball stadium. Although your client and "other members of the minority community" support the construction of the stadium, you indicated that a large landowner in the area has opposed the project and that he and his attorneys "have claimed inaccurately that the minority community opposes the project." That being so, you wrote on behalf of your client to the City Council on October 27 and requested any written communications between members of the City Council and certain named individuals, attorneys or law firms from June 1, 2002 through October 27, 2003. As of the date of your letter this office, it appears that you have received no response.

It is noted at the outset that the Committee on Open Government and its staff are authorized to offer advice and opinions concerning the Freedom of Information Law. This office is not empowered "intervene" in the legal sense or to compel an agency to grant or deny access to records. However, in an effort to offer guidance, I offer the following remarks.

First, the regulations promulgated by the Committee (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. In my view, the recipient of your request should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer.

Second, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to a request. 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)].

In a judicial decision that cited and confirmed the advice rendered by this office, 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 the 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 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.

Next, it is emphasized that the Freedom of Information Law is expansive in its scope, for it applies to all agency records and defines the term "record" in §86(4) 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 kinds of communications that you requested, insofar as they exist in some physical form, would constitute "records" that fall within the coverage of the Freedom of Information Law.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, insofar as the records sought exist and can be found with reasonable effort, they would be accessible, for none of the grounds for denial would appear to be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: City Council
Records Access Officer
City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14430

Committee Members

Randy A. Daniels
Mary O. Donohue
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Gary Lewi
Warren Mitofsky
J. Michael O'Connell
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December 29, 2003

TO: John Solak [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. Solak:

I have received your letter of December 6. You indicated that approximately a month prior to your transmission of that letter, you requested records from the office of the Broome County District Attorney. Since two weeks passed with no response, you telephoned that agency and were told that the request had been forwarded to the District Attorney, but as of the date of your letter to this office, there had been no acknowledgment or response. You have asked "[w]hat...the penalty [is] for non-compliance."

In this regard, there is no penalty *per se*; however, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) 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].

Based on the foregoing, I believe that your request has been constructively denied and that you may appeal the denials pursuant to §89(4)(a). That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reason for further denial, or provide access to the record sought."

I note that it has been held that if an appeal is not determined within ten business days of its receipt, it, too, may be deemed denied. In that event, the person denied access may seek judicial review of the denial by initiating a judicial proceeding under Article 78 of the Civil Practice Law and Rules.

Lastly, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be forwarded to the officials that you identified.

I hope that I have been of assistance.

cc: Hon. Gerald Mollen, District Attorney
Lou Augostini

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14431

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December 29, 2003

Mr. Keith Burke
President
Local CSEA
166 Tsatsawassa Lake Road
East Nassau, NY 12062

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Burke:

I have received your letter and the materials attached to it. You complained that the New Lebanon Central School District failed to respond to your request in a timely manner.

By way of background, on November 3, you requested "payroll records for any & all people that was ever paid mileage." Because the District did not respond, you appealed on November 14. On November 18, the Superintendent wrote to you and indicated that a review of account books was conducted concerning mileage reimbursement paid to CSEA members traveling between buildings, and it was explained that reimbursement was made only once this year. The Superintendent added that he would check other records if provide employees' names and added that reimbursement has been paid for conferences or required training.

In this regard, I offer the following comments.

First, there is no time limitation concerning your request; it might be interpreted as pertaining to mileage reimbursements during the past calendar year, the past school year, or perhaps since mileage reimbursements began to be made.

Second, in a related vein, a key issue may involve the manner in which the District maintains its records. By way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I

point out that it has been held by the Court of Appeals, 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 District, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. For example, if there is file dealing specifically with mileage reimbursements, or if there is a means of readily retrieving those items through the use of a computer, I believe that a request would meet the standard of reasonably describing the records, irrespective of the volume of material. On the other hand, if the records sought can be located only by reviewing hundreds or thousands of records individually, one by one, to locate those involving mileage reimbursement, that standard, in my view, would not be met, and District staff would not be required to engage that kind of effort.

Third, insofar as the records of your interest can be located with reasonable effort, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Items contained in the records that are irrelevant to the performance of one's duties, such as social security numbers or home addresses, may in my opinion be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. However, those portions of the records identifying employees who received mileage reimbursement, the amount and the reason (i.e., conferences, training, travel

between schools, etc.) would relate to the performance of their duties and, therefore, would be accessible under the law.

Lastly, when a proper request is made, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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: Patrick J. Gabriel
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14432

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December 29, 2003

Mr. Hans Carlson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Carlson:

I have received your letter in which you referred to §87(2)(b) of the Freedom of Information Law and asked whether "the provisions of section 89(2)(b) [may] be cited as a definition of 'an unwarranted invasion of personal privacy.'"

From my perspective, the phrase "unwarranted invasion of personal privacy" cannot be defined. The concept of privacy is constantly changing. What we believed as a society about privacy five years ago is different from what we believe today; what we will feel about the subject five years from now will be different from what we feel today. Moreover, facts and circumstances may result in different outcomes. For example, §89(7) of the Freedom of Information Law indicates that the home address of a present or former public employee need not be disclosed. However, if a public employee's address is included within an assessment roll or a voter registration list, it would be available pursuant, respectively, to provisions found in the Real Property Tax Law and the Election Law.

Perhaps most significantly, the introductory language of §89(2)(b) states that "[a]n unwarranted invasion of personal privacy *includes, but shall not be limited to...*" the series of such unwarranted invasions of privacy that follow. In my view, the language cited in italics in the preceding sentence indicates that the provisions that follow represent six among perhaps countless instances in which it might be found that disclosure would result in an unwarranted invasion of personal privacy.

In short, it is reiterated that the provisions within §89(2)(b) cannot, in my opinion, be characterized as a "definition" of what might constitute an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1433

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December 29, 2003

Mr. Tim Corr
Vice President
CSEA Nassau Local 830
400 County Seat Drive
Mineola, NY 11501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Corr:

As you are aware, I have received your letter and the materials attached to it. You have complained with respect to the time in which Nassau County has sought to respond to your request for records.

In this regard, first, you indicated that your request was addressed to the Commissioner of Parks. Here I point out that the regulations promulgated by the Committee on Open Government require that each agency must designate one or more persons as "records access officer" (see 21 NYCRR Part 1401). The records access officer has the duty of coordinating an agency's response to requests for records, and requests ordinarily should 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 suggested for the future that you address requests to the records access officer at the agency in possession of the records of your interest.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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.

The advice rendered by this office was confirmed in Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), in which 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, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, or if the estimated date is unreasonable, 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: Nicholas Thalasinos, Deputy County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 29, 2003

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.

Dear Ms. Mangano:

I have received your letter in which you asked what action you might take when an agency, such as a village, no longer maintains the records that you have requested.

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,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Village of Ossining

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OMLAO-3727
FOIL-AO-14435

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 29, 2003

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:

As you are aware, I have received your letter of December 4. You have sought an opinion concerning "a private citizen's 'duties' when participating in a Town Board executive session..." and added that "[w]hat is at issue is whether or not a private citizen is bound by the rules that apply to public officials in and out of executive session."

While I am not certain of the nature of your question, it is assumed that you are asking whether a private citizen is forbidden from divulging information pertaining to what is said or heard during an executive session. Based on that assumption, I offer the following comments.

First, there are no general "rules" in the Open Meetings Law that prohibit a member of a public body, such as a town board, or any other person present during an executive session from divulging what transpired during the executive session.

By way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

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 generally prohibit a board member or other person from disclosing information heard or acquired during an executive session. 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 matter described in your correspondence, a discussion concerning an appointment to a "volunteer position."

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).

Lastly, 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 or other person might serve to defeat or circumvent the principles under which those bodies are intended to operate.

If I have not addressed the issue that you have sought to raise, please contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board, Town of Woodstock

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14436

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 29, 2003

Mr. Frank Allen
01-A-5199
Lakeview Shock Incarceration Corr. Fac.
P.O. Box T
Brocton, NY 14716-0679

Dear Mr. Allen:

I have received your letter in which you requested certain records under the Freedom of Information and Privacy Acts.

In this regard, first, the Acts that you cited are federal statutes that apply only to federal agencies. The New York Freedom of Information Law applies to records maintained by government agencies in this state. I note, too, that while the federal Act includes provisions concerning the waiver of fees, there is no equivalent provision in the state law.

Second, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. It does maintain possession or control of records generally, and this office does not possess any of the records that you are seeking.

Third, the regulations promulgated by the Committee (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be sent to him or her.

Next, although the Freedom of Information Law is based on a presumption of access, the first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of

> any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

As such, grand jury minutes or other records "attending a grand jury proceeding" would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding 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 - 14437

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 29, 2003

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.

Dear Ms. Mangano:

I have received your memorandum in which you sought my views concerning your right to gain access to a certain police report.

The report, according to your memorandum, was filed by a Village of Ossining employee with the Village Police Department, and nobody was arrested. You wrote that you want the "narrative of what was reported to have allegedly occurred." You also asked whether your understanding is correct that the Village "COULD release this report to [you] if it wanted to" and that it is apparently being withheld because you were not "the complainant or suspect."

In this regard, as you are likely aware based on your review of opinions rendered by this office, a police blotter, historically and by custom, typically contains no names. Rather, it is log or diary summarizing events reported by or to a police department that contains no investigative information. A routine entry might be something like: "Motor vehicle accident at the intersection of 5th and Main Streets, 3:10 p.m.", with the date. It would not include the names of the those involved or additional detailed information. In contrast, a police report may contain a variety of additional information, including the names of those involved, names of witnesses, informants, suspects and perhaps others (i.e., family members), as well details concerning the incident and the course or nature of an investigation.

As you are also aware, due to its structure and language, rights of access to police reports will differ from one situation to the next, for the contents of those records and the effects of disclosure are the key factors in applying the exceptions to rights of access appearing in §87(2) of the Freedom of Information Law.

If a police report includes the name of a member of the public as the complainant and that of the person who may be subject of the complaint, but no arrest is made, the provision of likely

significance is §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." It has consistently been advised that the identity of a member of the public who makes a complaint may be withheld under that provision. His or her identity is often irrelevant to the agency; what is relevant to the agency is whether the complaint has merit. Further, disclosure of his or her identity may result in retribution. If, however, a complaint is filed by a public employee acting in the performance of his or her official duties, there is nothing "personal" about his or her identity, and I do not believe that that person's name could be withheld in that instance. With respect to the subject of the complaint, if it is found that the complaint is without merit or cannot be substantiated, it has been advised that his or her identity may be withheld based on the exception pertaining to unwarranted invasions of personal privacy. If a request is made for a record by means of the name of the subject of the complaint, the deletion of identifying details would serve no purpose, and in that instance, it has been advised that the record may be withheld in its entirety.

Lastly, the Freedom of Information Law is permissive. Stated differently, an agency *may* withhold records in accordance with the exceptions appearing in §87(2), but it is not required to do so. The only situations in which an agency must deny access would involve those in which a statute specifies that the record is confidential. For instance, if a person is arrested and charged with a criminal offense, and the charge is dismissed in favor the accused, the records relating to 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:tt

cc: Village Clerk
Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14438

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 29, 2003

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.

Dear Ms. Mangano:

I have received your letter in which you asked whether, under the Freedom of Information Law or §2019-a of the Uniform Justice Court Act, the Village of Ossining's list of "outstanding parking tickets", also known as the "boot and tow" list, is accessible to the public. If it is available, you also asked whether it must be disclosed on a CD-Rom and, if so, what the fee might be. Although you received the list in the past, the Clerk of the Justice Court wrote that it was provided to you in error, for it includes information "for in house use and not available to the public." You enclosed a sample of the list made available to you.

In this regard, I offer the following comments.

First, as you are likely aware, the courts are not subject to the requirements of the Freedom of Information Law. That statute applies to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

While the courts are not subject to the Freedom of Information Law, records maintained by the courts are in most instances accessible. Section 2019-a of the Uniform Justice Court Act provides in relevant part that "[t]he records and dockets of the court except as otherwise provided by law shall be at reasonable times open to the public..."

If the boot and tow list is maintained exclusively by the Court, it would appear to be available under §2019-a. Since the Freedom of Information Law would not be the governing statute in that instance, I cannot suggest whether the Court would be obliged to transfer the list onto a CD-ROM. When making copies available, based on §255 of the Judiciary Law, I believe that the Clerk could assess a fee equivalent to the fee that could be charged by a county clerk for a similar service.

If the list is also maintained for or in possession of the Village, it would be subject to the Freedom of Information Law. I note that the Court of Appeals, the state's highest court, has held that copies of court records that come into the possession of an agency, i.e., a village, are agency records that fall within the coverage of the Freedom of Information Law [Newsday v. Empire State Development Corporation, 98 NY2d 746 (2002)]. Further, 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, the list would be accessible, for none of the grounds for denial would appear to apply. Further, that it contains information "for internal use" is not pertinent to rights of access, for the law includes all agency records within its coverage.

Whether the Village has the ability to transfer the list onto a CD-ROM is unknown to me. However, based on the judicial interpretation of the Freedom of Information Law, if the Village has the capacity to do so, and if you pay the requisite fee, I believe that it would be obliged to do so [see Brownstone Publishers v. New York City Department of Buildings, 166 AD2d 294 (1990)]. The fee for copies of records other than photocopies, according to §89(1)(b)(iii) of the Freedom of Information Law, would be the actual cost of reproduction.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Margaret Vincek, Court Clerk
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14439

41 State Street, Albany, New York 12231
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December 29, 2003

Ms. Corrine Nyquist
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Nyquist:

I have received your letter of December 8 and the materials attached to it.

By way of background, you wrote to the New Paltz Police Department and asked that it investigate a case of alleged voter fraud. Approximately a month later, you were informed that no action would be taken. Because you were "[i]nterested in how thorough the investigation was and at what level the decision was made to take no action", you sent a request to the Chief of Police under the Freedom of Information Law for "all documents and letters relating to the investigation of voter fraud by" a named individual. In response, you were informed that the request was denied on the ground that disclosure would result in "an unwarranted invasion of personal privacy" pursuant to §87(2)(b).

It is your view that the "core purpose" of the state and federal freedom of information statutes is "to show what the government is up to." I agree with that contention. However, it is emphasized that I am unfamiliar with the content of the records of your interest. That being so, the following remarks, of necessity, will be general in nature.

As a general matter, the New York Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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) indicates that an agency may withhold "records or portions thereof" in accordance with the grounds for denial of access that follow. In consideration of the phrase highlighted in the preceding sentence, it is clear that the Legislature envisioned situations in which a single record or report might include both information accessible to the public and information that may be withheld. It also indicates that an agency is required to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Several of the grounds for denial may be pertinent to an analysis of rights of access, and the provision cited in response to your request may be most significant.

When a particular person is the subject of an allegation or complaint, and the government agency investigating concludes the matter by dismissing it without a charge, an arrest, or the imposition of any penalty or sanction, it has generally been advised that records relating to the matter may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Any person can initiate a complaint or allegation regarding you, me or anyone. If it is found to be false or cannot be substantiated, the fact that a complaint or allegation has been made should not, in my opinion, be accessible in a manner in which it might result in detriment to that person. I point out that in a situation in which a person is charged with a criminal offense and the charge is dismissed in favor of the accused, the records relating to the event typically are sealed and made confidential pursuant to §160.50 of the Criminal Procedure Law. In that instance, I believe that the intent is consistent with the prior suggestion, that an arrest or charge that does not result in an admission or finding of guilt should not follow a person, perhaps forever, to his or her detriment. On the other hand, if a person is found guilty or has admitted to having committed a crime, the records regarding the incident typically are available through the disclosure of court or other records.

Section 87(2)(b) concerning unwarranted invasions of personal privacy might also be asserted in relation to witnesses, informants or others who might have been interviewed or contacted as part of the investigation.

To the extent that the records focus on the person who is the subject of the investigation, it appears that the Department could withhold the records for the reason mentioned in the response to you. To the extent that the records do not focus on that person, I would conjecture that two other exceptions may be pertinent.

Communications between and among government agency officers and employees would fall with §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.

Also potentially relevant is §87(2)(e), which permits an agency to deny access to 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."

Disclosure at this juncture would not, in my opinion, have any impact on an investigation or judicial proceeding; the investigation has apparently ended and there will be no proceeding. However, depending on the nature of the records and the degree of detail, it is possible, though perhaps unlikely, that subparagraph (iv) would be applicable. In short, insofar as disclosure of criminal investigative techniques or procedures would enable potential lawbreakers to tailor their activities in a way in which they could evade detection or effective law enforcement, it has been held that records may be withheld [see e.g., Fink v. Lefkowitz, 47 NY2d 567 (1979)].

Without being aware of the content of the records, I regret that I cannot offer more substantive guidance.

Lastly, at the end of your letter, you referred to me as "Records Appeals Officer." Please note that the authority of the Committee on Open Government is advisory. Neither myself nor the Committee has the power to determine appeals or otherwise compel an agency to grant or deny access to records. The provision dealing with the right to appeal, §89(4)(a), states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In the case of a town, an appeal would be made either to the town board as the governing body, or to a person designated by the Board to determine appeals.

I note, too, that the regulations promulgated by the Committee on Open Government (21 NYCRR §1401.7) require that a person denied access to a record must be informed of the right to appeal the denial. Based on your correspondence, it appears that you were not so informed. Because that is so, it is suggested that you might resubmit your request, specifying that you are seeking the records anew and that, in the event of a denial of access, you expect to be informed of the right to appeal and to whom the appeal may be made.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Ray Zappone
Joseph Moriello, Town Attorney
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14440

41 State Street, Albany, New York 12231
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December 29, 2003

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.

Dear Ms. Mangano:

I have received your letter in which you asked what action you might take when an agency, such as a village, no longer maintains the records that you have requested.

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,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Village of Ossining

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO- 3735
FOIL-AO- 14441

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December 30, 2003

Ms. Megan O'Neil-Haight
School Board Member
Corning-Painted Post School District
23 Owen Street
Corning, NY 14830

The staff of the Committee on Open 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'Neil-Haight:

I have received your letters of December 10 and 16. In your capacity as a member of the Corning Painted-Post School District Board of Education, you raised a variety of issues relating to the implementation of the Open Meetings and Freedom of Information Laws. The focus of your correspondence relates to an executive session held "for the purpose of chastising two board members for their minority held views on a facilities renovation plan..."

You wrote that the reason expressed for entry into executive session was "to discuss a specific personnel matter." You have questioned whether, under the circumstances, there would have been a basis for conducting an executive session. Additionally, you referred to motions often made to discuss "a matter in litigation" as the basis for entry into executive session.

In this regard, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, 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. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership

before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is inappropriate, misleading or that 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 terms of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, are limited and precise. 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.

In my view, the discussion to which you referred involving the stance taken by two members concerning a facilities renovation plan could not validly have been considered during an executive session. Very simply, the subject matter would not have fallen within the scope of §105(1)(f) or any other ground for entry into executive session.

With respect to the motion to discuss "a specific personnel matter", I agree with your inference, as have the courts, that it was inadequate. A specific personnel matter might involve the elimination of a teaching position due to budgetary constraints or program changes. In neither of those instances would there be a basis for conducting an executive session, for neither would focus on a particular person. I believe that a motion to conduct an executive session should include sufficient information to enable the public, as well as the members of a public body, to know with reasonable certainty that the subject to be discussed may properly be considered in executive session.

Even when §105(1)(f) may be validly asserted, 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; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as "a specific personnel matter" fails to enable the public or members of the Board to know whether the subject at hand may properly be considered during an executive session.

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 general intent of the grounds for entry into executive session, 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 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; §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 short, only to the extent that the Board discusses its litigation strategy may an executive session be properly held under §105(1)(d).

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].

A proper motion might be: "I move to enter into executive session to discuss litigation strategy in relation to the case of the XYZ Company v. the District" or something analogous.

Next, you raised issues concerning determinations made by "consensus" and asked when minutes of executive sessions must be prepared. The Open Meetings Law offers guidance

concerning minutes and their contents, and the courts have provided direction regarding the ability of boards of education to take action in executive session, as well as action reached by consensus.

By way of background, §106 of the Open Meetings Law pertains to minutes and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

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 rare circumstances in which a statute permits or requires such a vote.

Before addressing the matter of action taken by consensus, I point out that a provision of the Freedom of Information Law relates to the issue. Section 87(3)(a) of that statute requires that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency", which is defined to include a state or municipal board [see §86(3)], such as a school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), I believe that the State Legislature 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, 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 which states that:

> "it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

With respect to the notion of a "consensus", in Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education, the issue pertained to 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).

When the Board reaches a "consensus" that is reflective of final action, I believe that minutes must be prepared that indicate the manner in which each member voted. I recognize that public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous ratification does not indicate how the members actually voted behind closed doors, the public may be aware of the members' views on a given issue. If indeed a consensus represents action upon which the Board relies in carrying out its duties, or when the Board, in effect, reaches agreement on a particular subject, I believe that the minutes must reflect the actual votes of the members.

In another decision that dealt with action taken by consensus, it was found that:

> "A consensus is 'judgment arrived at by most of those concerned' (Webster's New Collegiate Dictionary, 150th Anniversary Edition at 238). It can only be arrived by some type of allocution by each member. Whether by formal written ballot or informal oral expression, it is a vote, with...approval or denial dependent upon the outcome of that vote. Thus according to P.O.L. § 87(3) each member's final vote must be recorded" [ASPCA v. State University of New York at Stony Brook, 556 NYS2d 447, 453 (1990); reversed on other grounds, 79 NY2d 927 (1992)].

Other issues were also raised in relation to the Freedom of Information Law. You referred, for example, to a demand by the Board President that certain documents be returned to her, in your words, "so there would be no record of these items having been produced nor considered in executive session." You asked whether records must be returned or may be "recovered" because an official "did not want any of this to get out."

First, the records, in my view, are the property of the District, not a particular Board member. The documentation to which reference was made would fall within the coverage of the Freedom of Information Law, for that statute is applicable to all records of an agency. Section 86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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, irrespective of the function or origin of the document to which you referred or the desire of an official to avoid its "getting out", it would constitute a "record" that falls 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."

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..."

Next, you referred to "information packets" prepared and distributed to Board members on the Friday before a Wednesday meeting and "press leaks" of the content of the packets. You asked whether those preparatory materials are "considered confidential."

Again, the Freedom of Information Law pertains to all District records, and as a general matter, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the contents of the records in question serve as the factors relevant to an analysis of the extent to which they may be withheld or must be disclosed. In my view, several of the grounds for denial may be relevant to such an analysis.

Records prepared by District staff and forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could

appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

It is emphasized that the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, as indicated earlier, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of teachers or other staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Items within an agenda packet might in some instances fall within that exception.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is the Family Educational Rights and Privacy Act (20 U.S.C. §1232g). In brief, that statute generally forbids a school district from disclosing personally identifiable information concerning students, unless the parents of students consent to disclosure.

In short, a blanket denial of access to an agenda package may be inconsistent with the Freedom of Information Law. However, there would likely be one or more grounds for denial that could appropriately be cited withhold portions of those records.

I point out that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such

records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Consequently, even if it is determined that a record may be withheld under §87(2)(g), for example, an agency would have the authority to disclose the record.

It is also emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and *vice versa*. For instance, if an administrator transmits a memorandum to the Board suggesting a change in the curriculum, that record could be withheld. It would consist of intra-agency material reflective of an opinion or recommendation. Nevertheless, when the Board discusses the recommendation at a meeting, there would be no basis for conducting an executive session. Consequently, there may be no reason for withholding the record even though the Freedom of Information Law would so permit. Further, in a decision in which the issue was whether discussions occurring during an executive session 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).

Lastly, with regard to claims concerning confidentiality, I point out that, like the Freedom of Information Law, the Open Meetings Law is 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.

I am unaware of any statute that would generally prohibit a Board member from disclosing the kinds of information referenced in your letters. 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.

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that may 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. Nevertheless, historically, I believe that public bodies were created to bring together representatives of the public who may disagree. Through the process of discussion, deliberation and compromise, the goal involves the ability 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, I believe they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making.

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 sent to members of the Board and District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
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December 30, 2003

Ms. Blanche Retta
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Retta:

I have received your letter and the attached material in which you questioned the propriety of denials of your requests for a variety of records concerning the "shooting death of [your] son...and two individuals [he] was alleged to have killed" approximately eighteen months ago.

In this regard, I offer the following comments.

First, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning police reports in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate [Gould v. New York City Police Department, 89 NY2d 267 (1996)].

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.

With respect to autopsy reports and related records, §677(3)(b) of the County Law states that:

> "Such records shall be open to inspection by the district attorney of the county. Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that

> the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Based upon the foregoing, the Freedom of Information Law in my opinion is inapplicable as a basis for seeking or obtaining an autopsy report or other records described in §677, for the right to obtain such records is based solely on §677(3)(b). In my view, only a district attorney and the next of kin of the deceased have a right of access to records subject to §677; any others would be required to obtain a court order based on demonstration of substantial interest in the records to gain a right of access. A request for an autopsy report and related records may be submitted directly to the Schenectady County Coroner.

Another provision of significance, §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 (1966)].

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 "could 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, with respect to your attempt to obtain your son's personal items taken "during the search and seizure process", the issue is whether your request involves a "record" that falls within the scope of the Freedom of Information Law as opposed to an item of physical evidence. The Freedom of Information Law is applicable to agency records, and §86(4) of the Law defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

If any of the requested items constitute a "record", I believe that they would be subject to rights conferred by the Freedom of Information Law. Conversely, it has been held that items of physical evidence (i.e., tools and clothing) do not constitute records and are beyond the coverage of the Freedom of Information Law [Allen v. Stroynowski, 129 AD 2d 700; mot. for leave to appeal denied, 70 NY 2d 871 (1989)].

I hope that I have been of assistance.

Sincerely,

David Treacy

David Treacy
Assistant Director

DT:jm

cc: Barbara Plummer
Mark Rider
William Callahan

There Is

NO

701(a)(a)-

14443

From: Robert Freeman
To: [redacted]
Date: 12/30/2003 4:26:03 PM
Subject: Dear Ms. Friend:

Dear Ms. Friend:

I have received your email in which you indicated that the Town of Richmond requires that a person seeking records under the Freedom of Information Law (FOIL) may do so only by means of a form that includes a "photo identification." You have questioned the propriety of such a requirement.

In this regard, I do not believe that an agency, such as a town, may impose such a requirement as a condition precedent to the submission of a request made under the FOIL or gaining access to records.

First, it was held years ago by the Appellate Division, Fourth Department, which includes the area in which your newspaper functions, that records accessible under FOIL must be made equally available to any person, without regard to status or interest [Burke v. Yudelson, 51 AD2d 673 (1976)]. Therefore, as a general matter, the identity of the person seeking records is irrelevant to the use of the law or his or her rights.

Second, there is nothing in FOIL that pertains to the use of a particular form. Further, since §89(3) merely authorizes that an agency may require that a request be made in writing, it has consistently been advised that that any written request that reasonably describes the records sought should suffice and that a failure to complete an agency's prescribed form cannot serve to enable an agency to delay responding to a request or denying access to records.

Third, it is clear that requests for records may be made by mail; a person need not be present at an agency's premises to request records under FOIL. That being so, I do not believe that it would be reasonable or consistent with law, nor would it serve any purpose, to require a photo identification as a condition precedent to seeking records.

Lastly, the only instance in which the identity of an applicant for records is pertinent would involve a request by person for records pertaining to him/herself when the records could be withheld if sought by any other person. In that instance, disclosure to others would constitute "an unwarranted invasion of personal privacy." However, the subject of the record could not invade his/her own privacy. In that circumstance, §89(2)(b) indicates that the record should be available to the subject when he/she offers reasonable proof of identity. In the case of a request made in person or by mail, reasonable proof of identity typically would involve a notarized signature or some other acceptable identifier; I am unaware of any situation in which a photo identification has been or may be required.

I hope that I have been of assistance.

cc: Town Board, Town of Richmond

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 30, 2003

Mr. Mark Brozyna
01-A-3665
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 facts presented in your correspondence.

Dear Mr. Brozyna:

I have received your letter in which you asked this office to obtain records on your behalf. You wrote that "what [you] have been trying to get are the supporting depositions/DWI bill of particulars from arrests in the town of Charlton NY Saratoga County by the New York State police on the following dates 4/16/91, 7/29/95 and 12/11/95. [You] have tried the town, County Department of Criminal Justice Dept and the Dept of Motor Vehicles with no reply or they don't have them and [you are] told to try one of the other agencys [sic] listed." You wrote that you would also like to discuss the identity of the person who provided information about you to your probation 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, compel an agency to grant or deny access to records or obtain records on behalf of an individual. 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 the arrest records of your interest, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. While I am unfamiliar with the record keeping systems of the agencies from which you requested records, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records.

Third, in regard to your interest in obtaining reports from the probation department that indicate the identity of the person who may have provided information to your probation 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.

From my perspective, several grounds for denial of the information of your interest are of significance. For instance, an agency may withhold portions of records that if disclosed "would constitute an unwarranted invasion of personal privacy", [87(2)(b)], or "could endanger the life or safety of any person" [87(2)(f)].

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 a diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Lastly, it appears that some of the records sought may be maintained by a court. If that is so, a request might be made to the clerk of the appropriate court. Although the Freedom of Information Law does not apply to the courts, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255).

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

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December 30, 2003

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 in which you asked about the availability of a variety of records. You wrote that you would like to obtain statements that you and your former girlfriend provided to a "welfare investigator", as well as records involving her and her ex-husband related to their divorce and custody proceedings.

In this regard, I offer the following comments.

First, in regard to statements made to a welfare investigator, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 §136 of the Social Services Law. Subdivision (2) of §136 states that:

> "All communications and information relating to a person receiving public assistance or care obtained by any social services official, service officer, or employee in the course of his work shall be considered confidential and, except as otherwise provided in this section, shall be disclosed only to the commissioner of social services, or his authorized representative, the county board of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town or its authorized

> representative or, by authority of the county, city or town social services official, to a person or agency considered entitled to such information."

Based upon the foregoing, I believe that the information in question is exempted from disclosure pursuant to §136 of the Social Services Law and, therefore, §87(2)(a) of the Freedom of Information Law.

Second, with respect to records related to a divorce, by way of brief background, the Freedom of Information is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts 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 (see e.g., Judiciary Law, §255).

However, a separate statute deals directly with records concerning divorce and other matrimonial actions or proceedings. Specifically, I believe that access to records relating to matrimonial proceedings is governed by §235(1) of the Domestic Relations Law, which states that:

> "An officer of the court with whom the proceedings in a matrimonial action or a written statement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of act, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination of perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court."

Based on the foregoing, as a general matter, the details of a matrimonial proceeding are considered confidential.

Subdivision (3) of §235 states that:

> "Upon the application of any person to the county clerk or other officer in charge of public records within a county for evidence of the disposition, judgment or order with respect to a matrimonial action, the clerk or other such officer shall issue a 'certification of disposition', duly certifying the nature and effect of such disposition, judgment or order and shall in no manner evidence the subject matter of the pleadings, testimony, findings of fact, conclusions of law or judgment of dissolution derived in any such action."

While any person may request a "certification of disposition" which indicates that a divorce has been granted, I believe that other records involving separation and divorce are exempt from disclosure, except as provided in subdivision (1) of §235.

Lastly, in regard to records pertaining to a custody proceeding, §166 of the Family Court Act is of potential significance. That statute states that:

> "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

Since the matter is outside the jurisdiction of this office, it is suggested that you contact the Office of Court Administration at (212) 428-2700 or that you seek the services of an attorney.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm