STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14417

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

January 2, 2004

Mr. Romero Ubaldo
02-A-1716
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. Ubaldo:

I have received your letter in which you questioned the availability of "autopsy or death records."

In this regard, 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.

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

capacity to demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

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-14448

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 2, 2004

Mr. Stanley McPherson
91-A-9440
Auburn Correctional Facility
135 State Street
Albany, 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. McPherson:

I have received your letter in which you wrote that several 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)].

Lastly, in response to your request for a copy of a book titled "Committee on Open Government", please note that this office does not have a publication by that name. However, I have enclosed a copy of the pamphlet "Your Right to Know", which discusses New York's Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:jm

FOIL-AO-14449

From: Robert Freeman
To: [redacted]
Date: 1/5/2004 11:12:30 AM
Subject: Dear Mr. Terry:

Dear Mr. Terry:

I have received your inquiry and would like to clarify with respect to your first question. The Freedom of Information Law requires each agency to maintain a list, by subject matter, in reasonable detail, of all records of the agency, "whether or not available...." The list is not required to be an index of each and every record maintained by agency, but rather a categorization of the kinds of records that it maintains, again, whether or not they are available.

Second, in general, records associated with litigation, assuming that they have been filed with a court or in possession of both parties to the litigation, would be accessible.

I note that detailed advisory opinions accessible in the FOIL index to opinions on our website includes opinions dealing with the issues that you raised. It is suggested that you might click on to "S" and scroll down to "subject matter list", "N" for "notice of claim" and "L" for "litigation, records related to."

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-14450

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

January 5, 2004

Mr. Larry Walker
01-B-2180
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. Walker:

I have received your letter in which you explained that neither the New York State Police Marcy Barracks nor the Oneida County Sheriff's Department has responded to your requests for a variety of records related to your arrest.

In this regard, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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

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

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

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

Lastly, you might consider resubmitting your request to the New York State Police directly to Lt. Laurie Wagner, Records Access Officer, Bldg 22, State Campus, Albany, NY 12226.

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-14451

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

January 5, 2004

E-MAIL

TO: John Kiechle <[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. Kiechle:

I have received your inquiry in which you wrote that your request for a copy of an auditor's report prepared for the Indian River School District was denied. You added, however, that you were told that you could "file a freedom of information request which means a one dollar per page for about 125 pages."

From my perspective, the response given to you by the School District is inconsistent with the Freedom of Information Law.

First, §87(2)(g)(iv) of that statute specifies that external audits must be disclosed.

Second, the Freedom of Information Law requires that available records be made accessible for inspection and copying. When a record is available under the Freedom of Information Law, which appears to be so in this instance, an agency cannot assess a fee for inspection of the record. When a request for a copy is made, an agency is obliged to prepare a photocopy, and §87(1)(b)(iii) indicates that an agency may not charge more than twenty-five cents per photocopy, unless a different fee is prescribed by "statute." A statute is an enactment of the State Legislature. There is no statute of which I am aware that would authorize a school district to establish or charge a fee in excess of twenty-five cents per photocopy.

Lastly, there is no provision of law that would preclude a member of the Board of Education from sharing or making a copy of the audit available for you.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14452

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

January 5, 2004

E-Mail

TO: Millie L. Gage <[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. Gage:

I have received your inquiry in which you asked whether the "FOI regulations apply to no for profit organizations (501c3) that receive public funding and services."

As a general matter, the Freedom of Information Law does not apply to not-for-profit organizations, despite their receipt of government funding. That statute is applicable to agencies, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law generally is applicable to entities of state and local government; it would not apply to an entity outside of government in most circumstances. In short, the receipt of government funding does not transform an organization into a governmental entity.

I note that there are rare circumstances in which not-for-profit corporations have been found to constitute agencies. For example, while most volunteer fire companies are not-for-profit corporations, they have been found to fall within the coverage of the Freedom of Information Law because they perform what has been characterized by the state's highest court as an essential governmental function.

If you have questions regarding a particular entity, please feel free to contact me. I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1445

41 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 6, 2004

Mr. John Johnson
95-A-0078
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

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

Dear Mr. Johnson:

I have received your letters in which you asked about the availability of "transcripts pertaining to the death of [your] daughter in which [you] believe an insurance company and/or lawyers questioned and/or took a disposition [sic] from [your] sister pertaining to how [your] daughter may have died."

First, it is not clear whether the records of your interest are maintained by an "agency" covered by the Freedom of Information Law. In this regard, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law applies, in general, to records of entities of state and local government in New York. It would not apply to a private organization or a private investigator.

Second, assuming the records are maintained by an "agency", as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 exceptions, §87(2)(b), authorizes an agency to withhold records insofar as 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 witness, for example.

Another provision that might be 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."

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

Lastly, since you referred to depositions, it is possible that the record of your interest may be available from a court. If that is so, although the Freedom of Information Law does not apply to the courts, court records are generally available to the public under other provisions of law (see e.g., Judiciary Law, §255). To seek court records, a request may be made to the clerk of the proper court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

FOIL-AO-14454

From: Robert Freeman
To: bjmolinaro@norwichnewyork.net
Date: 1/7/2004 9:05:13 AM
Subject: Dear Mr. Molinaro:

Dear Mr. Molinaro:

I have received your inquiry and appreciate your interest in compliance with the Freedom of Information Law (FOIL).

You referred to a request for time sheets and questioned whether they must be disclosed, particularly those portions that include information concerning sick time.

In this regard, as you may be aware, the key provision relating to the matter is §87(2)(b), which authorizes an agency to withhold records or portions of records the disclosure of which would constitute "an unwarranted invasion of personal privacy." There are several judicial decisions that focus on the privacy of public employees, and in general, it has been held that those portions of records pertaining to public employees that are relevant to the performance of their duties are accessible, for disclosure in those instances would result in a permissible invasion of privacy. Conversely, if an item is truly intimate or irrelevant to the performance of one's duties, it may likely be withheld.

With specific respect to the records at issue, there is a unanimous decision by the Court of Appeals, the state's highest court, involving a request for records indicating the days and dates of sick leave claimed by a particular police officer [see Capital Newspapers v. Burns, 109 AD2d 92, affirmed 67 NY2d 562 (1986)]. In short, the Court determined that the records must be disclosed, for they are relevant to the officer's duties. Based on that decision, it is clear in my view that the records at issue, including portions indicating the use of sick leave, must be disclosed. If there are portions of the records indicating the nature of a person's illness or medical conditions, I believe that they may be deleted to protect his or her privacy.

For a more expansive analysis of the issue, several opinions are accessible on our website. You can click onto advisory opinions rendered under the FOIL, then "A", and then scroll down to "attendance records."

Should any further questions arise, 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 OML-AO - 3738
FOIL-AO - 14455

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

January 8, 2004

E-Mail

TO: Diana Calandro <[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. Calandro:

I have received your letter in which you raised a series of questions concerning actions taken by the Superintendent and Board of Education of the Eastchester Union Free School District No.1.

According to your letter, the public was misled concerning the nature and magnitude of an effort to "fill school fields", and the Superintendent made verbal and written agreements with contractors without approval by the Board until a year after the agreements were reached. Although you have been informed that many of the issues of your concern were discussed at open meetings, you wrote that no reference to them can be found in the minutes.

You asked who oversees school boards and superintendents and how the District can operate in this fashion and added that the fields "are now possibly contaminated..."

In this regard, I note that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information and Open Meetings Laws, and consequently, the following comments will focus on matters that you raised that may relate to those statutes.

First, I am not an expert with respect to the powers and duties of superintendents or boards of education. However, if the ability to engage in contractual agreements concerning the project to which you referred lies only within the authority of the Board, I do not believe that the Superintendent could validly, on his or her own, have engaged in such agreements. Further, if the authority to contract is solely with the Board, it could only have taken action to do so during open meetings, and any such action would have to have been memorialized in minutes of a meeting.

Second, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Subdivision (1) of §106 of that statute provides 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, it is clear that minutes need not consist of a verbatim account of everything said at a meeting or even that reference be made to each topic discussed. However, if any motion was made or action taken, the law requires that the minutes reflect that to have been so.

Third, it is emphasized that the Freedom of Information Law, which deals with public access to records, is expansive in its scope, for it applies to all records of an agency, such as a school district. 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."

Whether documents are characterized as official or otherwise, irrespective of their origin, authorship or function, if they are maintained by or for the District, they would constitute "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. From my perspective, any contract or communication between the District and a contractor pertaining to the contract would be accessible. In short, I do not believe that any of the grounds for denial of access would be pertinent or applicable in that context.

When seeking records, a request should be made to the District's "records access officer." The records access officer has the duty of coordinating an agency's response to requests. Additionally, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records the records sought. Therefore, although a person seeking records need not identify the record or records of his or her interest, a request should include sufficient detail to enable agency staff to locate the records.

As in many other instances, if a member of the public believes that a government agency or official has acted unreasonably or has failed to carry out a duty required by law to be performed, that person may initiate a judicial proceeding to attempt to compel compliance with law pursuant to Article 78 of the Civil Practice Law and Rules. I note that a court in such proceeding brought under

the Open Meetings Law may award attorney's fees to the successful party; in a suit brought under the Freedom of Information Law, a court may award attorney's fees when the person denied access has substantially prevailed, there was no reasonable basis for the denial, and when the records are of clearly significant interest to the general public.

Lastly, if you believe that action has resulted in contamination, it is suggested that you contact the County Health Department and the regional office of the Department of Environmental Conservation.

Attached is a copy of "Your Right to Know", which serves as a guide to the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

RJF:jm

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1444

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

January 8, 2004

Mr. Allen Anderson
00-A-6914
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-0010

Dear Mr. Allen:

I have received your letters, which consist of "appeals" made to this office due to agencies' failure to respond to your requests in a timely manner.

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

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

For your information, the recently designated appeals officer at the New York City Police Department is Mr. Jonathan David.

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 OML-AO-3739
FOIL-AO-14457

41 State Street, Albany, New York 12231
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January 9, 2004

E-Mail

TO: Commissioner Davenport <7comish@nycap.rr.com>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Commissioner Davenport:

As you are aware, I have received your letter of December 15. As a member of the Mechanicville Housing Authority and a person with a disability, you questioned whether you may have the right to tape record executive sessions held by its Board. You indicated that you would use your own tape recorder and that you would pay for tapes at your own expense.

From my perspective, it is unlikely that you have the right or perhaps privilege to tape record the executive sessions, unless the Board authorizes you to do so. Further, even if you use your own property to record those sessions, I believe that recordings of executive sessions would be subject to the Freedom of Information Law. In this regard, I offer the following comments.

First, there is no statute that deals directly with the taping of executive sessions. Several judicial decisions have dealt with the ability to use recording devices at open meetings, and although those decisions do not refer to the taping of executive sessions, their thrust is pertinent to the matter. Perhaps the leading decision concerning the use of tape recorders at meetings, a unanimous decision of the Appellate Division, involved the invalidation of a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken

> in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

In view of the judicial determination rendered by the Appellate Division, I believe that a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

Again, while there are no decisions that deal with the use of tape recorders during executive sessions, I believe that the principle in determining that issue is the same as that stated above, i.e., that the Board may establish reasonable rules governing the use of tape recorders at executive sessions.

Unlike an open meeting, when comments are conveyed with the public present, an executive session is generally held in order that the public cannot be aware of the details of the deliberative process. When an issue focuses upon a particular individual, the rationale for permitting the holding of an executive session generally involves an intent to protect personal privacy, coupled with an intent to enable the members of a public body to express their opinions freely. Viewing the matter from a different vantage point, when representatives of public bodies have asked whether they should tape record executive sessions, I have suggested that doing so may result in unforeseen and potentially damaging consequences. For reasons to be discussed later in detail, I believe that a tape recording is a "record" as that term is defined in section 86(4) of the Freedom of Information Law and, therefore, would be subject to rights conferred by that statute. Further, a tape recording of an executive session may be subject to subpoena or discovery in the context of litigation. Disclosure in that kind of situation may place a public body at a disadvantage should litigation arise relative to a topic that has been appropriately discussed behind closed doors.

In short, I am suggesting that tape recording an executive session could potentially defeat the purpose of holding an executive session, and that, in my opinion, the Board could, by rule, prohibit a member from using a tape recorder at an executive session absent the consent of a majority of the board. If other members of the Board had the right or privilege to tape record executive sessions, I believe that you would have the same right or privilege. However, for the reasons expressed, I do not believe that they do, or that you would have a greater right or privilege in consideration of your condition.

Second, from my perspective, a tape recording of an executive session prepared by a Board member would fall within the coverage of the Freedom of Information Law. That statute pertains to all agency records and defines the term "record" expansively to include:

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

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

The Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

Additionally, 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 closest to your situation 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 took notes in part "as a private person making personal notes of observations...in the course of" meetings. The court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Based upon the foregoing, assuming that you record an executive session in furtherance of the performance of your duties as a member of the Board, I believe that the tape recording would

constitute a "record" that falls within the coverage of the Freedom of Information Law. That being so, aside from the possibility that portions might be available to the public under that law, perhaps more important, and potentially more damaging to the Authority, would be disclosure in a litigation context.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14458

41 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 9, 2004

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:

I have received your letter of December 12 and the materials attached to it. You offered several contentions concerning the treatment of and response to your request for records of the Global Concepts Charter School.

By way of background, first, the request was received by the School on October 20, and its receipt was acknowledged on October 22, when you were informed that your request would be processed "as soon as possible." Based on the language of the Freedom of Information Law, §89(3), when an agency needs more than five business days to determine to grant or deny a request for records, it is obliged to "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..." That being so, an indication that a determination will be made "as soon as possible" is, in my view, inconsistent with law.

Second, you referred to a portion of the response by Mr. Dawan Jones, the School's records access officer, stating that the School "charges the statutorily permitted fee of $.25 per page for duplication of the records..." You wrote that the fee is "the maximum allowed and not as Mr. Jones implies as the 'statutory' amount." From my perspective, by stating that the fee is "statutorily permitted", Mr. Jones was not suggesting that it is statutorily required or that the School must charge twenty-five cents per photocopy; rather, I believe that his statement merely indicates that the School is permitted to do so.

Third, you suggested that Mr. Jones "may be attempting to charge a fee to locate records that are readily available...." Having read the passage to which you referred, I do not find any suggestion that such an attempt was made.

Lastly, since accessible records are available for inspection at no charge, you expressed the view that the School's application for public access to records should so state. While it may be considerate or appropriate to do so, there is nothing in the Freedom of Information Law that would require such a notification, nor is there any reference in that statute to the use of a particular form.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: William J. Minniefield
Dawan Jones

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14459

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

January 12, 2004

Mr. Mark I. Cushman
[redacted]

Dear Mr. Cushman:

I have received your letter and the materials attached to it concerning your contention that a Village of Herkimer official was involved in "the intentional concealment of public records." Although you asked the District Attorney to take action relative to your allegation, it does not appear that any action has been taken. Consequently, you have sought assistance from this office.

In this regard, as you may be aware, 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 direct that an agency or its personnel grant or deny access. Having reviewed the opinion prepared at your request more than a year ago, there is little that I might add to it. 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 regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14460

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

January 12, 2004

Mr. John O'Donnell
[redacted]

Dear Mr. O'Donnell:

I have received your letter of December 12. As in the case of previous correspondence, you have contended that the Town of Evans has failed to comply with the Freedom of Information Law in relation to your request for records concerning moneys paid to attorneys regarding 74 lawsuits initiated since 1996.

Having discussed the matter with the Town Clerk at some length, it appears that the Town has honored your request to the extent that is possible. If that is so, I believe that the Town would have complied with law.

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 town, is not required to create or prepare a new record in response to a request. It appears that the printout that you attached includes the information in which you are interested. I would conjecture that it may not reflect the order or format that you would have preferred or that might be most useful to you; nevertheless, if the printout contains the information that you requested, the Town, in my view, complied with law.

In short, the Town cannot provide records or information that it does not maintain, and it is reiterated that Town officials are not required to a prepare a different record, perhaps in a different order or format, to comply with law or to accommodate a member of the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. Carol A. Misner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14461

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

January 12, 2004

E-Mail

TO: Jonathan E. Rubin [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. Rubin:

As you are aware, I have received your letter of December 19 in which you sought an advisory opinion concerning rights of access to records of the New York City Police Department's "Application Processing Division."

You indicated that, to your knowledge, the records of the Division consist of a potential police officer's application, an employment questionnaire, and the results of any "pre-employment investigations" prepared by staff. The Department denied your request, citing §50-a of the Civil Rights Law and §87(2)(b) of the Freedom of Information Law pertaining to unwarranted invasions of personal privacy. The officer of your interest was hired by the Department but was later convicted of a crime and removed from his position. Consequently, it is your view that §50-a is inapplicable and that "personal information could easily be redacted."

I agree with your contentions and 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 initial ground for denial of access, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. However, its language and judicial construction indicate that it is not applicable in the situation that you described. That statute exempts from disclosure persomel records pertaining to police officers that are used "to evaluate performance toward continued employment or promotion." An employment application and records associated with an application would not be used to evaluate

performance toward continued employment or promotion. Moreover, it has been held §50-a cannot be asserted when an individual is no longer employed as a police officer [Village of Brockport v. Calandra, 745 NYS2d 662, 191 Misc. 2d 718 (2002); aff'd 758 NYS2d 877, 305 AD2d 1030 (2003)].

Assuming that §50-a of the Civil Rights Law does not apply, I believe that the Freedom of Information Law would govern rights of access. I note in this regard that there is nothing in that statute the deals specifically with personnel records. As is so in most instances, the content of those records and the effects of disclosure are the crucial factors in determining rights of access and, conversely, the ability of an agency to deny access to records.

Perhaps most relevant is the provision in the Freedom of Information Law to which the Department apparently referred, §87(2)(b). Based on its judicial interpretation, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of those persons are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

In a judicial decision that focused on access to a resume of a person who was later hired by an agency, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that portions of resumes pertaining to applicants who are hired by a government agency 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 application for employment that are relevant to the performance of one's duties, must be disclosed. In addition, it has been held that those portions of records indicating one's general education background must be disclosed [Ruberti, Girvin and Ferlazzo v. NYS Division of State Police, 218 AD2d 494 (1996)].

Other aspects of a resume or application may, in my view, be withheld. Those items pertaining to the applicant who was later hired that are irrelevant to the position, i.e., home address, social security number, marital status, hobbies, etc., may be deleted on the ground that disclosure would constitute an unwarranted invasion of the applicant's privacy. In addition, when there is a background investigation, it is likely that records include the identities of others, such as prior employers, neighbors, and others. If that is so, I believe that personally identifying details pertaining to those persons may be deleted to protect against an unwarranted invasion of their privacy.

Lastly, at the time that your letter was transmitted to this office, seventeen days had passed without having received a response since the receipt of your appeal by the Department. As you are aware, §89(4)(a) of the Freedom of Information Law requires that an agency must determine an appeal within ten business days of it receipt by either granting access to the records or fully explaining in writing the reasons for further denial. If an agency fails to respond within the statutory time, the person seeking the records may consider the appeal to have been denied and be deemed to have exhausted his or her administrative remedies. In that circumstance, he or she may seek judicial review of the denial of 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)].

In an effort to enhance compliance with and understanding of the matter, and to attempt to avoid litigation, a copy of this opinion will be forwarded to the person at the Department designated to determine appeals.

I hope that I have been of assistance.

RJF:jm

cc: Jonathan David

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14462

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

January 12, 2004

Mr. Vincent Malerba
82-A-2059
Marcy Correctional Facility
P.O. Box 5000
Marcy, NY 13403

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

Dear Mr. Malerba:

I have received your letter in which you wrote that you have made several Freedom of Information Law requests and now seek assistance from this office in obtaining general information regarding the "Merle Cooper Program", which you completed at the Clinton Correctional Facility Annex.

In this regard, I point out that the Committee on Open Government does not maintain records of other agencies, but 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. Further, since you requested information concerning the program from this office, I note that we have none, and that neither myself nor other staff is familiar with it. 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)].

Lastly, it is noted that the person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, 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-14463

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 13, 2004

Mr. Robert J. Spence
Spence & Davis, LLP
666 Old Country Rd., 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, unless otherwise indicated.

Dear Mr. Spence:

I have received your letter of December 18, as well as the materials attached to it. You have sought an advisory opinion concerning a partial denial of your request for records by the Town of Islip. Although the portion of the request involving the Town's assessment roll was granted, the Town denied access to the property inventory on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Since the receipt of your letter, I also received a copy of a determination of your appeal rendered by Richard Hoffman, Deputy Town Attorney.

While you are familiar with the opinion offered previously by this office, the following remarks will essentially reiterate advice and commentary offered in the past. That will be so, for copies of this response will be forwarded to Mr. Hoffman.

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.

Long before the enactment of that statute, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969). For instance, index cards containing a variety of information concerning specific parcels of real property have long been accessible to the public. As early as 1951, it was held that the contents of a so-called "Kardex" system used by assessors were available. The records determined to be available were described as follows:

> "Each card, approximately nine by seven inches (comprising the Kardex System), contains many printed items for insertion of the name of the owner, selling price of the property, mortgage, if any, frontage, unit price, front foot value, details as to the main building, including type, construction, exterior, floors, heating, foundation, basement, roofing, interior finish, lighting, in all, some eighty subdivisions, date when built or remodeled, as well as details as to

> any minor buildings" [Sears Roebuck & Co. v. Hoyt, supra, 758; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

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

In the case of a request for an assessment roll, §89(6)is pertinent, for that provision states that:

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

Therefore, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In Szikszay v. Buelow [436 NYS 2d 558, 583 (1981)], it was determined that an assessment roll maintained on computer tape must be disclosed, even though the applicant requested the tape for a commercial purpose, because that record is independently available under a different provision of law, Real Property Tax Law, §516. Since the assessment roll must be disclosed pursuant to the Real Property Tax Law, the restriction concerning lists of names and addresses in the Freedom of Information Law was found to be inapplicable.

With respect to inventory data, different provisions of the Real Property Tax Law offer direction. Section 500 requires assessors to prepare an inventory of the real property located within a city or town, and §501 states that the assessor shall publish and post notice indicating that an inventory is available at certain times. As I understand that provision, the inventory must be made available to any person for any reason when it is sought during the period specified in the notice. At that time, as in the case of the assessment roll being available to the public pursuant to a statute other than the Freedom of Information Law, the inventory would be available pursuant to §501 of the Real Property Tax Law. Before or after that specified time, however, it appears that the inventory would be subject to whatever rights exist under the Freedom of Information Law. If that is so, it appears that the inventory could be withheld if it would be used for a commercial or fund-raising purpose.

That is the conclusion, as I interpret the decision, that was reached in COMPS, Inc. v. Town of Huntington [703 NYS2d 225, 269 AD2d 446 (2000); motion for leave to appeal denied, 269 NY2D 446 (2000); motion for leave to appeal denied, 95 NY2d 758 (2000)]. The Court concluded that the request was properly denied, for the record consisted of the equivalent of a list of names and addresses that was intended to be used for a commercial purpose. That being so, the record was appropriately withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Further, the Court specified that "[b]ecause the respondents have not utilized the inventory data for the purposes of any assessment or reassessment, they are not under any statutory duty to publish the inventory data *at this time*" (id., 226; emphasis mine). Through the inclusion of

the phrase, *at this time*, it appears that the Court distinguished rights of access at the time the inventory is required to be made available during the period specified in the notice required by §501 of the Real Property Tax Law from those rights extant at all other times. Based on the decision, it appears that the inventory is available to any person for any reason during the time specified in the notice, but that it may be withheld at other times if it would be used for a commercial or fund raising purpose.

Lastly, as I understand his determination, Mr. Hoffman suggested that the inventory has never been published and that, therefore, the request may be denied. If that is his contention, I respectfully disagree. The Court in COMPS, supra, indicated in the context of the facts of that case that a town was "not under any statutory duty to publish the inventory data at this time." To reiterate, §501 of the Real Property Tax Law requires the publication of a notice during a particular period stating that an appointment may be made to review the data. However, the Court also found that the inventory constitutes a "record" subject to whatever rights may exist under the Freedom of Information Law. That being so, I believe that rights of access to the inventory, as a record, are determined by the Freedom of Information Law at all times that it exists during the time other than that specified in the notice published pursuant to §501.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Hoffman

OML-AO-3742
FOIL-AO-14464

From: Robert Freeman
To: jpalm@stny.rr.com
Date: 1/16/2004 8:31:30 AM
Subject: Dear Ms. Palmer:

Dear Ms. Palmer:

I have received your letter in which you indicated that a request has been made for minutes of all Town Board and Planning Board minutes from 1999 to the present. You wrote that the materials are voluminous, for they include site plans and maps that are oversized. Since you do not have the capacity to copy them, you asked whether you can offer that the requester "look at these" in your office. You also questioned whether there is "a limit on how much a person can request."

In this regard, I offer the following comments.

First, it is suggested that you contact the applicant to discuss the request. From my perspective, minutes of meetings do not include site and plans and maps; rather they typically consist of a record or summary of a board's motions, proposals, resolutions, action taken and the vote of the members; those are the items that the law requires to be included in minutes [see Open Meetings Law, §106(1)]. That being so, you might attempt to learn whether only the minutes have been requested, or whether the applicant also is seeking the other materials to which you referred.

Second, under the Freedom of Information Law, records are available for inspection and copying. Inspection is free, and certainly you can offer that the applicant inspect the records. If a person wants copies, the fee is a maximum of twenty-five cents per photocopy up to nine by fourteen inches; the fee for larger copies would be based on the actual cost of reproduction. In situations in which an agency does not have the capability to photocopy large documents, it has been suggested that the applicant may photograph the document; often that is the cheapest and easiest method. I note, too, that if a person seeks copies, you can require that the fees be paid in advance.

Third, so long as the applicant reasonably describes the records, there is no real limit on how much can be requested. The Court of Appeals has held that if an agency can locate and identify the records sought, the applicant has reasonably described the records, irrespective of the volume of material. On the other hand, even if a request is specific but you could not locate the items requested without going through a haystack in an effort to find the needle, the request would not reasonably describe the records sought.

Lastly, the Freedom of Information Law requires that an agency respond to a request within five business days of its receipt. Within that time, the agency may grant access to the records, deny access in writing and inform the applicant of the right to appeal, or if more time is needed, acknowledge the receipt of the request in writing. Any such acknowledgement must include an approximate date indicating when the agency believes it will be able to grant or deny access. So long as the approximate date is reasonable (based, for example, on the volume of the request, the need to search or retrieve, the need to review the records, etc.), the agency would be complying with law.

I hope that I have been of assistance. If you have further questions, 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
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January 20, 2004

Mr. Demaine Jackson
02-B-0887
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

Dear Mr. Jackson:

I have received your letter in which you sought a variety of information from this office.

In brief, first, as a general matter, the reason for which a request is made and the intended use of records are irrelevant to rights of access to records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976), M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984).];consequently, an applicant ordinarily is not required to indicate a reason for requesting records. Second, each agency is required to promulgate rules and regulations that include the designation of one or more persons by name or title as records access officer and the location where records may be requested (see attached regulations). Third, it has been held that records indicating the days and dates of sick leave claimed by a public employee must be disclosed. That being so, attendance records pertaining to public employees are generally accessible (see attached advisory opinion). Lastly, enclosed is a copy of a supplement to the latest report of the Committee on Open Government. The supplement includes an index to advisory opinions and summaries of judicial decisions rendered under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1446

41 State Street, Albany, New York i2231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

January 20, 2004

Mr. Terrence B. Laurey
02-B-1717
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Laurey:

I have received your letter in which you "appealed" to this office to obtain certain information from the office of a district attorney.

While your intent concerning the use of the term "appeal" is unclear, I point out that the primary function of the Committee on Open Government involves offering advice and opinions pertaining to the Freedom of Information Law. The Committee is not empowered to determine appeals, to compel an agency to grant or deny access to records, or to acquire records on behalf of an individual. When a request for records is denied by an agency, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal and states in relevant part that:

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

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-4467

41 State Street, Albany, New York 12231
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January 21, 2004

Mr. Al DiLorenza
86-A-3282
Upstate Correctional Facility
P.O. Box 2000
Malone, NY 12953

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

Dear Mr. DiLorenza:

I have received your letters in which you asked whether it is "legal or warranted for [you] to be outrageously charged for mere names of employees" of Clinton Correctional Facility.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law 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.

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-14468

41 State Street, Albany, New York 12231
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January 21, 2004

Ms. Lisa D. Connell
[redacted]

The staff of the Committee on 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. Connell:

I have received your letter in which you explained your difficulty in obtaining "information regarding employees of the New York City Police Department. Specifically, [you] asked for the complete 2002 payroll, along with the badge number, home address and telephone number for each officer in the department. [You] asked for this information in electronic form, not by photocopying."

In this regard, I offer the following comments.

First, the legislative history of the Freedom of Information Law is, under the circumstances, pertinent to the matter. Since its enactment in 1974, the statute has included a requirement that agencies prepare records that identify employees by name, address, title and salary. The original version did not specify which address of a public employee, the home address or the business address, should be included in such a record. However, it did specify that neither the names nor the addresses of law enforcement officers were required to be included in the record. The current version of the Freedom of Information Law, which was enacted in 1977 and became effective in 1978, requires that each agency is required to maintain a record setting forth the name, *public office address*, title and salary of every officer or employee of the agency. In my view, the Legislature recognized that home addresses of public employees would, if disclosed, represent a significant infringement of privacy in some instances. Further, the home address and telephone number of an officer or employee are not generally relevant to the performance of one's official governmental duties; pertinent, however, is an employee's business or public office address. In short, it was determined by means of the legislation that agencies must prepare records that identify public officers and employees and indicate their work locations.

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.

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

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

In my opinion, the only exception to rights of access that could potentially be cited with respect to the information sought would be §87(2)(f). The cited provision states that an agency may withhold records or portions of records when disclosure could "endanger the life or safety of any person." In my view, disclosure of the identities and assignments of municipal employees, including law enforcement officers, would not in most instances endanger their lives or safety. Even in the case of assignments to the Office of the District Attorney, it is unlikely that disclosure of the name of every officer so assigned would pose a threat to his or her safety. In my view, §87(2)(f) would not apply with respect to disclosure of the identities of those who are not in face to face contact or "constant interaction" with the "criminal element." Further, even with respect to those who may work undercover with the criminal element, I would conjecture that they do not use their real names, display any identification that would indicate that they are law enforcement officers, or work regular business hours in carrying out their duties. If that is so, I do not believe that the City would have any justifiable basis for withholding names of the employees in question.

Third, with respect to your request for the records in electronic form, I note that in perhaps the first decision rendered under the Freedom of Information Law concerning records stored electronically, it was held that the format in which the records are maintained does not affect rights

of access [Szikszay v. Buelow, 436 NYS2d, 558, 107 Misc.2d 886 (1981)]. That case involved an assessment roll that was clearly available in the traditional paper format that was found to be equally available in computer tape format.

The Freedom of Information Law has been construed expansively in relation to matters involving records stored electronically. As you may be aware, that statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

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

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

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disc. On the other hand, if information sought can be generated only through the use of new programs, so doing would in my opinion represent the equivalent of creating a new record.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which, as suggested in the response by the Town, states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered on a keyboard. While some have contended that those kinds of steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, I believe that 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 potentially relevant 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.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

cc: Jonathan David

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 21, 2004

Mr. Jeffrey A. Meyers
Senior Attorney
NYS Office of Parks, Recreation and
Historic Preservation
Agency Building 1
Empire State Plaza
Albany, NY 12238

Dear Mr. Meyers:

I have received your letter of December 26 in which you sought an advisory opinion concerning a request to "review approximately 5,000 historic artifacts relating to Frederic Church and the Olana State Historic Site and National Landmark." In short, it is your view that "these artifacts are not records under FOIL."

By way of background, a legal assistant with a law firm requested "Church family correspondence and diaries for the period covering 1865 up through 1873", "[a]ccounting books for Olana" and "invoices for the period covering 1865 up through 1892." You pointed out in your letter that the firm requested and was granted access to thousands of pages of documentation and that "much of the material that is sought in the current FOIL request has been digested and presented in the documents that have already been provided to the Firm..." The request at issue involves "approximately 600 items of correspondence and diaries and 4,000 items of accounting books, , checks, invoices and bills of sale", and you added that they are "stored in controlled and environmentally stable rooms, and all artifacts are stored in acid free folders with interleaving to reduce the transfer of acids or soil from one sheet to the next." You stated, too, that many of the documents were inside the structure when it was donated to the state, that others were "donated by private individuals with strict instructions for their care and limitations on their use." It is your opinion that they are "akin to the paintings on the walls, the china, the drapery, the carpeting and furniture that adorn the building and its interior", and you contend that the documents "have risen to the level of artifact."

You referred as well to the regulations promulgated by the Commissioner of Education dealing with archival records that could be damaged by means of physical access [8 NYCRR §188.27(e)] that provide that those records may be withheld or their use restricted when their "physical condition....might be endangered by use." You also sent a copy of your agency's Guidelines for Researchers at State Historic Sites", which include provisions regarding "Handling Historic Manuscripts and Bound Materials." Since you are familiar with them, I will not recite the

instructions. However, it is clear those materials are treated differently from conventional records, and that their physical use, including photocopying, could result in their destruction. I note, too, that in a "Declaration of Policy", §14.01 of the Parks, Recreation and Historic Preservation Law states that:

> "The legislature determines that the historical, archeological, architectural and cultural heritage of the state is among the most important environmental assets of the state and that it should be preserved. It offers residents of the state a sense of orientation and civic identity, is fundamental to our concern for the quality of life, and produces numerous economic benefits to the state. The existence of irreplaceable properties of historical, archeological, architectural and cultural significance is threatened by the forces of change. It is hereby declared to be the public policy and in the public interest of this state to engage in comprehensive program of historic preservation to accomplish the following purposes:
>
> 1. To promote the use, reuse and conservation of such properties for the education, inspiration, welfare, recreation, prosperity and enrichment of the public;
>
> 2. To promote and encourage the protection, enhancement and perpetuation of such properties, including any improvements, landmarks, historic districts, objects and sites which have or represent elements of historical archeological, architectural or cultural significance..."

In consideration of the foregoing, the primary question is whether the materials requested constitute "records" that fall within the coverage of the Freedom of Information Law. If, as you suggest, they are artifacts or, as expressed in the provision quoted above, "objects", rather than records, that statute would be inapplicable. However, if they are indeed records subject to rights conferred by that statute, they would appear to be available for inspection and copying.

The Freedom of Information Law includes all agency records within its coverage, and §86(4) defines the term "record" expansively to mean:

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

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved a case cited earlier concerning documents pertaining to a lottery sponsored by a fire department.

Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" [Westchester Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980)].

Typically, the kinds of materials at issue, i.e., accounting books, invoices, bills of sale and the like, would clearly constitute records when they are maintained by or for an agency. Nevertheless, if they can justifiably be likened, as you suggest, to paintings, china or furniture because they are, in reality, historical "objects", it may be concluded that they do not constitute "records" and, therefore, that the Freedom of Information Law would not apply. I point out that, in a different context, it has been held that physical evidence, such as clothing and tools, that consisted of evidentiary material in a criminal proceeding, did not constitute records for the purposes of that statute [Allen v. Strojnowski, 129 AD2d 700; motion for leave to appeal denied, 70 NY2d 871 (1989)]. While a court might reach a similar conclusion with respect to the materials that have been requested, I know of no judicial decision that has considered the kinds of materials that are the subject of this inquiry.

Since the materials contain "information" in a physical form, a court, might on the other hand find that they indeed constitute agency records. Judicial decisions indicate that 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)].

As stated earlier, if the materials are found to constitute "records", §87(2) of the Freedom of Information Law requires that they be made "available for public inspection and copying." If your agency is required to do so at the request of any person, whether it be a researcher or a junior high school student seeking the materials for a classroom assignment, the result would likely be the destruction of the materials and the elimination of their use or value to others.

The provisions to which reference was made earlier indicate that the materials at issue, whether they are artifacts or records, merit special treatment. In particular, §1401 of the Parks, Recreation and Historic Preservation Law indicates that it is the public policy of this state and in the public interest to promote the "protection" and "perpetuation" of the kinds of materials at issue and to preserve them for future generations. While I do not believe that §1401 may be characterized as a statute that exempts records from disclosure, when the direction offered by that statute is considered in conjunction with the Freedom of Information Law, it would be unreasonable, in my view, to require that the public at large be granted physical access to the materials. That being so, if the materials are found to be subject to the Freedom of Information Law, I believe that, of necessity, they could only be made available by means of methods that would ensure their preservation. In that circumstance, I believe that the agency would have the obligation under §1401 to ensure that the handling and reproduction of the materials is conducted by experts or conservators who have the ability to guarantee their integrity and preservation.

Further, in that event, since physical access to the public, including the firm making the request, would be restricted, and since photographs, rather than photocopies, would likely be made, I believe that the agency could assess a fee based on the actual cost of reproduction pursuant to §87(1)(b)(iii) of the Freedom of Information Law. If, for example, the agency would be required to retain a conservator, whatever costs associated with the reproduction of the materials are borne by the agency could be assessed upon the applicant.

Lastly, you indicated that some of the materials might have previously been disclosed. To the extent that the applicant continues to maintain copies of those materials, I do not believe that the agency would be required to make a second copy [see e.g., Moore v. Santucci, 151 AD2d 677 (1989); Walsh v. Wasser, 225 AD2d 911 (1996)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14470

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January 21, 2004

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 a package of correspondence in which you repeatedly indicated that "the NYS DOT procedure seems to be to acknowledge all FOIL requests in 2 or 3 days", and that since you had not received an acknowledgment within that time, you assumed that a request had been denied.

In this regard, notwithstanding the common practice of the Department, I note that section 89(3) of the Freedom of Information Law provides that an agency has up to five business days to grant or deny a request for records, or to acknowledge the receipt of a request. That the Department might not have acknowledged the receipt of request within "2 or 3 days" does not, in my opinion, signify a denial of a request.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: John Dearstyne
Mary Saviola

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 21, 2004

Mr. James McGoey
01-A-2691
Clinton Correctional Facility
P.O. Box 2000
Dannemora, NY 12929

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

Dear Mr. McGoey:

I have received your letter in which you asked whether you "have a legal right under F.O.I.L to preserve" a videotape that may be maintained by your facility. It is your understanding that tapes are held for "7 to 14 days."

In this regard, once a request for a record is made pursuant to the Freedom of Information Law, I do not believe that an agency may destroy or dispose of the record. The record must, in my view, be preserved during the pendency of any request or appeal.

I note that agencies cannot merely destroy records when they have the desire to do so or when they run out of storage space. On the contrary, retention and disposal of records are governed by law. Specifically, §57.05(11)(b) of the Arts and Cultural Affairs Law provides that the Commissioner of Education is empowered:

> "[t]o authorize the disposal or destruction of state records including books, papers, maps, photographs, microphotographs or other documentary materials made, acquired or received by any agency. At least forty days prior to the proposed disposal or destruction of such records, the commissioner of education shall deliver a list of the records to be disposed of or destroyed to the attorney general, the comptroller and the state agency that transferred such records. No state records listed therein shall be destroyed if within thirty days after receipt of such list the attorney general, comptroller, or the

agency that transferred such records shall notify the commissioner that in his opinion such state records should not be destroyed."

In the context of your correspondence, the kinds of records in which you are interested might have been destroyed in accordance with a schedule established by the Commissioner of Education that permit the disposal of those kinds of records after they existed for a particular period of time. If my assumptions are accurate, the destruction of any records would not have been illegal and would have been carried out in accordance with law.

Lastly, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to prepare a record that is not maintained by the agency in response to a request. In short, if the record in question does not exist, the Freedom of Information Law would not apply.

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

Sincerely,

David Treacy
Assistant Director

DT:tt

From: Robert Freeman
To: oldchatham@webtv.net
Date: 1/22/2004 3:30:44 PM
Subject: Dear Arlene:

Dear Arlene:

I have received your inquiry.

In brief, first, the Freedom of Information Law (FOIL) applies to all agency records, such as those of a town, and §86(4) defines the term "record" expansively to include "any information kept, held, filed, produced or reproduced by, with or for an agency....in any physical form whatsoever..." Therefore, even though a letter sent to a town attorney in his capacity as a town official may not be maintained at a town office, it would constitute a "record" that falls within the coverage of the FOIL, because it would be kept or held "for" an agency.

Second, when a request for a record is made, and the response is that the record is not maintained by the agency or cannot be located, the person seeking the record may request and the agency must prepare a certification in which a town official asserts that the record could not be found after having made a diligent search.

Lastly, assuming that the record in question can be found, I believe that it would be accessible to the public. The FOIL is based on a presumption of access and states that records must be disclosed, except to the extent that a basis for denial of access appearing in §87(2) may properly be asserted. In my view, none of the grounds for denial would apply.

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-14473

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January 22, 2004

Mr. Richard Goldberg
02-A-3114
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

Dear Mr. Goldberg:

As you are aware, I have received your correspondence concerning your unsuccessful attempts to obtain the "Civil Action Index" relating to your case in the Peekskill City Court. In response to your request, the Chief Clerk wrote that "[a]s this is a Criminal case, F.O.I.L does not apply. F.O.I.L. request[s] are made for civil cases." You have sought assistance in the matter, and I offer the following comments.

It is noted at the outset that the advisory jurisdiction of the Committee on Open Government relates to the Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) often grant broad public access to those records. Further, in many instances, whether the records pertain to a civil or criminal proceeding is of no significance. I note, too, that §255-b of the Judiciary Law entitled "Dockets of clerks to be public" states that "[a] docket-book, kept by a clerk of a court, must be kept open, during business

hours fixed by law, for search and examination by any person." If a judge's notes appear on a record that is otherwise public, it is suggested that the notes might be deleted and that the remainder be made available.

I hope that I have been of assistance.

Sincerely.

Robert J. Freeman
Executive Director

RJF:tt

cc: Janice Laughlin, Chief Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14474

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

January 22, 2004

Mr. Luis Vasquez
02-A-3664
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Vasquez:

I have received your letter in which you complained about your difficulty in obtaining records from the New York City Department of Corrections that indicate the identity of your visitors while you were placed in the "Queens Criminal Court holding pens...among those inmates awaiting conferences with their attorney's and/or testimony and dispositions with the Grand Jury." You further wrote that "[t]here is a Corrections Desk and Log Book for signing in inmates, and signatures for visiting attorneys etc..."

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

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

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14475

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 23, 2004

Mr. Jamel King
01-A-4949
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. King:

I have received your letter, which you characterized as an appeal to this office based on an unanswered request for records made to the New York City Police Department.

Please be advised that the primary function of the Committee on Open Government involves providing 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.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges 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 by the New York City Police Department to determine appeals is Mr. Jonathan David.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14476

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 23, 2004

Mr. Leon Korobow
[redacted]

The staff of the Committee 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. Korobow:

As you are aware, I have received your letter of December 29 and the materials attached to it. You have sought guidance concerning rights of access to certain records that you requested from the Village of Great Neck. Although some of the records have been made available, others have been withheld. Among those withheld include communications between the Village and the Department of Environmental Conservation pertaining to a grant to fund sewage denitrification. In denying access, the Village indicated that the records consist of "inter-agency correspondence."

While I agree that the records in question may be properly be characterized as "inter-agency" materials, their content is the determining factor in ascertaining 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. Section 87(2)(g) pertains to the authority to withhold "inter-agency or intra-agency" materials.

Second, §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials").

Third, due to the structure of the provision dealing with inter-agency and intra-agency materials, again, it is clear that the contents of those materials determine the extent to which they may be withheld, or conversely, must be disclosed. Section 87(2)(g) enables an agency to withhold records that:

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

I emphasize that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder. In the context of the records in question, those portions consisting of information described in subparagraphs (i) through (iv) would be accessible, unless a different exception may be cited.

Pertinent is a decision rendered by the Court of Appeals, the state's highest court, in which the 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)], it was asserted 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. 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).

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).

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, in the context of your request, insofar as the records at issue consist of statistical or factual information, I believe that they must be disclosed. Additionally, during our conversation, you alluded to the possibility that the materials might include the language of a resolution. If that is so, since a resolution adopted by a municipal body is a final agency determination, that portion of a record falling within §87(2)(g) would be accessible under subparagraph (iii).

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
Executive Director

RJF:tt

cc: Board of Trustees
John Dominsky, Clerk-Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14477

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 23, 2004

Ms. Henrietta L. Mitchell
00g-0630
Albion Correctional Facility
3595 State School Road
Albion, NY 14411-9399

The staff of the Committee on 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. Mitchell:

I have received your letter in which you asked whether you may request copies of letters that you have sent to the Department of Correctional Services.

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.

In my opinion, letters you have written and sent to an agency which are maintained by the agency should be available to you under the Freedom of Information Law because none of the grounds for denial would be applicable.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14428

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

January 23, 2004

Mr. Harry Elmore
78-A-0723
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. Elmore:

I have received your letter in which you complained about your difficulty in obtaining records related to yourself from the New York State Department of Correctional Services.

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 question of whether the Department of Correctional Services may legally dispose of records, I note that agencies cannot merely destroy records when they have the desire to do so or when they run out of storage space. On the contrary, retention and disposal of records are governed by law. Specifically, §57.05(11)(b) of the Arts and Cultural Affairs Law provides that the Commissioner of Education is empowered:

> "[t]o authorize the disposal or destruction of state records including books, papers, maps, photographs, microphotographs or other documentary materials made, acquired or received by any agency. At least forty days prior to the proposed disposal or destruction of such records, the commissioner of education shall deliver a list of the records to be disposed of or destroyed to the attorney general, the comptroller and the state agency that transferred such records. No state records listed therein shall be destroyed if within thirty days after receipt of such list the attorney general, comptroller, or the agency that transferred such records shall notify the commissioner that in his opinion such state records should not be destroyed."

In the context of your correspondence, the kinds of records in which you are interested may have been destroyed in accordance with a schedule established by the Commissioner of Education that permits the disposal of records after a particular period of time. If my assumptions are accurate, the destruction of any records would not have been illegal and would have been carried out in accordance with law.

I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to prepare a record that is not maintained by the agency in response to a request. In short, if the record in question does not exist, the Freedom of Information Law would not apply.

Lastly, you asked this office to search our files for information related to a Department of Correctional Services' response to your Freedom of Information appeal dated February 11, 1991. It is noted that Freedom of Information appeal records maintained by this office prior to 2003 have

been destroyed in accordance with our retention schedule and we no longer maintain any such records.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14479

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

January 23, 2004

Mr. Robert Serrano
00-A-4326
Auburn Correctional Facility
135 State Street
Auburn, NY 13024

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

Dear Mr. Serrano:

I have received your letters in which you requested that this office provide assistance and documents. You wrote that you have been unable to obtain a variety of records from several entities.

In this regard, I point out that the Committee on Open Government does not maintain records for other agencies, nor is it empowered to obtain records on behalf of individuals. However, it is authorized to provide advice concerning the Freedom of Information Law. Based on a review of the correspondence, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a

circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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

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

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

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

Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (i.e., 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 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 federal agency. While some information of your interest might be available from federal entities that are considered "agencies" for purposes of the federal Freedom of Information Act (5 USC §552), those entities fall beyond the definition of "agency" as that term is defined in the New York statute.

Lastly, it is suggested that you cite applicable provisions of law when submitting requests to entities that might maintain records of your interest.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1446

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

January 23, 2004

Mr. Richard Coleman
01-B-1141
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

Dear Mr. Coleman:

I have received your letter in which you appealed a denial of access to records that you requested from the office of the Cayuga County District Attorney.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to 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), states in relevant part that:

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

It is also noted in brief that the records pertaining to grand jury proceedings are generally confidential unless a court orders disclosure, that it has been held that records already made available to you or your attorney need be disclosed again unless neither has possession of the records, and that records accessible under the Freedom of Information Law may be different from those available as Brady or Rosario material.

I hope that the foregoing is useful to you.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14481

41 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 26, 2004

E-MAIL

TO: Keith Pierce [redacted]

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Pierce:

I have received your "clarification" concerning your request made under the Freedom of Information Law to the Department of Civil Service.

By way of background, you sought "a list of names for the persons applied for an open competitive exam process." While you were provided with a list of the applicants for the examination, the names of the disapproved applicants were redacted on the ground that disclosure would constitute an unwarranted invasion of personal privacy of those who were not approved to take the examination. You now seek information as to whether the disapproved applicants were in existing state titles and what those titles were. Having discussed the matter at length with a representative of the Department, it does not appear that there is an existing record which contains such information. If that is so, the Freedom of Information Law would not be applicable.

With respect to your second request, it appears that your contention is based on a mistaken assumption. The examination for Data Processing Fiscal Systems Auditor 2, No. 22-939, which was administered on December 14, 1996, was an open-competitive examination. It was not a battery test or part of the Promotion Test Batteries which were administered by the Department on September 7, and 21, 1996, from which scores are banked for a period of ten years. The actual score received on examination No. 22-939 is the one reported on the eligible list for this title.

That being so, my opinion regarding disclosure remains as initially suggested.

I hope that the foregoing serves to clarify your understanding of the matter.

cc: Patricia A. Hite

FOIL-AO-14182

From: Robert Freeman
To: [redacted]
Date: 1/26/2004 9:19:08 AM
Subject: Dear Ms. Hale:

Dear Ms. Hale:

I have received your inquiry in which you asked whether it is legal or ethical for a newspaper to print the names and addresses of patients transported to the local hospital by the volunteer ambulance squad.

Since questions involving ethics are beyond the jurisdiction of this office, I cannot effectively respond relative to that issue. With respect to the legality of publication of the information by the newspaper, assuming that the newspaper acquires the information legally (i.e., if the information is not stolen, but rather given to the newspaper), I do not believe that there would be anything "illegal" relative to publication of the details that you mentioned. Whether the ambulance company's disclosure is consistent with law involves a separate question, and the answer, in my view, is dependent on whether the new HIPAA provisions apply.

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-1448 3

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

January 26, 2004

Mr. Benjamin Grimes
00-A-1447
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. Grimes:

I have received your letter in which you asked for "analysis and assistance" regarding your attempts to obtain records pertaining to yourself from the Office of Children and Family Services.

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

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 your request involves records relating to child abuse, I point out that §422 of the Social Services Law 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 int that statute.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

FOIL-AO - 14484

From: Robert Freeman
To: Village of Schuylerville
Date: 1/26/2004 11:00:19 AM
Subject: Re: Help!

It is suggested that you might indicate what I have suggested on many occasions: that FOIL deals with all Village records, even those that are unquestionably and historically accessible to the public; that an agency may (but need not) require that a request be made in writing; and that agency staff, such as yourself, are happy to accommodate applicants for records, but that the law does not require that you respond instantly to a request, for it provides up to five business days to respond.

I hope that this helps. If you need something more or different

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3748
FOIL-AO-14485

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

January 27, 2004

Ronald B. McGuire, Esq.
30 Newport Parkway, Suite 2608
Jersey City, NJ 07310

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

Dear Mr. McGuire:

I have received your letter of January 2 and the materials attached to it. You have requested an advisory opinion concerning the status of "chartered student organizations at colleges operated by the City University of New York (CUNY)" under the Open Meetings and Freedom of Information Laws.

You referred to §15.2 of the CUNY by-laws indicating that students may charter "organizations, associations, clubs or chapters" and wrote that "chartered organizations at the various CUNY schools include groups engaged in political, social, cultural, recreational, educational and athletic activities as well as student publications." Those groups are eligible to receive funding derived from mandatory student activity fees. Section 16.5 of the by-laws requires each college to establish a "college association" which is responsible for approving the budgets of student organizations that receive student activity fees.

As you indicated, this office has advised student governments at public colleges fall with the coverage of both the Open Meetings and Freedom of Information Laws, and it has been so held by the courts. In Schuldiner v. The City University of New York (Supreme Court, Richmond County, September 13, 1999), petitioner sought and was granted an order declaring that the College of Staten Island Association is a "public body" subject to the Open Meetings Law and an "agency" falling within the coverage of the Freedom of Information Law. The same conclusion was reached in substance in (Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7,2000) and in relation to the applicability of the Freedom of Information Law concerning an equivalent entity operating at a branch of the State University (Stony Brook Statesman v. Associate Vice Chancellor for University Relations, Supreme Court, Ulster County, January 22, 1996).

I concur with your finding, however, that there are no decisions pertaining to the applicability of open government statutes to "chartered organizations that spend, but do not allocate, public funds

such as student activity fees." As the attorney for editors of several student newspapers, you indicated that they have expressed concern that the application of those statutes "would inhibit their activities."

In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law pertains to 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 its consideration of the language quoted above, the Court of Appeals has stated that:

> "In determining whether an entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity was 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...
>
> It may be that an entity exercising only an advisory function would not qualify as a public body within the purview of the Open Meetings Law... More pertinently here, however, a formally chartered entity with officially delegated duties and organizational attributes of a substantive nature, as this Association, Inc. enjoys, should be deemed a public body that is performing a governmental function (compare, [*Matter of Syracuse United Neighbors v. City of Syracuse*, 80 AD2d 984, 985 appeal dismissed 55 NY2d 995).] It is invested with decision-making authority to implement its own initiatives and, as a practical matter, operates under protocols and practices where its recommendations and actions are executed unilaterally and finally, or received merely perfunctory review or approval. This Association, Inc. therefore, is manifestly not just a club or extracurricular activity." [Matter of Smith v. CUNY, 92 NY2d 707, 713-714 (1999)].

The organizations that are subjects of your inquiry are clubs or entities involved in extracurricular activities. Unlike a college association that has the authority to take final and binding action and to govern within certain limits, the organizations in question appear to lack authority of that nature. If that is so, I do not believe that they would constitute public bodies or, therefore, that they are subject to the Open Meetings Law.

Second, the scope of the Freedom of Information Law is, in my view, more expansive than the Open Meetings Law, for it pertains to all agency records. Section 86(3) defines "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."

Whether the organizations at issue constitute agencies is unclear. However, I do not believe that the status of such entities as agencies is determinative in relation to your inquiry.

Most significant in my view is the definition of "record." That term is defined 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".

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved a case concerning documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" (see Westchester Rockland, supra, 581) and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In this instance, the by-laws of the CUNY Board of Trustees suggest that student organizations comprise an integral aspect of the activities at CUNY institutions. Further, according to §15.2, to exist, those organizations must file a document indicating their purposes and the identities of their officers, and in addition, the same provision states that extra-curricular activities carried out by those organizations "shall be regulated" by the student government organization. It

also includes language concerning the filing of charges against a student publication in cases in which there are allegations of misconduct in a variety of contexts.

Assuming that chartered organizations operate within the campuses or buildings of a CUNY institution, their documentation would, in my opinion, constitute CUNY records. In a decision rendered by the Court of Appeals, 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 are kept, held, produced or reproduced by a chartered club or extra-curricular organization, because such organizations would not exist but for their relationship with a CUNY institution, I believe that the records would fall within the coverage of the Freedom of Information Law. This is not to suggest that all such records would be accessible to the public, for exceptions to rights of access appear in §87(2) of that statute. In addition, I believe that access to records identifiable to a particular student or students would likely be restricted in accordance with the provisions of the Family Educational Rights and Privacy Act (20 USC §1232g).

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14486

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January 27, 2004

E-MAIL

TO: Cindy Amrhein [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. Amrhein:

I have received your letter in which you indicated that you were informed that military discharge papers are no longer accessible to the public. You have asked whether that should be so.

In this regard, by way of background, §250 of the Military Law, which has remained unchanged for some forty years, states that any certificate of honorable discharge issued after April 6, 1917 "may be recorded in any one county, in the office of the county clerk, and when so recorded shall constitute notice to all public officials of the facts set forth therein." As such, although there is no requirement that they do so, veterans may file certificates of honorable discharge with county clerks. The more recent filings, perhaps those within the last twenty years, include social security numbers.

A veteran who chooses to file a certificate of honorable discharge with a county clerk has the ability to direct that it be sealed pursuant to §79-g of the Civil Rights Law. That provision states that:

> "a. Notwithstanding the provisions of any general, special or local law to the contrary, any person filing a certificate of honorable discharge in the office of a county clerk shall have the right to direct the county clerk to keep such certificate sealed.
>
> b. Thereafter, such certificate shall be made available to the veteran, a duly authorized agent or representative of such veteran or the representative of the estate of a deceased veteran but shall not be available for public inspection."

Although the Freedom of Information Law is based on a presumption of access, the first ground for denial would authorize county clerks to shield from the public certificates of honorable discharge that have been sealed based on the direction to do so by a veteran. Section 87(2)(a) pertains to records that are "specifically exempted from disclosure by state or federal statute." Section 79-g of the Civil Rights Law is such a statute, and if direction to seal is given by a veteran, a county clerk would be prohibited from disclosing, notwithstanding the provisions of the Freedom of Information Law.

When there is no direction by a veteran to seal a certificate of honorable discharge, that record, like all others, would be subject to rights conferred by the Freedom of Information Law. As I understand the content of such a record, the only item that could be withheld would be the social security number. It has been held that local government agencies may withhold social security numbers on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], but that they not required to do so [Seelig v. Sielaff, 201 A.D. 2d 298 (1994)]. As a general matter, even though a local government agency, i.e., a county, may withhold records or portions thereof in appropriate circumstances, it is not obliged to do so, because the Freedom of Information Law is permissive. Therefore, while I believe that a local government agency may delete social security numbers from records that are otherwise available, the Freedom of Information Law would not prohibit a county clerk from disclosing certificates of honorable discharge in their entirety, unless those records are sealed under §79-g of the Civil Rights Law.

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

cc: Genesee County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14487

41 State Street, Albany, New York 12231
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January 27, 2004

Mr. David Garcia
98-A-6674
Green Haven Correctional Facility
Stormville, NY 12821

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

Dear Mr. Garcia:

I have received your letters in which you requested assistance in obtaining records from the New York City Police Department that would indicate whether certain police officers "have been involved in any misconduct." You also complained that a district attorneys office denied your request for records related to your criminal case.

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

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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 request for records of police officer misconduct, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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. 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. To acquire the records that fall within the coverage of §50-a, a police officer must consent to disclosure or a court order must be issued in accordance with the provisions in that statute.

In regard to your request for records related to your criminal case, 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 possess the record in order to successfully obtain a second copy. Specifically, the decision states that:

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

> for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions"(id.., 678).

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

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

FOIL-AO-14488

From: Robert Freeman
To: [redacted]
Date: 1/28/2004 11:17:08 AM
Subject: Dear Mr. Rudofsky:

Dear Mr. Rudofsky:

I have received your letter in which you sought advice concerning your ability "to obtain computer files of all lis pendens with their associated index numbers in NYC for the past three years."

In this regard, as I understand the provisions of §§6501 and 6511 of the Civil Practice Law and Rules (CPLR), the materials at issue are maintained by a county clerk acting clerk of a court. If that is so, the statute within the advisory jurisdiction of this office, the Freedom of Information Law, would not apply. In brief, that law excludes the courts from its coverage, and the fee for copies of records would likely be based on provisions of the CPLR.

Additionally, based on the provisions cited above, it appears that the records in question may be indexed by location, rather than chronologically, If that is so, it may not be possible to retrieve the records of your interest. I note, however, subdivision (d) of §6511 states that "A county clerk may adopt a new indexing system utilizing electro-mechanical, electronic or any other method he deems suitable for maintaining the indexes."

It is suggested that you contact the offices of the county clerks that maintain the records in question to ascertain whether they can be made available in the format to which you referred and what the cost would be.

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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FOIL-AO-14489

From: Robert Freeman
To: jbalch@sgcsd.net
Date: 1/29/2004 9:43:35 AM
Subject: Dear Ms. Balch:

Dear Ms. Balch:

Your inquiry concerning the "charge for student records" has been forwarded to this office, the Committee on Open Government. As you may be aware, the Committee is authorized to provide advice concerning the Freedom of Information Law (FOIL).

All records kept by or for an agency, such as a school district, fall within the coverage of FOIL. I note that access to student records may be governed by the federal Family Educational Rights and Privacy Act (FERPA); however, the provisions of FOIL determine the fees that can be charged.

In brief, when a record is accessible to an applicant, inspection is free. When copies are requested, §87(1)(b)(iii) states that an agency may charge a maximum of twenty-five cents per photocopy up to nine by fourteen inches. When the records are larger or cannot be photocopied (i.e., a tape recording, computer disk, etc.), the fee is based on the actual cost of reproduction.

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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CC: recmgmt@mail.nysed.gov

FOIL-AO-14490

From: Robert Freeman
To: djs@mail.woodstock.org
Date: 1/30/2004 4:51:15 PM
Subject: Dear Ms. Stern:

Dear Ms. Stern:

I have received your inquiry in which you asked whether "all votes of a public board [must] be roll call votes."

In this regard, while there is no requirement that there be a roll call vote *per se* , there is a provision in the Freedom of Information Law that requires the preparation of a record containing equivalent information. Specifically, §87(3)(a) states that each agency, such as the board of trustees of a municipal library, "shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes..." Therefore, although there need not be a roll call, a record must be prepared that indicates the manner in which each member cast his or her vote. Typically the record of votes is included as part of the minutes of a meeting.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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FOIL-AO-14491

From: Robert Freeman
To: jbutler@bsk.com
Date: 1/30/2004 4:22:35 PM
Subject: Dear Ms. Butler:

Dear Ms. Butler:

I have received your email. In short, while FERPA does not specify that a parent, for example, has the right to obtain a copy of an education record pertaining to his or her child, FOIL includes all agency records within its coverage. That being so, and since FOIL requires that copies of accessible records be made available upon payment of the requisite fee, I believe that a school district would be obliged to do so in the situation that you described.

If you would like to discuss the issue, please feel free to call. I hope that I have been of assistance.

All the best,
Bob Freeman

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14492

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

February 4, 2004

Mr. William P. Gardner 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. Gardner:

I have received your communication of January 15, as well as copies of others that appear to be between you and the Department of Civil Service.

Although the content of those communications is not entirely clear, I offer the following general remarks.

First, the Freedom of Information Law pertains to existing records maintained by or for a government agency, and I point out that §89(3) of that statute provides in relevant part that an agency is not required to prepare or acquire a record in response to a request. Therefore, if, for example, the Department of Civil Service does not maintain a record that you have requested, it would not be required to create a new record or obtain the record from another source on your behalf.

Second, Department of Civil Service rules have long indicated that an eligible list, a list of those who passed a civil service exam and their scores or ranking, must be disclosed by an agency.

Third, as you suggested in the correspondence, the Freedom of Information Law does not require that a person seeking a record must precisely identify the record. Section 89(3) states that an applicant must "reasonably describe" the record sought. If the agency has the ability to locate the record based on the terms of the request, I believe that the applicant would meet the responsibility of reasonably describing 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..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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: Jane Prus

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1449 3

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February 4, 2004

Mr. Phillip Fearron
03-R-1822
Butler Correctional Facility
P.O. Box 400
Red Creek, NY 13143

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

Dear Mr. Fearron:

I have received your letter in which you complained that your request made pursuant to the Freedom of Information Law for certain family court records had not been answered.

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

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

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

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

Based on the provisions quoted above, the courts 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.

It is noted that the primary statute dealing with family court records, §166 of the Family Court Act, indicates that records of that court shall not be open to "indiscriminate" public inspection. That being so, it is suggested that you resubmit a request to the clerk of the court describing your interest or relationship to the matter to which the records pertain.

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-1414

41 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 6, 2004

E-Mail

TO: Andy [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 Andy:

I have received your letter in which you asked "what paperwork" should be submitted to ascertain the salaries of two employees at Erie County Community College.

In this regard, first, each agency is required to designated at least one person as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records. It is suggested that you telephone the office of the President of the College to learn the name of the records access officer.

Second, a request should be made in writing that reasonably describes the records sought. There is no particular form that must be used. In this instance, §87(3)(b) of the Freedom of Information Law is pertinent, for it requires that each agency must maintain a record that includes the name, public office address, title and salary of every officer or employee of the agency. Consequently, it is suggested that you request portions of that record or a similar record that identifies the employees of your interest and their salaries.

It is noted that our website includes "Your Right to Know", which is a guide to the Freedom of Information Law that contains a sample letter of request.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14495

41 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 9, 2004

Commissioner George Mayer
Eastchester Fire Department
255 Main Street
Eastchester, NY 10709-2901

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

Dear Commissioner Mayer:

I have received your letters of January 14 and January 23. Both pertain to a request made to the Board of Commissioners of the Eastchester Fire Department for records involving the Volunteer Firemen's Benevolent Association of the Town of Eastchester, Inc. Your comments indicate that the Department has no control over the Association or its finances, and that, consequently, the Department does not maintain the records sought. You have requested my advice concerning the matter.

In this regard, in short, it appears that the only responsibility imposed on the Department relative to the request involves informing the applicant for the records that the Department does not maintain or have control over any such records. I note that the Freedom of Information Law pertains to existing records maintained by or for an agency. That principle is expressed in §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...."

In the context of the situation that you have described, if the Department does not maintain the records at issue, the Freedom of Information Law would not apply. Further, the Department would not be obliged to create or obtain records on behalf of the applicant.

Attached to your second letter is an appeal. Here I point out that an appeal in my view may properly be made when an agency possesses records and denies access in accordance with one or more of the exceptions to rights of access appearing in §87(2). In this instance, there appear to have been no records to which access was denied. If that is so, I do not believe that an appeal involving a denial of access could properly have been made.

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-14496

41 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 9, 2004

Mr. Dennis J. Winter
[redacted]

Dear Mr. Winter:

I have received your letter of January 20, the materials attached to it, and a videotape of a meeting held by the Board of Commissioners of the Eastchester Fire District.

In brief, you have attempted to obtain records from the District involving the finances of the Volunteer Firefighter's Benevolent Association of the Town of Eastchester, Inc. The District has indicated that it does not maintain the records of your interest, and you raised the following question: "is a fire district required to keep and maintain the financial record of the Benevolent that serves exclusivity [sic] for the benefit of that same District as its designated recipient of their 2% tax moneys."

In this regard, the advisory authority of the Committee on Open Government is limited to matters relating to rights of access to government records, primarily under the state's Freedom of Information Law. Your question deals the with the responsibilities, powers and duties of a fire district. That being so, I cannot respond, for the question pertains to a matter beyond the jurisdiction or expertise of this office.

I note, however, that the Freedom of Information Law pertains to existing records maintained by or for an agency. That principle is expressed in §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...."

In the context of the situation that you have described, if the District does not maintain the records at issue, the Freedom of Information Law would not apply. Further, the District would not be obliged to create or obtain records on behalf

I hope that the foregoing serves to clarify your understanding of the functions of the Committee and the scope of the Freedom of Information Law.

Enclosed is the videotape that you sent for my review.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Enc.

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3757
FOIL-AO-14497

41 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 9, 2004

E-MAIL

TO: Doreen Tignanelli [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. Tignanelli:

I have received your inquiries, both of which pertain to the right to gain access to a draft environmental impact statement. You wrote that you were informed that the document in question would not be available until it had been reviewed by a town planning board and asked whether my advice would be the same as that offered in FOIL-AO-12388.

In this regard, assuming that the statement was prepared by or for a developer, my response would be the same. In short, since the Freedom of Information Law is applicable to all records maintained by or for an agency, such as a town, the statement would be subject to rights of access as soon as it comes into the possession of an agency or its representative. Further, in my view, none of the grounds for denying access would apply. That the Planning Board has not reviewed or made a determination concerning the statement is, in my view, irrelevant to rights of access or the town's ability to deny access.

You also referred to a request for minutes of a meeting that occurred in June of 2003. In response, you were told that "the minutes might not be available yet and even if they are, [you] would have to FOIL them." As suggested above, the Freedom of Information Law includes all agency records within its coverage, including minutes of meetings. Therefore, in a technical sense, an agency may require that a request for minutes of meetings be made pursuant to that statute. However, I point out that the Open Meetings Law provides specific direction relative to minutes, and §106 requires that minutes of a meeting be prepared and made available to the public within two weeks of the meeting. I note, too, that there is no law that requires that minutes be approved. That being so, if it is the practice of a board to approve its minutes and it has not had the opportunity to do so within two weeks of a meeting, it has been suggested that the person who prepares minutes

must do so and disclose them within the statutory time, and that he or she may mark the minutes as "draft" or "preliminary", for example.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14498

41 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 10, 2004

Mr. Robert A. Beckert
[redacted]

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

Dear Mr. Beckert:

As you are aware, I have received a variety of materials from you relating to a construction project in the City of Hudson. Among the documents are unanswered requests for records made pursuant to the Freedom of Information Law.

In this regard, first, I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require each agency, such as a city, to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests ordinarily should be made to that person. In my view, those in receipt of your requests should have responded directly in a manner consistent with law or forwarded the requests to the records access officer.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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: Chairman, Planning Commission
John Connor, Jr., City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3758
FOIL-AO-1444

41 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 10, 2004

Hon. Barbara Tierney
Clerk/Treasurer
Village of Schuylerville
P.O. Box 56/35 Spring Street
Scuylerville, NY 12871

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

Dear Ms. Tierney:

I have received your letter and the correspondence attached to it. You have sought guidance concerning a contention by a resident that "she did not need to FOIL for" a certain document and that she could "demand" immediate access to records.

In this regard, first, the Freedom of Information Law includes all government agency records within its coverage, and §89(3) of that statute states in part that an agency, such as a village, may require that a request for a record be made in writing. Although a clerk or other official may choose to accept and respond to a request made orally, the law authorizes an agency or its representative to require a written request.

Second, while an agency may respond instantly to a request, there is no obligation to do so. The same provision as that cited above states that an agency must respond to a request within five business days of its receipt by granting access to records, denying access in writing, or acknowledging the receipt of a request in writing if more than five business days will be needed to grant or deny access. When the receipt of a request is acknowledged because additional time is needed, the law requires that the acknowledgment must include an approximate date indicating when it is believed that a determination concerning access to the records will be rendered. So long as the approximate date is reasonable in consideration of the volume of a request, the need to search for or review the records, an agency's workload, etc, it has been held that agency would be acting in a manner consistent with law (see Linz v.Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

You also sought my opinion "on the requirement to have public presentations on reviews of financial statements conducted by an independent accountant at the request of the Board." If I have

interpreted your question correctly, you have asked whether the Open Meetings Law would be applicable in that context. In short, it has been held that any gathering of a majority of a public body for the purpose of conducting public business, irrespective of the absence of an intent to vote or take action, constitutes a "meeting" that falls within the coverage of the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

If I have misconstrued your question, please feel free to offer clarification.

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-3759
FOIL-AO-14500

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

February 11, 2004

E-Mail

TO: [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Schoettle:

As you are aware, I have received your letter of January 22 in which you raised several questions relating to the Open Meetings and Freedom of Information Laws.

You referred initially to an executive session held by a committee of the governing board of a public library, and you asked whether the committee may conduct an executive session and, if so, who, other than members of the committee, may attend. In this regard, as indicated in the opinion addressed to you on January 12, a committee consisting of two or members of a public body, such as the board of trustees of municipal library, is itself a "public body" subject to the Open Meetings Law. As stated further in that opinion, such a committee "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." In short, I believe that a committee may conduct an executive session in accordance with the provisions of §105 of the Open Meetings Law.

Subdivision (2) of that provision states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Stated differently, members of a committee, a public body, have the right to attend an executive session of that body, and the committee may permit others to attend. It is assumed that persons who attend who are not members of a public body are permitted to do so due to some function that they carry out, i.e., taking minutes, or due to some knowledge, expertise, or connection with the subject matter under consideration.

If it is believed that a public body has failed to comply with the Open Meetings Law, any person may complain to this office and seek an advisory opinion. While advisory opinions are not

binding and cannot alter events that have already occurred, it is our hope that they are educational and persuasive, and that they enhance compliance with law. In the alternative, a person may seek judicial review or intervention pursuant to §107(1), which provides that:

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

You also asked whether I informed the library that you made an inquiry. There is nothing in the correspondence received from you that identifies the library, and I am unaware of which library is the subject of your inquiries.

Next, you questioned whether the president of a board may appoint a committee "which in effect represents a quorum of the Board itself." Without additional information concerning the powers and duties of the Board and its president or chairman, I cannot effectively respond. However, again, a committee as you described it would be subject to the requirements of the Open Meetings Law.

Your remaining questions pertain to the Freedom of Information Law, and you asked, first, whether you may "assume that whatever is not delivered does not exist." In this regard, when any portion of a request is denied, an agency is required to provide the reason and inform the applicant of the right to appeal the denial. Viewing your question from a different perspective, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Lastly, §87(1)(b) of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government, 21 NYCRR §1401.8, indicate the only fee that can be imposed under the law is for the reproduction of a record; no fee may be charged for search, personnel time or other administrative expenses. Under the provisions cited, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches; in the case of other records, i.e., tape recordings, computer disks, etc., the agency may assess a fee based on the actual cost of reproduction, which does not include fixed costs of the agency, such as salaries, or overhead.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14501

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

February 11, 2004

Mr. Richard Beltre
03-R-3893
Bare Hill Correctional Facility
Caller Box 20, 181 Brand Road
Malone, NY 12953

Dear Mr. Beltre:

I have received your letter in which you appealed a denial of access to certain records sought under the Freedom of Information Law.

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

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

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

I note that any such appeal would likely be rejected. 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, the subject of your request.

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 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-14502

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

February 11, 2004

Mr. John R. McPhillips
President
Unit 9200 CSEA Local 860
Safety & Health
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 facts presented in your correspondence.

Dear Mr. McPhillips:

I have received your letter in which you indicated that you have twice requested records from the Department of Labor, but that receipt of those request has not been acknowledged.

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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Patricia Rhodes Hoover

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14503

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

February 12, 2004

E-Mail

TO: Ian J. Heald <Ian.Heald@acs-inc.com>

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Heald:

I have received your letter in which you indicated that you would like to seek records under the Freedom of Information Law from the NYS Department of Health.

In this regard, it is noted at the outset that each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and a request ordinarily should be sent to that person. The records access officer for the Department of Health is Robert LoCicero, NYS Department of Health, Corning Tower, Empire State Plaza, Albany, NY 12237.

When seeking records, an applicant is required to "reasonably describe" the records sought. Therefore, an applicant is required to supply sufficient detail to enable staff to locate and identify the records. Based on the content of your inquiry, it appears that you have the ability to do so.

Although a state agency may choose to transmit records *via* email, it is not required to do so. An agency, however, is required to provide photocopies of records. If you seek photocopies, it is suggested that you offer to pay the requisite fee, which cannot exceed twenty-five cents per photocopy.

Lastly, "Your Right to Know", a guide to the Freedom of Information Law, is available on our website. The guide includes a sample letter of request that may be useful to you.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1415

41 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 18, 2004

Mr. David Donhauser
99-B-1868
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. Donhauser:

I have received your letter and the materials relating to it. You indicated that you and others are having "problems" in using the Freedom of Information Law at the Mid-State Correctional Facility. The attachments refer specifically to requests for a "transfer order."

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 point out that the Department's regulations specify that "personal history data" concerning an inmate is available to the inmate.

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 some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1450S

41 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 18, 2004

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.

Dear Mr. Claasen:

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

The issue involves access to inspection reports maintained by the Huntington Housing Authority relating to properties owned by "real estate concerns." Although the addresses of those properties were made available, the inspection sheets were withheld. In denying access, the Authority's Chairman wrote that the records sought are:

> "...inter-agency records which are not a final agency policy determination. The inspection reports contain pre decisional recommendations and the building inspector's impressions of the properties in question. The records are exempt from disclosure requirements except for the cover sheet which contains the final determination."

I agree that the records in question constitute "intra-agency" materials. However, I disagree in part with the Chairman's response.

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

Pertinent in the context of your request is §87(2)(g). While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure.

Specifically, §87 (2)(g) enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

One of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals, the state's highest court, was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is predecisional or 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, as well as any final determination, 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. William Spencer
Paul Levitt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1450 6

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

February 18, 2004

Hon. Steven L. Labriola
Town Clerk
Town of Oyster Bay
Town Hall
54 Audrey Avenue
Oyster Bay, NY 1171-1592

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 Mr. Labriola:

I have received your letter in which you indicated that "a few residents...linger in the Minutes Office for many hours while viewing these documents." Since "staff must be present and available during this duration", you sought information concerning "reasonable time restrictions or guidelines" pertinent to the issue.

In this regard, it has been held judicially that an agency cannot limit the ability of the public to inspect records to a period less than its regular business hours. By way of background, §89 (1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87 (1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

Section 1401.2 of the regulations, provides in relevant part that:

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

Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Relevant to the matter is a decision rendered by the Appellate Division, Second Department, which includes the Town of Oyster Bay, in which an issue was the validity of a limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating in part that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Based on the foregoing, the Town, in my view, cannot limit the ability to inspect records to a period less than its regular business hours. I note, too, that some municipalities have made copies of records frequently requested available for review and duplication either at their own offices or at public libraries.

Lastly, I do not believe that a member of the public may designate the date or dates on which he or she seeks to review records. If, for instance, records will be in use by staff on a particular date or during a particular period of time, an agency would not, in my view, be required to alter its schedule or work plan. In that instance, the agency could offer a series of dates to the person seeking to inspect the records in order that he or she could choose a date suitable to both parties. Similarly, if a request involves a variety of items, while the applicant may ask that certain records be made available sooner than others, I do not believe that he or she can require an agency to make records available in a certain order.

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-1450

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February 18, 2004

Mr. Walter C. Ervin Jr.
[redacted]

Dear Mr. Ervin:

I have received your letter of January 19 and the materials attached to it. As in the case of previous correspondence, your commentary focuses on the status of the Southern Tier Economic Development Corporation (STED) and its obligation to disclose records pursuant to the Freedom of Information Law.

Having reviewed the materials and the opinion addressed to you just over two years ago, my response must be essentially as it was then, that the status of STED in relation to the Freedom of Information Law is questionable. While it is clear that STED maintains a significant relationship with the City of Elmira and perhaps the County of Chemung, whether it constitutes an "agency" for the purpose of the Freedom of Information Law remains unclear and uncertain. If you would like to seek judicial review of the issue, I believe that a proceeding must be initiated in Supreme Court, Chemung County.

I note, too, that the matter would not involve the "unincorporation" of STED, but rather the possibility that it might be found to be an agency subject to the Freedom of Information Law.

It is also reiterated that the Freedom of Information Law is expansive in its coverage, for it includes within its cope any records maintained by or for an agency, such as the City or County. Therefore, any records that are prepared for the City, for example, or that come into the possession of a government official in his or her capacity as a government official would be subject to rights of access conferred by that statute.

Lastly, I note that not-for-profit corporations are required to file a form 990 annually with the Internal Revenue Service. The form 990 is a basic financial statement that is available from the IRS and that must be made available by the corporation. It is suggested that you might request STED's 990 forms from STED.

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 18, 2004

Mr. Kenneth McLennon
87-A-2040
Franklin Correctional Facility
62 Bare Hill Rd., Box 10
Malone, NY 12953

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

Dear Mr. McLennon:

I have received your letter and the correspondence attached to it. In brief, the materials pertain to your efforts in obtaining a death certificate and records associated with an autopsy relative to a death in New York City.

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

Second, with respect to records prepared in relation to a death by the Medical Examiner of New York City and death certificates, relevant is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute."

When an autopsy report or other record of an examination of a death is prepared in New York City by the Office of the Chief Medical Examiner, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts those records from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994]. I note that in Mitchell, the court found that the applicant was "not making his request merely as a public citizen" under the Freedom of Information Law, "But, rather, as someone involved in a criminal action that may be affected by the content of these records and thereby has a substantial interest in them." On the basis of Mitchell, it would appear that your ability to gain access to autopsy reports and related records in question would be dependent upon your capacity to demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

With respect to death certificates, I note that some of the citations that you provided became outdated due to amendments to §4174 of the Public Health Law, which deals specifically with records of deaths. Paragraph (a) of subdivision (1) of that statute indicates that death records may be disclosed only under specified circumstances and states in part that "no...death record shall be subject to disclosure under article six of the public officers law", which is the Freedom of Information Law.

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

STATE OF NEW YORK
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February 19, 2004

Mr. Samuel Winbush
91-A-9875
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. Winbush:

As you know, this office has received a variety of correspondence from you concerning your efforts in obtaining records from the Department of Correctional Services. Having reviewed the materials, I offer the following comments.

First, you requested various records pertaining to yourself, and I note that §5.5 of the regulations promulgated by the Department defines "correctional supervision history" to include:

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

The same provision defines "personal history" as follows:

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

From my perspective, the records described in the provisions quoted above must be made available to you.

You also requested certain manuals and guides used by the Department, by hearing officers and in relation to other functions.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 three of the grounds for denial may be pertinent in considering rights of access to those records.

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. I would conjecture, however, that not all of the techniques or procedures contained in the records sought could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

The other provision of possible significance as a basis for denial is §87(2)(f). Again, that provision permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." As suggested with respect to the other exceptions, I believe that the Department is required to review the documentation at issue to determine which portions fall within this or the other exceptions.

Lastly, since you have experienced delays in response 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..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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-1451O

41 State Street, Albany, New York 12231
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February 19, 2004

Mr. Bayan Aleksey
Lieber Correctional Center, SK5059
Room: RA146
P.O. Box 205
Ridgeville, SC 29472-0205

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

Dear Mr. Aleksey:

I have received your letters in which you complained with respect to an alleged failure on the part of the Clarkstown Police Department to respond to your requests for records. You asked that this office "open an investigation" concerning the actions of Police Department officials.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office has neither the resources nor the authority to conduct an investigation or compel an agency to grant or deny access to records.

With respect to the alleged failure of the Department to respond to your requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has 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: Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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41 State Street, Albany, New York 12231
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February 19, 2004

Mr. Hector Lopez
95-A-7409
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

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

Dear Mr. Lopez:

I have received your letter in which you requested assistance in obtaining an "action letter" from your facility. You explained that your request for the record has been denied and you have not received a response to your appeal.

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

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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-1451 2

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February 19, 2004

Mr. Joseph E. Allen
Madison County Jail
P.O. Box 16
Wampsville, NY 13163

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

Dear Mr. Allen:

I have received your letter in which you complained that the Cayuga County Sheriff failed to respond to your request for records sought under the Freedom of Information Law.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has 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: Sheriff Outhouse

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14513

41 State Street, Albany, New York 12231
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February 19, 2004

Mr. Harry Bowman
#26595-039
U.S. Penitentiary
P.O. Box 150160
Atlanta, GA 30315

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

Dear Mr. Bowman:

I have received your letter in which you questioned the propriety of a denial of access to records by the Town of Lancaster and asked that this office investigate the matter.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee has neither the resources nor the authority to conduct investigations or to compel an agency to grant or deny access to records. However, in an effort to offer guidance, I offer the following comments.

As I understand the matter, the records sought relate to events that occurred at the Lancaster Speedway and a homicide.

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

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

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

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

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

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

The last relevant ground for denial is §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

Records prepared by employees of an agency and communicated within the agency or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard Sherwood

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1454

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

February 19, 2004

Mr. Gregorio Cruz
90-A-3992
Woodbourne Correctional Facility
Riverside Drive
Woodbourne, NY 12788

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

Dear Mr. Cruz:

I have received your letter and the materials attached to it. You complained that the Department of Correctional Services failed to respond to your request for records in a timely manner.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has 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 by the Department to determine appeals is Anthony J. Annucci, Counsel to the Department.

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

Since a portion of your request involves a transfer, §87(2)(g) may pertinent. That provision authorizes an agency to withhold records that:

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

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

I 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1451S

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

February 19, 2004

Mr. Trevor Brown
02-R-1042
Mohawk Correctional Facility
6100 School Road
P.O. Box 8451
Rome, NY 13442

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

Dear Mr. Brown:

I have received your letter in which you requested assistance in obtaining a "warrant application, search warrant, official duty of service and supporting deposition" from the Westchester County District Attorney's office. You wrote that your request was denied and you have not received a response to your appeal.

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

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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, it is noted that if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possess the record in order to successfully obtain a second copy [see Moore v. Santucci [151 AD2d 677 (1989)]. 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
cc: Richard Weill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14516

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

February 19, 2004

Mr. Robert Hodges, Jr.
01-B-1363
Box 149, Exchange Street
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. Hodges:

I have received your letter in which you asked for assistance in obtaining records from the Utica Police Department. You wrote that the Department has not responded to your requests for "information in the investigatory file" of your case.

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

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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, it is noted that if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possess the record in order to successfully obtain a second copy, [see Moore v. Santucci [151 AD2d 677 (1989)]. 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-1457

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

February 20, 2004

Mr. Darrel Isaac
96-A-4523
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. Isaac:

I have received your letter in which you referred to an unanswered request for "statistical or factual tabulation concerning commissary sales for all maximum, medium and minimum security facilities." You asked whether sales figures of that nature "fall into any one of the exempted categories enumerated by FOIL."

In this regard, first, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create a record in response to a request. I am unaware of the nature or the extent to which the Department of Correctional Services prepares figures or statistics pertaining to commissary sales, or whether they are broken down by facility or by means of the categories that you referenced (maximum, medium and minimum security). If the Department does not maintain figures in the manner in which you requested them, it would not be required to prepare new records containing that kind of breakdown on your behalf.

Second, to the extent that 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.

Insofar as the kinds of records in which you are interest exist, I believe that they would be accessible under the law. In short, §87(2)(g)(i) states that "statistical or factual tabulations or data" contained within "inter-agency or intra-agency materials" must be disclosed.

It is suggested that you attempt to ascertain the nature of the figures that are routinely developed or prepared by seeking the most recent records concerning sales at the commissary in your facility. If you can obtain that information, perhaps it can enable you to make a proper request for similar information concerning other facilities.

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-14578

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

February 20, 2004

Mr. Dencil Lopez
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. Lopez:

I have received your letter in which you sought assistance in relation to your request made to the Office of the Bronx County District Attorney for records concerning prosecution witnesses involved in your proceeding, including "cooperation agreements" made between those persons and the District Attorney.

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

Of possible relevance is the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], which involved a request by an inmate for statements made by co-defendants and witnesses from the office of a district attorney. Although the court found that records of that nature are "generally exempt from disclosure under FOIL", it was also stated that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available fro inspection by a member of the public" (id., 679).

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 nor your attorney any longer have copies of records previously disclosed, those records need not be disclosed to you again.

Insofar as your request involves records that were not disclosed to your or your attorney, it appears that several grounds for denial may be pertinent. Perhaps most significant is §87(2)(e)(iii), which 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." Also relevant may be §§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."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: P.D. Coddington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1459

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

February 20, 2004

Mr. Stephen Seifert
91-A-4999
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

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

Dear Mr. Seifert:

I have received your letter and the materials attached to it. You have sought guidance concerning the "appropriateness" of your request made under the Freedom of Information Law to the Department of Correctional Services. Although some of the records sought were made available, others that you requested were not directly referenced in the response to the request, and you were not informed of the right to appeal a denial of access.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Insofar as the items that you requested do not exist in the form of a record or records, the Department in my opinion would not be required to prepare a new record containing the information sought.

Second, when an agency withholds any records falling within the scope of a request, a denial of access must be given in writing, and the regulations promulgated by the Committee on Open Government require that the person denied access be informed of the right to appeal (21 NYCRR §1401.7).

Third, as it pertains to existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Insofar as the records that you request exist, it appears that none of the grounds for denial of access, except perhaps in one situation, would apply. That situation pertains to item (f) of your request, which deals with "records related to the denial of medical treatment" on a certain date. While I do not know of the either the existence or content of any such records, if there

are such records, I believe that §87(2)(g) would be pertinent. 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.

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-14520

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

February 20, 2004

Mr. George Estrada
I.D. 18694-057
F.C.I. Allenwood
P.O. Box 2000
White Deer, PA 17887

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

Dear Mr. Estrada:

I have received your letter and attached material in which you explained that the New York County District Attorney's office has not made a determination regarding your outstanding request for records. You asked this office to intervene on your behalf.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, 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, it is noted that if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possess the record in order to successfully obtain a second copy [see Moore v. Santucci [151 AD2d 677 (1989)]. 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-14521

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

February 20, 2004

Mr. Akmir Gray
88-B-2613
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. Gray:

I have received your letter and the materials attached to it. You have sought assistance in relation to a request for "audio-video footage recorded by stationary surveillance camera" located in a certain room during a particular time period. The request was denied on the ground that "an agency is not required to create a document..."

In this regard, while I have no personal knowledge relative to the matter, I note 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 that it does not maintain in response to a request. Based on the Department's response, it appears that the record in which you are interested does not exist.

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,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14522

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

February 20, 2004

Mr. Thomas Caine
94-A-3357
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508

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

Dear Mr. Caine:

I have received your letter in which you sought guidance concerning requests made to the Division of Parole. According to the materials that you attached, several requests were made for "statistics on the percentage of violent offenders who were granted parole at their initial appearance."

In this regard, 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. I have no personal knowledge of the nature of statistics prepared by the Division of Parole. If the statistics in which you are interested do not exist, the Division would not be required to prepare new records containing the statistics on your behalf.

Notwithstanding the foregoing and in consideration of the delays in answering your requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has 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: Gregory Sanderl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1523

41 State Street, Albany, New York 12231
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February 20, 2004

Mr. Jason Wickson
03-B-0996
Auburn Correctional Facility
135 State Street
Auburn, NY 13201

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

Dear Mr. Wickson:

I have received your letter in which you asked that this office "look into" your allegation that all of your requests made at your facility are denied.

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 have the authority or the resources to investigate or to compel an agency comply with law. However, in consideration of your remarks, I offer the following comments.

First, although you did not describe the nature of records that you have requested, I point out that when there is a denial of access to records, the regulations promulgated by the Committee (21 NYCRR §1401.2) require that the reason for the denial be indicated.

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

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

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

that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice 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-14524

41 State Street, Albany, New York 12231
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February 20, 2004

Mr. Michael R. McCarthy
98-B-1992
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. McCarthy:

I have received your letter and the correspondence attached to it. You referred to a denial of your request for the Department of Correctional Services Employee Manual and expressed the view that the decision in Boddie v. Goord [674 NYS2d 466, 251 AD2d 799 (1998)] requires disclosure of that record.

From my perspective, you have misconstrued that decision. In this regard, I offer the following comments.

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

It is clear that the manual constitutes intra-agency material that falls 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 record sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that it would be available, unless a different basis for denial can be asserted.

One such 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 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 other provision significant as a basis for denial is §87(2)(f). Again, that provision permits an agency to withhold records insofar as disclosure "could endanger the life or safety of any person." That exception was cited by the Appellate Division in Boddie, supra. In affirming the lower court's determination that certain portions of the Manual could be withheld, the Court concluded that those portions that "pertain to the supervision and security of inmates" (id., 467) fall within that exception.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1452.5

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February 20, 2004

Mr. Wildon Rodriguez
99-A-6661
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. Rodriguez:

I have received your letter in which you sought assistance in relation to a request made to the Office of the Kings County District Attorney.

As I understand the situation, you asked whether a person by a particular name works or worked for that agency. In response, you were informed, in your words, that "FOIL obligates this office to provide requestors with copies of reasonably described, nonexempt records, and not information per se."

In my view, the response is technically correct. The title of the Freedom of Information Law may be misleading, for it is not a statute that deals with information generally, but rather with records. Further, although that law requires that agencies respond to requests for and often disclose existing records, it does not require that agency officials answer questions. They may choose to do so, but they are not required to do so.

In the future, rather than seeking "information" or asking questions, it is suggested that you seek existing records. In this instance, you might request any record indicating the employment of a named person by the Office of the District Attorney from 1993 to the present, or something similar to that.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jonathan E. Rubin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1415

41 State Street, Albany, New York 12231
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February 20, 2004

Mr. Bernard Johnson
99-A-6283
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

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

Dear Mr. Johnson:

I have received your letter in which you indicated that the Office of the Queens County District Attorney and the New York City Police Department failed to respond to your requests for records in a timely manner.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1452

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February 20, 2004

Mr. Joseph LoRusso
96-A-0015
Cayuga Correctional Facility
S-Block, Box 1186, Rte. 38A
Moravia, NY 13118

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

Dear Mr. LoRusso:

I have received your letters in which you explained difficulty in obtaining records from your facility and responses to your appeals by the Department of Correctional Services.

Having reviewed your correspondence, it is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions. This office is not empowered to investigate or to compel an agency to comply with law by granting or denying access to records. Nevertheless, in an effort to offer guidance, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a

circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has 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 earlier, §89(3) states in part that an applicant must "reasonably describe" the records sought. It has been held that whether or the extent to which a request reasonably describes the records may be dependent on the nature of an agency's filing or record keeping system [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. In the context of your requests, that issue may be significant in relation to those involving "package room folder records" and a check. If, for example, those records are maintained and retrievable by means of an inmate's name or other unique identifier, they would likely be easy to locate. In that circumstance, the request would meet the standard of reasonably describing the records. On the other hand, if the receipt of packages is logged in not by name, but rather by date, and if thousands of notations would have to be reviewed, one by one, to locate those pertaining to a particular inmate, the request, in my view, would not reasonably describe the records.

Third, insofar as records 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.

While I believe that the records of your interest would in most instances be accessible, in one case, it is possible that portions may be withheld. You referred to the records contained in your "guidance folder." It is likely that those records would fall within the coverage of §87(2)(g). That provision authorizes an agency to withhold records that:

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14528

41 State Street, Albany, New York 12231
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February 20, 2004

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

I have received your letters in which you sought assistance in obtaining "DD5's" under the Freedom of Information Law.

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

In considering the records in question, relevant is a decision by the Court of Appeals concerning, DD5's, which are also known as "complaint follow up reports", prepared by police officers in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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

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

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

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

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

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14529

41 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 23, 2004

Mr. Paul King
98-A-6792
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024-9000

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

Dear Mr. King:

I have received your letter concerning requests made under the Freedom of Information Law. As I understand your comments, the requests involved records maintained by courts and court officials. If that is so, the Freedom of Information Law would not apply.

That statute is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

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

I note, too, that this office has no oversight role in relation to the courts or court personnel.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14530

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 23, 2004

Mr. James Carter
92-A-0027
Auburn Correctional Facility
135 State Street
Auburn, NY 13201

Dear Mr. Carter:

I have received your letter in which you indicated that you have faced difficulty and sought assistance in obtaining "a listing of all opening and closing dates" of Albany County grand jury terms in 1990.

In this regard, I note that this office is authorized to provide advice and opinions pertaining to the Freedom of Information Law. From my perspective, that statute would not apply in the context of the situation that you described.

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.

Notwithstanding the foregoing, having attempted to gain information on your behalf, I was informed that grand juries are empaneled by both Supreme and County Courts in Albany County. Since that is so, it is suggested that you contact the clerks of both courts. It is also suggested that you should not request "lists" or "listings", for lists may not exist, and clerks or staff would not be required to prepare lists on your behalf. When making such a request, it is recommended that you seek records indicating the opening and closing dates of grand jury terms in 1990. Lastly, I do not know how long such records must be kept, and it is possible that records containing the specific information of your interest may no longer exist.

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-14531

41 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 23, 2004

Mr. Michael Koupash
Executive Vice President
Council 82, Local 2796
1344 Brooklyn Boulevard
Bay Shore, NY 11706

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

Dear Mr. Koupash:

I have received your letter, as well as the materials attached to it. You have sought assistance in relation to unanswered requests made to the Office of Parks, Recreation and Historic Preservation. Having reviewed the materials, I offer the following comments.

First, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires government agencies to supply information *per se*. Rather, it is a law that requires agencies to respond to requests for records. Stated differently, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute specifies that an agency is not required to create a new record in response to a request for information.

Similarly, the Freedom of Information Law does not require that an agency supply information by responding to questions. Virtually every aspect of your request involves an attempt to acquire information by asking questions. In the future, it is suggested that you request existing records rather than raising questions. For example, rather than asking "How much was budgeted" to fund a certain program, you might request "records indicating the amount of funding budgeted" for a particular program. I would conjecture, too, that in some instances there may be no particular record or records that contain answers to your questions. If that is so, again, the agency would not be required to prepare a new record containing the information sought on your behalf.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas McCarthy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14532

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 23, 2004

Mr. Robert Serrano, Jr.
00-A-4326
Auburn Correctional Facility
135 State Street
Auburn, NY 13024

Dear Mr. Serrano:

I have received your letters of January 27 and January 30, which, for reasons unknown, did not reach this office until today.

First, having reviewed your comments, it is emphasized at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the New York Freedom of Information Law. That statute pertains to governmental entities in New York. It does not apply to private hospitals, federal agencies or banks, for example. Consequently, this office does not maintain materials regarding records of those institutions. Similarly, this office does not maintain documents regarding the Patriot Act or the Health Information Portability and Accountability Act, both of which are federal enactments.

Second, the New York Freedom of Information Law applies equally to all agencies of government in New York, including the New York City Police Department, public hospitals and other entities of New York City government. It is also noted that the Committee, as required by §89(1) of the Freedom of Information Law years ago promulgated general rules and regulations involving the procedural implementation of that statute. In turn, §87(1) of the Freedom of Information Law requires that each agency promulgate uniform rules and regulations for units or departments within that agency. Those regulations must be consistent with the regulations promulgated by the Committee on Open Government and the Freedom of Information Law.

In short, all government agencies in New York are required to abide by the Freedom of Information Law and to comply with the procedures reflected in the Committee's regulations. Enclosed are copies of both of those documents for your review.

Since you referred to the New York City court system, I point out that the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not public; in most cases they are accessible under other provisions of law (see e.g., Judiciary Law, §255).

Lastly, although the regulations promulgated by the Committee require that an initial denial of a request indicate the reason or reasons, an agency is not required to provide detail in describing its rationale. However, if an appeal is denied, §89(4)(a) states that an agency must "fully explain in writing the reasons for further denial."

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14533

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February 23, 2004

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 your letters in which you complained about your ongoing "difficulties in obtaining records necessary for [you] to pursue your appeals." You explained that the judge who presided over your Article 78 proceeding directed that you "should get any records from [your] trial attorney." You asked for "assistance in properly pursuing 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.

As indicated to you in correspondence from this office dated August 19, 2003, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was previously made available to you or your attorney, i.e., in conjunction with a criminal proceeding, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

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

counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 24, 2004

Yianni Pantis, Esq.
2308 Garfield Ave., Suite A
Carmichael, CA 95608-5120

The staff of the Committee 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 a variety of documentation from you concerning your request for certain records maintained by the Westchester County Clerk, and you have sought an advisory opinion pertaining to the Clerk's obligation to provide the records in digital format.

By way of background, you wrote that you represent First American Real Estate Solutions ("FARES"), and your request involves "public land records both historical and day forward in Tiff images format from 1995 to present." The records at issue include real estate transfer tax returns that are confidential pursuant to the Tax Law, §1418, and it was determined that a download of the database that includes those returns would be unlawful. Further, the County's Department of Information Technology concluded that redaction of return information from the land records database would involve the creation of a new record. As you are aware, §89(3) of the Freedom of Information Law indicates in part that an agency is not required to create a record in response to a request. It is your view, however, that through the use of "extraction data software", the confidential aspects of the database can be segregated from other data elements, and that, therefore, the County would not be creating a new record. According to your letter:

> "The Extraction Data Software is nothing more than screen scraper software, which is software used to automate interaction between two systems through the terminal interface (designed for human use) of one of those systems - in this case between the County Clerk's computer system and the storage device to be provided by FARES."

It was advised by your representatives that the software could either be provided to the County for the County's "in-house use" or used through the Internet from a remote location, and you added that:

> "...the process by which the Extraction Data Software extracts and assembles documents is such that documents that are not within the input parameters, whether confidential or not, are never accessed by the Extraction Data Software. In other words, the Extraction Data Software only accesses and pulls those pages that are a part of the particular document requested, and all other pages and documents, whether confidential or not, are completely ignored. This, in a sense, is 'redaction,' as the final product does not contain any confidential/non-disclosable records" (emphasis yours).

Your correspondence cites several judicial decisions, as well as advisory opinions rendered by this office. From my perspective, some of the case law and the opinions to which you referred may be out of date or inconsistent with the direction provided in the most recent and expansive decision relating to the matter, New York Public Interest Research Group v. Cohen, 729 NYS2d 379 (2001). It had been advised by this office that programming or reprogramming may involve the equivalent of creating a new record, and that, pursuant to §89(3), an agency is not required to do so to accommodate an applicant for a record or records. Nevertheless, I now concur with the decision rendered in New York Public Interest Research Group ("NYPIRG"), in which it was found that "programming", in that instance the process of entering queries as a means of segregating portions of an existing record from those that could be withheld from those other portions that would otherwise be accessible, did not involve the creation of a new record. On the contrary, the court determined that taking those steps involved extracting or generating portions of an existing record, and that the agency was required to do so to comply with law.

While I am not an expert in the area of information technology, it does not appear that any judicial decision or advisory opinion involves facts analogous to those presented here. In NYPIRG, through the process of entering queries with the use of its existing software, an agency was able to separate the public from the deniable elements of its database. In the circumstance that you suggested, the County would be required to install or utilize software that it does not now use or possess. In my view, an agency is not required to acquire or use software not in its possession to perform functions that it would not otherwise perform in order to accommodate the needs of a person or entity seeking records under the Freedom of Information Law. I believe that the agency may choose to do so, but that it is not required to do so.

If the extraction data software were to be used remotely as you suggested, it is my understanding that the entire database would effectively be disclosed, and that confidential portions would be "redacted" before being transmitted. It is unclear, however, whether or how there would be a guarantee or unequivocal assurance that confidential elements within the database would remain confidential. In essence, the County would seemingly lose full control over its database and would rely on representations by your firm or the software firm that the confidential data would never be accessed. In my opinion, the County is not required to make such a disclosure, even with such a representation.

On the other hand, if the County, as in NYPIRG, has the ability, through the process of entering queries, to segregate those portions of the database that are confidential from the remainder and make the remainder available in digital format, I believe that it is obliged to do so.

If I have misunderstood the facts or the technology, please so inform me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charlene M. Indelicato, County Attorney
Thomas Gardner, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14535

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

February 24, 2004

E-Mail

TO: Giovanni Graceffa <Graceffag@liro.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. Graceffa:

As you know, I have received your letter of January 26. You have sought advice concerning a request made under the Freedom of Information Law to the Syosset Volunteer and Exempt Firepersons Benevolent Association ("the Association"). The records sought involve finances of the Association and the names of individuals who have received assistance from the Association from 1998 to the present. You referred to an advisory opinion prepared by this office which in your view suggests that you are entitled to the records sought.

From my perspective, it appears that you may have misinterpreted that opinion. In this regard, I offer the following comments.

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

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

Based upon the foregoing, as a general matter, the Freedom of Information Law applies to governmental entities. It is my understanding that the Association is not a governmental entity and that, therefore, its records are not subject to the Freedom of Information Law. I point out that it was advised in the opinion to which you referred that a different firepersons benevolent association did not appear to be subject to the Freedom of Information Law.

Second, having dealt with the issue in a different context recently, it is also my understanding that a fire district ordinarily does not have control of such an association or its finances. If that is so, the records of the Association would not be maintained by or for any government agency and, again, the Freedom of Information Law would not apply.

Lastly, I note that not-for-profit corporations are required to file a Form 990 with the Internal Revenue Service (IRS) and that IRS rules require those corporations to make the Form 990 available to any member of the public.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14536

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

February 25, 2004

Leonard Ira Morgenbesser, PhD
[redacted]

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

Dear Mr. Morgenbesser:

As you are aware, I have received your letter of January 27 in which you raised questions relating to a request made under the Freedom of Information Law to the City of Albany.

According to you letter, Mayor Jennings selected an "unpaid" archaeologist who resides in the City to prepare an "archaeology survey" pertaining to a parcel on which a developer may construct an apartment complex. You added that there is "community opposition" to the proposal and that you requested a copy of the survey on behalf of your neighborhood association. Following the submission of your request, the City Clerk acknowledged its receipt and indicated, in your words, that you "would hear further."

You have asked whether, in my view, the archaeologist's report is accessible under the Freedom of Information Law, "how much time should elapse" before the City determines your rights of access, and the amount that the City may charge for duplicating the record. You also asked whether the report should be available to members of the City Council, or whether they "have to FOIL the City of Albany as well for a copy of the report."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records. Section 86(4) of that statute defines the term "record" expansively to include:

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

Based on the language quoted above, any documentation prepared for the City by the archaeologist would constitute a "record" subject to rights conferred by the Freedom of Information Law. I note that the state's highest court, the Court of Appeals, rejected a "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'" [Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995)]. Therefore, if a document is produced for an agency, as in the case of the survey at issue, it constitutes an agency record, even if it is not in the physical possession of the agency.

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

From my perspective, it is unlikely that any of the grounds for denial of access would apply. One of the exceptions to rights of access, §87(2)(g) concerning "inter-agency or intra-agency materials", is applicable with respect to communications between and among agency officers and employees, and it has been found to apply in situations in which records are prepared by consultants retained by agencies. Specifically, Xerox Corporation v. Town of Webster [65 NY 2d 131 (1985)] dealt with reports prepared "by outside consultants retained by agencies" (id. 133), and it was found that the records prepared by consultants should be treated as if they were prepared by agency staff and should, therefore, be considered intra-agency materials. However, based on the Xerox decision, I believe that a consultant would be person or firm "retained" for compensation by an agency to provide a service. It is my understanding that the archaeologist serves voluntarily and without compensation. If that is so, I do not believe that the record prepared by the archaeologist could be viewed as a consultant's report or that it would fall within the scope of §87(2)(g) of the Freedom of Information Law.

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

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

With respect to fees, unless otherwise prescribed by statute, §87(1)(b)(iii) of the Freedom of Information Law limits an agency's charges to twenty-five cents for photocopies up to nine by fourteen inches, or, in the case of records that cannot be photocopied (i.e., computer discs, tape

recordings, etc.), the fee is based upon the actual cost of reproduction. The regulations promulgated by the Committee on Open Government specify that no fee can be assessed for search or personnel costs, for example (see 21 NYCRR §1401.8).

Lastly, I am unaware of whether there are any provisions of a City of Albany local law or equivalent enactment that specifies that members of the Common Council have a right, in their capacities as members, to gain access to the record in question. However, in many instances, when records are sought by the members of a governing body in the performance of their official duties, the records are readily disclosed. In the alternative, however, any person, including a member of a municipal body, may seek records pursuant to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Marsolais

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14537

41 State Street, Albany, New York 12231
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February 26, 2004

Mr. Jody Allen
86-B-2551
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

Dear Mr. Allen:

I have received your letter in which it appears that you have requested various records from this office relating to you that were prepared by a facility that had been part of the Division for youth.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee does not maintain possession or control of records generally, such as those of your interest.

Second, the functions of the Division for Youth are now carried out by the Office of Children and Family Services.

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

Relevant to the matter is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the provision to which you referred, §501-c of the Executive Law, which states that files pertaining to youths maintained by the Division for Youth (or its successor) are confidential and may be disclosed only in specified circumstances. That provision states in relevant part that:

> "Records or files of youths kept by the division for youth shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by any person other than one authorized to receive such knowledge or to make such inspection or examination: (i) by the division pursuant to its regulations; (ii) or by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in

> such court; or (iii) by a federal court judge or magistrate, a justice of the supreme court, a judge of the county court or family court, or a grand jury. No person shall divulge the information thus obtained without authorization to do so by the division, or by such justice, judge or grand jury."

Based on the foregoing, assuming that §501-c is applicable, it is likely that the records in question would be disclosed only pursuant to a court order.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1615 38

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

February 27, 2004

E-Mail

TO: Michele Tow [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. Tow:

I have received your letter in which you referred to a request for records made to a municipality, which acknowledged the receipt of the request and indicated that a response would be given "in a timely fashion." Because you have since contacted the agency to attempt to ascertain the status of the request and have received no further response, you asked what might constitute an "unreasonable delay."

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3764
FOIL-AO-14539

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February 27, 2004

E-Mail

TO: Ray Waterman [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. Waterman:

As you are aware, I have received your letter in which you wrote that the Village of Hamburg "is dealing on a piece of property that may be a park - they don't know" and "won't divulge any information that may upset the sale." You asked whether that may be "against the law."

Because I have little detail concerning the matter, I cannot offer definitive advice. It is unclear whether the Village wants to purchase or sell property or whether the site of the property is known to the public. It is also unknown whether there is one party with which the Village may be negotiating, or whether there are or may be many. Those factors, in my view, would be pertinent in considering the issues. Nevertheless, in an effort to provide basic information, I offer the following comments.

It is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information and Open Meetings Laws, and my remarks will be limited to consideration of those statutes. There may, however, be other laws of significance, such as those involving zoning, environmental concerns, public hearings, etc.

As the Open Meetings Law relates to the matter, that statute is based on a presumption of openness, and meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1). Consequently, a public body, such as a village board of trustees, cannot enter into an executive session to discuss the subject of its choice. From my perspective, the grounds for entry into executive session are based on the need to avoid some sort of harm that would arise by means of public discussion, and that is so with respect to the only ground for entry into executive session that appears to be relevant in relation to the matter that you described.

Specifically, §105(1)(h) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

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

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

Again, since I am unaware of the factual circumstances relating to the matter, I cannot offer unequivocal guidance.

With respect to the disclosure of 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.

Most pertinent is likely §87(2)(c), which authorizes an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards...." That provision was asserted in a case in which appraisals maintained by a municipal agency were requested prior to the consummation of a transaction, and the Court of Appeals, the state's highest court, upheld the denial [Murray v. Troy Urban Renewal Agency, 561 NY2d 888 (1982)]. In short, premature disclosure of the appraised value would have placed the agency at a disadvantage in the negotiating process.

I hope that the foregoing is useful to you and 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 1, 2004

E-Mail

TO: Eli Dickinson <esd2@buffalo.edu>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Dickinson:

I have received your letter in which you referred to a request for records maintained by the Student Association at the State University at Buffalo. Although it is your belief that the records are "at their fingertips", you were informed that you would receive a response "win the next several weeks."

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 recent 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.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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41 State Street, Albany, New York 12231
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March 1, 2004

Mr. Robert Lewis
80-C-0358
Auburn Correctional Facility
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. Lewis:

I have received your letter in which you asked for "assistance or intervention regarding how [you] should go about obtaining the materials necessary to properly pursue [your] criminal matters." You wrote that you have not received responses to requests "sent to N.Y.S.P. Headquarters in Albany."

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)].

The name and address of the person designated as Records Appeals Officer at New York State Police is William J. Callahan, Administrative Officer, New York State Police, Building 22, 1220 Washington Avenue, Albany, NY 12226-2252.

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

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

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

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-14542

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March 1, 2004

Mr. Charles Gray
Ulster County Jail
61 Golden Hill Drive
Kingston, NY 12401

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

Dear Mr. Gray:

I have received your letter in which you asked for assistance in obtaining records related to your criminal proceeding. You complained that public officials have ignored your Freedom of Information Law requests.

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

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

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

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

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

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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March 1, 2004

Mr. Abdur Fuseini
97-A-0800
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. Fuseini:

I have received your letter in which you requested assistance in obtaining the contents of your "backpack vouchered by District Attorney Manhattan...and co-signed by New York City Police Department." You wrote that your backpack contains items such as your house keys, bank card and identification cards.

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.

From my perspective, the issue of substance 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."

In my opinion, the contents of your backpack would not constitute records and thus would not be subject to rights conferred by the Freedom of Information Law. 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. Strojnowski, 129 AD 2d 700; mot. for leave to appeal denied, 70 NY 2d 871 (1989)].

I regret that I cannot be of further assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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March 1, 2004

Ms. Gail Thompson
[redacted]

The staff of the Committee on 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. Thompson:

I have received your letter of January 16 which, for reasons unknown, did not reach this office until January 29. You referred to your unsuccessful efforts in obtaining information pursuant to the Freedom of Information Law from the Town of Clayton, the Clayton Local Development Corporation, and the Thousand Islands Emergency Rescue Service, Inc.

Having reviewed the materials attached to your letter, 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."

While a town is clearly an agency subject to the Freedom of Information Law, whether a local development corporation falls within the scope of that statute is, in my view, dependent on its nature and its relationship with government. Specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations. The cited provision describes the purpose of those corporations and states in part that:

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

Therefore, due to its status as a not-for-profit corporation, it is not clear in every instance that a local development corporation is a governmental entity; however, it is clear that such a corporation performs a governmental function.

Relevant to your inquiry is a decision rendered by the Court of Appeals, the state's highest court, in which it was held that a particular not-for-profit corporation, also a local development corporation, is an "agency" required to comply with the Freedom of Information Law [Buffalo News v. Buffalo Enterprise Development Corporation, 84 NY 2d 488 (1994)]. In so holding, the Court found that:

> "The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's counterpart, the Freedom of Information Act (5 U.S.C. §552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus the BEDC is a 'governmental entity' performing a governmental function of the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

Based on the foregoing, if the relationship between the Clayton Local Development Corporation and the Town of Clayton is analogous to that of the BEDC and the City of Buffalo, it would constitute an "agency" required to comply with the Freedom of Information Law. Stated differently, if there is significant government control, i.e., if a majority of the corporation's board of directors consists of or is designated by government, or if it functions within Town government, based on a decision by the state's highest court, it would be required to comply with the Freedom of Information Law, notwithstanding its status as a not-for-profit corporation.

Even if the Corporation is not subject to the Freedom of Information Law, the membership on the board of directors of a municipal official in his or her capacity as a municipal official would

bring records within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

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

In view of the foregoing, if a Town of Clayton official acting in his or her capacity as a Town official serves on the board of the Clayton Local Development Corporation, records that he or she produces or receives in that capacity would be Town records subject to rights conferred by the Freedom of Information Law.

A somewhat similar analysis may be pertinent relative to the Thousand Islands Emergency Rescue Service, Inc. ("the Service"). If it is purely private and charges any customer that contacts the Service, it would not likely constitute an agency that would fall within the coverage of the Freedom of Information Law.

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

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and

> there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

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

With specific respect to your situation, the Appellate Division has held that a volunteer ambulance corporation is subject to the Freedom of Information Law. In so holding, the decision states that:

> "The Court of Appeals has rejected any distinction between a volunteer organization on which a local government relies for the performance of an essential public service and an organic arm of government (*see, Matter of Westchester Rockland Newspapers v. Kimball,* 50 N.Y.2d 575, 579, 430 N.Y.S.2d 574, 408 N.E.2d 904).
>
> "The appellant performs a governmental function, and it performs that function solely for the Mastic Ambulance District, a municipal entity and a municipal subdivision of the Town of Brookhaven (hereinafter the Town). The appellant submits a budget to and receives all of its funding from the Town, and the allocation of its funds is scrutinized by the Town. Thus, the appellant clearly falls within the definition of an agency and is subject to the requirements of FOIL" [Ryan v. Mastic Ambulance Company, 212 AD 2d 716, 622 NYS 2d 795, 796 (1995)].

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

If the local development corporation and the Service are not subject to the Freedom of Information, I know of no provision that would require that they disclose the records to which you referred. However, I believe that all not-for-profit corporations are required to file a basic financial

statement, a Form 990, with the Internal Revenue Service. Further, under IRS regulations, the Form 990 must be disclosed by the corporation to the public.

Second, with respect to your request to the Town, I point out that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create a record in response to a request. In this regard, at the end of your request, you wrote as follows: "if there has [sic] been any revenues realized between 1997 and 2003 for Economic Development, Economic Assistance and Opportunity and/or Ambulance, I would like to know when it was received, who it was received from, what it was for and the amount." If records exist containing the information sought, I believe that they would be subject to rights of access. However, if no such records are maintained by the Town, Town officials would not be required to prepare new records containing those items on your behalf.

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, the records requested from the Town, insofar as they exist, are accessible, for none of the grounds for denial would apply. I note, too, it appears that the records in question may be the same in substance as those required to be maintained and made available pursuant to §29(4) of the Town Law. That provision states that the supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

In addition, subdivision (1) of §119 of the Town Law states in part that:

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

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

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an 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. Bonnie Rose
William Danforth
Martin A. Yenawine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1545

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March 1, 2004

Mr. Gregory Boomer
94-A-4650
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. Boomer:

I have received your letter in which you asked how you can "get a lab technician of forensic science (for the New York State Police) to answer a legal question" under the Freedom of Information Law.

In this regard, I offer the following comments.

It is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information responsive to a request, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. In short, while agency officials could choose to provide answers to your questions, they would not be required to do so by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

DT:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 2, 2004

Mr. M. Kingwood
91-A-1625
Southport Correctional Facility
Box 2000
Pine City, NY 14871

Dear Mr. Kingwood:

I have received your letter in which you inquired "about appealing a denial of F.O.I.L. request to a lawyer for criminal case documents."

In this regard, if your attorney is not a government employee, the Freedom of Information Law likely would not apply. That statute pertains to agency records, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by entities of state or local government. Therefore, if your attorney is not an agency employee, the Freedom of Information Law would not serve as a proper vehicle for seeking the records. If that statute does not apply, it is suggested that you continue to attempt to contact your attorney or perhaps another attorney in his/her office.

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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March 2, 2004

Mr. Howard Norton
[redacted]

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

Dear Mr. Norton:

As you are aware, I have received a variety of materials from you relating to requests made under the Freedom of Information Law, notably to the offices of the Suffolk County Clerk and the District Attorney.

You referred in your requests particularly to §700 of the County Law and focused on the language of subdivision (1), which states in part that a district attorney required "to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected or appointed." You also cited several opinions rendered by the Attorney General relating to that provision. The substance of those opinions has been consistent and advised that:

> "It has long been recognized...that the district attorney and his assistants need not personally prosecute every offense committed within their jurisdiction (*People v. Van Sickle*, 13 NY2d 61 [1963]; *People v. Czajka*, 11 NY2d 253 [1962]). Petty crimes and offenses may be prosecuted by administrative officers of a local government and by attorneys (*ibid.*). The district attorney, however, by law has the responsibility for prosecution of all crimes and offenses and, therefore, must set up a system whereby he knows of all criminal prosecutions in the county and consents to appearance on his behalf by other public officials or private attorneys (*People v. Van Sickle, supra*; 1979 OP Atty Gen [Inf] 28, 245)" (1986 Op Atty Gen [Inf] 123).

Based on the foregoing, you requested "any and all records referring to and/or describing any and all terms and or conditions" involving the implementation of such a "system" as it pertains to present or former officers of the Town of Islip, as well as any others involved with the Town of Islip.

The FOIL officer for the District Attorney wrote that the request was "overbroad." Similarly, you requested records indicating "designations of the order in which assistant district attorneys were and/or are to carry out" their responsibilities under the County Law. In response, you were informed that the County does not possess any records "resembling your request." You also requested rules adopted for the purpose of implementing the Freedom of Information Law, as well as a subject matter list. The request was denied by the County Clerk's FOIL officer on the ground that it did not "reasonably describe" the records as required by §89(3) of the Freedom of Information Law. Other related requests were made, but they will not be detailed for purposes of this response, which will be general in nature.

First, as suggested in the correspondence, the Freedom of Information Law pertains to existing records, and §89(3) provides that agencies are not required to create a new record or records in response to a request. However, two of the records sought involve exceptions to that general principle.

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."

I would conjecture that the office of the County Clerk is subject to the uniform rules and regulations applicable to units and departments within Suffolk County government. If that is so, any such rules or procedures should have been made available in response to your request.

I am unaware, however, of whether the uniform rules would be applicable in the case of the office of a district attorney. Of possible significance to the issue is §700(7) of the County Law, which suggests that a district attorney maintains control of the records of his office. That provision states that:

> "The district attorney shall keep and preserve all records now or hereafter in his care or custody or under his control and all records, books and papers relating to the functioning of his office or the performance of his duties. No such record, book or paper shall be destroyed or otherwise disposed of, except pursuant to law. At the expiration of his term, the district attorney shall, within sixty days, turn over all such records, books or papers to his successor in office."

Another area which deals with custody and control of records involves the duties of a district attorney in relation to investigations and grand jury proceedings. In a Court of Appeals decision concerning that issue, and whether "the presence of an unauthorized prosecutor may create the possibility of prejudice", it was stated that "[g]enerally, the District Attorney is the prosecutorial officer with the responsibility to conduct all prosecutions for crimes and offenses cognizable by the courts of the county in which he serves", and that "[d]uring the actual proceedings, the legal adviser of the Grand Jury is the District Attorney and legal advice from any other source is improper" [People v. DiFalco, 44 NY2d 482, 486-487]. The Court held further that "[s]ecrecy is a vital requisite of Grand Jury proceedings (CPL 190.25, subd 4) and its actions and deliberations must be 'uninfluenced by the presence of those not officially and necessarily connected with it'...The unauthorized appearance of this prosecutor infringes upon the secrecy requirement, thereby, impairing the integrity of the proceeding" (id., 488).

In conjunction with the foregoing, there may be situations in which requests are made for records that may potentially be used in grand jury proceedings. In those cases, it would appear that only the district attorney would or should have the authority to review records for the purpose of determining an appeal made under the Freedom of Information Law.

In short, pursuant to §87(1) of the Freedom of Information Law, the offices of the County Clerk and the District Attorney, as well as any other entity of Suffolk County government, are

required to implement the responsibilities imposed by that statute based on procedural rules and regulations that must, by law, exist. Insofar as they do exist, in my opinion, they would clearly be accessible.

With respect to the subject matter list, §89(3) 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 except the records specified in subdivision three of section eighty-seven..." One of those records is the subject matter list. Specifically, §87(3) states 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.

Next, with regard to records reflective of the "system" used by the District Attorney to carry out his duties generally or in relation to the Town of Islip, while such a system must exist, there is nothing in the Freedom of Information Law requiring that such records must have been prepared or must exist. 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 a diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Insofar as such records are in existence, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Policies, procedures and instructions to staff that affect the public are, according to subparagraphs (ii) and (iii) of §87(2)(g), accessible. The extent to which any such records exist is unknown to me.

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

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

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

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

While I am unfamiliar with the recordkeeping systems of the entities at issue, to the extent that records sought can be located with reasonable effort, I believe that the requests would have met the requirement of reasonably describing the records. On the other hand, insofar as records are not maintained in a manner that permits their retrieval only by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of a request, a request would not in my opinion meet the standard reasonably describing the records.

Lastly, with respect to oaths and undertakings, as you are likely aware, §§402 and 403 of the County Law require respectively that oaths be filed and undertakings be executed. When an oath is filed or an undertaking is executed, records reflective of those actions would, in my view, be accessible under the Freedom of Information Law. However, there is nothing in the Freedom of Information Law that directs a district attorney or others to take particular actions in relation to the filing of an oath of office or execute an undertaking. There may be direction in other statutes, but those matters are beyond the scope of the authority or expertise of this office. Again, with certain exceptions, two of which were discussed earlier, the Freedom of Information Law pertains to existing records maintained by or for an agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Thomas Spota
Hon. Edward P. Romaine
John M. Kennedy, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 3, 2004

Raymond F. Bara, Esq.
Assistant County Attorney
Oneida County Health Department
520 Seneca 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.

Dear Mr. Bara:

I have received your letter in which you sought an advisory opinion concerning rights of access to waiver applications submitted by "establishments" to Oneida County pursuant to Article 13-E of the Public Health Law concerning the "Regulation of Smoking in Certain Public Areas."

You wrote that:

> "Oneida County's waiver application requires establishments to include basic information about the establishment's business, information about either financial hardship or other factors which would render compliance unreasonable, and a plan to minimize the adverse effects of the waiver upon persons subject to involuntary exposure to second-hand smoke. In addition, applicant establishments must also submit New York State sales tax statements proving a reduction in business and a business certificate for the establishment."

You added that it is your initial view that "every aspect of the application should be available for public access, with the exception of privacy-sensitive items such as tax identification and social security numbers..."

I am in general agreement with your opinion, and based on a review of Article 13-E, the waiver application used by the County, the Freedom of Information Law and its judicial construction, I offer the following comments.

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

In my opinion, most significant in analyzing the extent to which the application must be disclosed is §87(2)(d). 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..."

Having reviewed the application, it appears that the only element of its content that relates to §87(2)(d) would be Section C, part 3, which requires an applicant to provide the following documentation:

> "Exact copies of New York State sales tax statements that were submitted by the establishment to the State of New York, which show at least a ten percent (10%) reduction in New York State sales tax receipts from the sale of food and beverages for a period of three (3) consecutive months during which the facility has operated smoke-free as compared to the combined average of such receipts during the same three (3) month period in the two (2) years prior to smoke-free operation."

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

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

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

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in

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

From my perspective, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

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

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

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting

> business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421).

In consideration of the foregoing and the nature of establishments that would likely apply for waivers, it is doubtful in my opinion, with the exception of the particular "privacy sensitive" items to which you referred, could justifiably be withheld. As you are aware, when an agency denies access to records and the denial is challenged in a judicial proceeding, §89(4)(b) of the Freedom of Information Law states that the agency has the burden of proving that the records withheld fall within one or more of the exceptions to rights of access. Moreover, the courts have consistently held that the exceptions must be construed narrowly. As stated by the Court of Appeals when expressing its general view of the intent of that statute in Gould v. New York City Police Department [89 NY2d 267 (1996)]:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for

> exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

The applicants for waivers operate their establishments in full view of the public. The prices they charge are known; their incentives, i.e., "happy hours", are known and often publicized; the general level of business activity can be known by any member of the public simply by entering the premises during business hours. The figures presented with the waiver application involve a relatively short period of time, three months. Although it has been contended in other contexts that tax records submitted by a taxpayer, whether individual or by a business enterprise, to the State Department of Taxation and Finance or the Internal Revenue Service (IRS) are confidential [see e.g., Tax Law, §697(e)], in an effort to obtain expert advice on the matter, I have in the past contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service and the Office of Counsel at the NYS Department of Taxation and Finance to discuss the issue. I was informed that the statutes requiring confidentiality pertain to records received and maintained by those agencies; 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)], by an employer or that are submitted by a taxpayer to a government agency, as in this situation.

In sum, other than the "privacy-sensitive items such as tax identification and social security numbers" to which you referred, I believe that the waiver applications submitted to the County are accessible. Social security or tax identification numbers may in my view be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [§87(2)(b)] with respect to individuals or under §87(2)(d) regarding business entities. Because a tax identification number can be used as a means of acquiring information absent the authority to do so or potentially engaging in fraud or criminal acts, I believe that the County would be justified in deleting those items.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL AO- 14549

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March 3, 2004

E-MAIL

TO: Doreen Tignanelli [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. Tignanelli:

As you are aware, I have received your correspondence concerning a request for records of the Town of Poughkeepsie. The issue involves access to minutes of a meeting held by the Planning Board in June, 2003. You wrote that you were informed that "that the minutes might not be available yet and even if they are, [you] would have to FOIL them." You asked whether you can be required to "foil minutes from a public meeting."

In this regard, I offer the following comments.

First, all records maintained by or for an agency fall within the scope of the Freedom of Information Law, including those that are clearly public, such as minutes of meetings of a public body, i.e., a planning board. Section 89(3) of that statute provides in part that an agency may require that a request for a record be made in writing. Therefore, the Town, in my view, may require that a request for minutes be made in writing in accordance with the Freedom of Information Law.

Second, §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.

I hope that I have been of assistance.

RJF:tt

cc: Planning Board
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 3, 2004

E-MAIL

TO: Michael J. Dollard <MJDollard@town-victor-ny.us>

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 facts presented in your correspondence.

Dear Mr. Dollard:

I have received your e-mail concerning the Victor Local Development Corporation ("VLDC"). You wrote that the VLDC "is a joint venture between the village and town of Victor. They fund it but significant amounts of money comes from grants, donations, sales of services, P.R. support etc... It is a Not for Profit corp. and files the appropriate tax returns. Town and village assistance stops at giving cash, there is no sharing of staff." Although the VLDC "is willing to meet the requirements of the Freedom of Information Law and they do hold open meetings", you asked what is required concerning notice of its meetings and the publication of an agenda.

In my view, the primary issue is whether the VLDC is an "agency" for purposes of the Freedom of Information Law or a "public body" for purposes of the Open Meetings Law.

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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" [§86(3)].

In this regard, specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations. The cited provision describes the purpose of those corporations and states in part that:

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

Therefore, due to its status as a not-for-profit corporation, it is not clear in every instance that a local development corporation is a governmental entity. However, it is clear that such a corporation performs a governmental function.

Relevant to your inquiry is a decision rendered by the Court of Appeals in which it was held that a particular not-for-profit local development corporation is an "agency" required to comply with the Freedom of Information Law [Buffalo News v. Buffalo Enterprise Development Corporation, 84 NY 2d 488 (1994)]. In so holding, the Court found that:

> "The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's counterpart, the Freedom of Information Act (5 U.S.C. §552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus the BEDC is a 'governmental entity' performing a governmental function of the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

Based on the foregoing, if the relationship between the VLDC and the Village and Town of Victor is similar to that of the BEDC and the City of Buffalo, the VLDC would constitute an "agency" required to comply with the Freedom of Information Law.

Notwithstanding the status under the Freedom of Information Law, I believe that its board would constitute a "public body" for purposes of the Open Meetings Law. Section 102(2) defines that phrase to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of VLDC is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law and it likely consists of more than two members. Further, based upon the language of §1411(a) of the Not-for-Profit Corporation Law, which was quoted in part earlier, and if there is a substantial degree of governmental control exercised by the Village and Town, I believe that the VLDC would be conducting public business and performing a governmental function for a public corporation, in this instance, the Village and Town of Victor.

You have also asked "what constitutes a "legal notice announcing a meeting." Section 104 of the Open Meetings Law pertains to notice of meetings. In brief, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

I point out that subdivision (3) of §104 specifies that a legal notice need not be given prior to a meeting. Stated differently, to comply with the Open Meetings Law, a public body is not required to pay to place a legal notice in a newspaper or to "advertise" that a meeting will be held at a certain time and place; a public body must merely "give" notice to the news media and post the notice. In some circumstances, public bodies have given notice to the news media, and the newspapers or radio stations in receipt of the notices have chosen not to print or publicize the meetings to which the notices relate. In those cases, despite the failure of a notice to be publicized, a public body would have complied with law.

Lastly, you asked whether the VLDC is "required to publish or release an agenda." In this regard, in short, 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.

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

DT:tt

cc: Debra Denz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 3, 2004

Mr. David Brooks
89-A-4087
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 facts presented in your correspondence.

Dear Mr. Brooks:

I have received your letter in which you explained your difficulty in obtaining a "true unredacted copy of the 'felony complaint'" in your case from the New York County Supreme Court. You wrote that upon payment of an $8.00 fee, the court sent a copy of the complaint with the name of the complainant redacted. You questioned the propriety of the court refusing to send another copy prior to receiving another $8.00 fee.

In this regard, 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.

It is suggested that you contact the clerk to ascertain the reason for the redaction.

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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March 4, 2004

E-Mail

TO: Thomas Callahan [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. Callahan:

I have received your inquiry in which you asked how long an agency has following a response to "prepare" records.

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 your request involves the creation or preparation of new records, the agency would not be obliged to do so.

On the other hand, if you are referring to the process of locating, retrieving or reviewing 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.

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."

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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March 4, 2004

Hon. Karen S. Lavinski
Town Clerk
Town of Warwick
132 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 Ms. Lavinski:

I have received your letter in which you wrote that a resident has contended that he is not required to submit a request in writing "just to review public records from the Town."

In this regard, first, all records maintained by or for an agency fall within the scope of the Freedom of Information, including those that are clearly public. Section 89(3) of that statute provides in part that an agency may require that a request for records be made in writing. Therefore, the Town, in my view, may require that a request to inspect records be made in writing in accordance with the Freedom of Information Law.

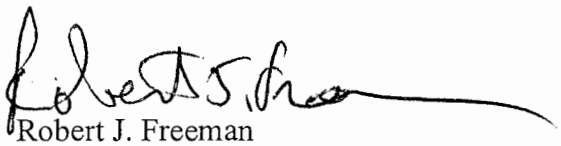
Second, I do not believe that an agency can require that a request be made on a prescribed form. Section 89(3) of the law, as well as the regulations promulgated by the Committee (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business 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.

While the Law does not preclude an agency from developing a standard form, 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, I believe that an agency, such as a town, may require that a request to inspect records be made in writing. While you may waive that requirement, there is no obligation to do so.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

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March 5, 2004

Mr. Samuel M. Leaf
Davis Wright Tremaine LLP
174 Broadway
New York, N Y 10019-4315

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

Dear Mr. Leaf:

I have received a copy of your letter of February 6 addressed to Jonathan David, Records Access Appeals Officer for the New York City Police Department. You indicated in the letter that by sending a copy to me, you are seeking an advisory opinion concerning the propriety of a denial of a request for records made pursuant to the Freedom of Information Law.

In brief, you requested records on behalf of your client, Sing Tao Newspapers New York Ltd. and its reporter, Chin Yun Feng, "concerning the investigation, arrest and plea of guilty by Ying Liu, including "arrest reports, mug shots and any other photographs in the police files, police reports and notes, investigators' reports and notes, and any evidence seized." You also sought records pertaining to "any investigation into whether Ms. Liu was running a business....without the appropriate license to do so", as well as a public statement issued by the Department concerning her case. The prosecution of Ms. Liu, according to court papers appended to the letter, ended with an agreement that she pay restitution to certain complainants and "a plea of guilty to disorderly conduct." The court accepted the plea and determined that "Sentence is a conditional discharge."

In response to the request, Lt. Michael Pascucci denied access "on the basis of Public Officers Law section 87(2)(e)(i) as such records/information, if disclosed would interfere with law enforcement investigations or judicial proceedings." Based on the facts as indicated in your letter and the materials attached to it, I do not believe that the Department can support or justify its response. In this regard, I offer the following comments.

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

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

The Court of Appeals confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. 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 cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

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

In short, I believe that the blanket denial of the request was inconsistent with law.

Second, the basis for the denial offered by the Department appears, at this juncture, to be without justification. The provision upon which the denial is based, §87(2)(e)(i), authorizes and agency to withhold records that "are compiled for law enforcement purposes and which, if disclosed, would...interfere with law enforcement investigations or judicial proceedings..."

In an Appellate Division decision that is often cited in the context of records relating to law enforcement, Pittari v. Pirro, [258 Ad2d 202 (1999)], it was stated that:

> "[t]he question is whether the nature of the records sought and the timing of the FOIL request rendered those records exempt from disclosure under FOIL. The Court of Appeals, in *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572, 419 N.Y.S.2d 467, 393 N.E.2d 463 noted:
>
> > '[T]he purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution'" (id., 169).

The "timing" in this instance is clearly different from that in Pittari. As I understand the matter, the defendant in that case sought records under the Freedom of Information Law *prior* to discovery, for the court found that "[i]f a criminal proceeding is pending, mandating FOIL disclosure would interfere with the orderly process of disclosure in the criminal proceeding set forth in CPL article 240" (id., 171). In contrast, you have requested records *after* conviction and the conclusion of the proceedings. Consequently, the harm sought to be avoided by the court in Pittari is not a consideration, and §87(2)(e)(i) in my view is cannot validly serve as a basis for a denial of access.

In view of the nature of the records sought, it is possible that other grounds for denial of access might enable the Department to withhold portions of the records. For instance, identifying details pertaining to witnesses or others interviewed by the Department might be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Portions of inter-agency or intra-agency materials consisting of advice, opinion or recommendation offered by Department or other agency officers or employees could, in my view,

be withheld under §87(2)(g) (see Gould, supra, 276-277). The remaining aspects of the records sought, however, would appear to be accessible, for none of the grounds for denial of access appear to apply.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to the Department's records access and appeals officers.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jonathan David
Lt. Michael Pascucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 8, 2004

Ms. Jean A. Black, CPA
24 West Avenue
Spencerport, NY 14559

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

Dear Ms. Black:

I have received your letter and the materials attached to it. As I understand the situation, having received certain records from the Rochester City School District, you sought additional information concerning an inconsistency and asked whether a certain individual was employed by the District under a different name. As of the date of your letter to this office, you received no further response from the District.

In this regard, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency is not required to create a record in response to a request for information. Similarly, while agency officials may choose to supply information by answering questions, I do not believe that they are required to do so to comply with that statute. In one item of correspondence, you referred to a salary list identifying a certain person relating to one year and to a different list in which that person's salary was substantially more during a different year, and you asked the records access to officer to "please let [you] know if there is an error." In the other, you referred to a retirement benefit pertaining to a person with a certain name and asked whether she used a different last name when employed.

In a technical sense, in neither circumstance would your correspondence in my opinion clearly involve a request for records. While an agency official could choose to confirm that there may be an error or attempt to ascertain whether a retiree was employed under a different name, I do not believe that there would be an obligation do so to comply with the Freedom of Information Law. In the future, rather than seeking information or raising questions, it is suggested that you seek existing records. For instance, to know of a person's earnings or perhaps his or her name used during a given year, you might request the portions of W-2 forms or equivalent records indicating a name and gross wages.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Barbara Jarzyniecki

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14556

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March 8, 2004

Mr. P.N. Prentice
[redacted]

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

Dear Mr. Prentice:

I have received your letter in which you questioned the propriety of a delay by an agency in satisfying a request made under the Freedom of Information Law.

In this regard, although I believe that the issue has been addressed in previous correspondence, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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March 8, 2004

Ms. Janine Novick
[redacted]

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

Dear Ms. Novick:

As you are aware, I have received your letter of February 11. You wrote that the Chemung County Clerk's Office "refuses to allow anyone to make photocopies of naturalization records, on the grounds that it is illegal to do so." Nevertheless, you and others have acquired naturalization records from other similar offices and in addition, you indicated that the following notice appears in the front of the naturalization record books:

> "Clerks of court are prohibited by law from making and issuing certifications of a naturalization record or any part thereof, except upon order of the Court...
>
> "The prohibition against the issuance of certifications by clerks of court does not extend to the furnishing of uncertified information. Clerks of court may furnish such information orally, in writing, by printing, or by photocopy or other reproductive process, in accordance with the rules of court, without consent of or approval by the Immigration and Naturalization Service" (GPO-951-675, Form M-154 (Rev. 12-5-72)N).

In this regard, from my perspective, there is a distinction between the issuance of a certification and a disclosure of a record pursuant to the Freedom of Information Law. The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I know of no statute that would prohibit the inspection or copying of the records at issue. Further, I have attempted to conduct research on the matter and the only New York statute that I was able to locate that pertains in any way with clerks and naturalization is §527 of the County Law,

which deals with the appointment of naturalization clerks. That provision is silent with respect to disclosure or the ability to withhold records.

In sum, I do not believe that there would be any prohibition regarding disclosure of the records at issue; on the contrary, I believe that they are subject to inspection, copying and reproduction 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. Catherine K. Hughes

FOIL-AO- 14558

From: Robert Freeman
To: [redacted]
Date: 3/9/2004 2:41:39 PM
Subject: Dear Mr. Christensen:

Dear Mr. Christensen:

Section 89(3) of the Freedom of Information Law describes the responses that may be offered by an agency when a request for records is made. Pertinent in the context of the matter that you described is the following sentence, which is part of that provision:

"Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Stated differently, if you request a copy of a record, on request, the agency must certify that it is a true copy (not that the contents are accurate); if the agency indicates that it does not maintain a record that has been requested, on request, it must certify that it does not possess the record or that the record could not be found after having made a diligent search.

I hope that I have been of assistance.

Robert J. Freeman
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March 9, 2004

Mr. Dominic J.M. Tacoma
[redacted]

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

Dear Mr. Tacoma:

I have received your letter in which you sought guidance concerning delays in responding to your requests for records of the Wading River Fire District.

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, Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Fire Commissioners

From: Robert Freeman
To: [redacted]
Date: 3/10/2004 4:11:31 PM
Subject: Dear Mr. Gregory:

Dear Mr. Gregory:

I have received your letter concerning smoking waivers. In this regard, the Committee on Open Government is authorized to offer advice and opinions pertaining to rights of access to records under the Freedom of Information Law. This office does not have possession or control of records generally. In this instance, we have no records that fall within the scope of your request.

I am unaware of whether there is any statewide compilation or list of smoking waiver applications or the determinations reached. If there is no such list or compilation, it would appear that a county by county inquiry would have to made.

I note that every 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 a request should be made to that person at the agency that maintains the records sought. I point out, too, that the Freedom of Information Law pertains to existing records; it does not require that an agency create a record in response to a request or answer questions. Therefore, in the future, rather than asking, for example, "how many" establishments have applied for waivers, you might request "records identifying establishments that have applied for waivers", and so on.

I hope that I have been of assistance.

Robert J. Freeman
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March 15, 2004

Mr. David Mack
[redacted]

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

Dear Mr. Mack:

I have received your letter of February 23 and the correspondence attached to it.

You have sought clarification relative to a request for a list of "current subcontractors used for investigative purposes" by the New York State Insurance Fund, as well as records indicating "the hourly fees those subcontractors are currently paid..." Although "the exact same request" was granted two years ago, the Insurance Fund denied access to records indicating hourly fees pursuant to §87(2)(d) of the Freedom of Information Law.

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

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 [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 basis for denial cited by the Insurance Fund, §87(2)(d), permits an agency to withhold records that:

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

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

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

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

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

In my view, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

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

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

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise..."

From my perspective, it is possible that the records in question may have *some* value to competitors, but whether disclosure would cause *substantial injury* to the competitive position of the subcontractors is questionable, and that is the standard that must be met to justify a denial of access. I would conjecture that their hourly fees are not a secret or so valuable that the Insurance Fund could demonstrate to a court that disclosure "would cause substantial injury to the competitive position" of a subcontractor. Moreover, if contracts are awarded based on competitive bidding or a similar standard, disclosure could encourage competitors to offer a government agency a better price, thereby saving the taxpayers' money.

Copies of this opinion will be sent to Insurance Fund officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth J. Ross
Edward D. Siegel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 15, 2004

Mr. Robert J. Zafonte
[redacted]

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

Dear Mr. Zafonte:

I have received your correspondence in which you "appealed" to this office following a denial of your request for evaluations of the Superintendent of the East Meadow School District.

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions concerning public access to government information. The Committee is not empowered to compel an agency to grant or deny access to records. When an agency sustains an initial denial of access following an appeal, the person denied access may seek judicial review of the agency's determination. It is my hope, however, that a review of this response by District officials will serve to enhance understanding of the Freedom of Information Law and eliminate any need or desire to engage in litigation.

From my perspective, assuming that the evaluations of your interest are similar to others, it is likely that portions of their content may be withheld, but that the remainder must be disclosed.

By way of background, first, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another and from one employee to another. Neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

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

or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Two of the grounds for denial are relevant to an analysis of rights of access to the records in question.

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

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

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

Also significant is §87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear based upon judicial decisions that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, with regard to records pertaining to public employees, the courts have found in a variety of contexts that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

While the contents of performance evaluations may differ, I believe that a typical evaluation contains three components.

One involves a description of the duties to be performed by a person holding a particular position, or perhaps a series of criteria reflective of the duties or goals to be achieved by a person holding that position. Insofar as evaluations contain information analogous to that described, I believe that those portions would be available. In terms of privacy, a duties description or statement of goals would clearly be relevant to the performance of the official duties of the incumbent of the position. Further, that kind of information generally relates to the position and would pertain to any 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.

Lastly, although irrelevant to the foregoing, I am an alumnus of East Meadow High School, class of '65.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert R. Dillon
Leon Campo

STATE OF NEW YORK
DEPARTMENT OF STATE
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March 15, 2004

E-MAIL

TO: Sandy Hubble [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. Hubble:

As you are aware, I have received your correspondence in which you sought guidance concerning both the Open Meetings Law and the Freedom of Information Law.

You asked, in brief, "what can and cannot be done in executive session" and asked whether a certain document is an "interoffice memo." Having requested the record in question from the Town of Richmond, you were informed that it would be withheld. The same record, however, was made available "without hesitation" by Ontario County.

In this regard, first, the Open Meetings Law is based on a presumption of access. Stated differently, meetings of public bodies, such as town boards, must be conducted in public, except to the extent that an executive session may 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. That being so, 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. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

I note that the full text of the Open Meetings Law, as well as numerous other materials, are available via the Committee on Open Government website.

Second, when a public body takes action of any sort, minutes must be prepared in accordance with §106 of the Open Meetings Law. That provision states that:

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

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.

Third, like the Open Meetings Law, the Freedom of Information Law is based upon a presumption of access, stating that all records of an agency are available, except to the 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 "interoffice memo", a written communication sent by one government agency (i.e., a county planning board) to another government agency (i.e., a town), would fall within §87(2)(g) of the Freedom of Information Law. 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.

Although I have no knowledge of the content of the document at issue, I point out that the Freedom of Information Law is permissive. While an agency *may* withhold records in accordance with the exceptions listed in §87(2), it is not required to do so. Therefore, it is possible that the Town could have chosen to withhold a record if authorized to do so, by §87(2)(g), but that the County could have opted to disclose the same record.

Lastly, again, a variety of material pertaining to both the Freedom of Information Law and the Open Meetings Law is available on our website.

I hope that I have been of assistance.

RJF:tt

cc: Town Board, Town of Richmond

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1456

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March 15, 2004

E-MAIL

TO: Dennis Painter <dp@AdairBrady.com>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Painter:

As you are aware, I have received your letter of February 20.

You wrote that, while engaged in genealogical research in Allegany County, you began to photograph records with your digital camera. The deputy clerk, however, informed you that you are "not allowed" to do so, and that you may copy the contents of records "by hand" or obtain photocopies upon payment of a fee. You have questioned the propriety of the clerk's prohibition.

In this regard, as you suggested, §87(2) of the Freedom of Information Law states that records are available for inspection and copying. There is nothing in that statute that references the ability to photograph records or, contrarily, imposes a prohibition from so doing.

From my perspective, the issue involves whether the clerk's action is reasonable. There is case law involving the use of personal photocopier, and it was held that municipality could prohibit the use of one's photocopier if its presence or use, due to the size of the device or the municipal office, is disruptive [see Murtha v. Leonard, 60 NYS 2d 101 (1994), 210 AD 2d 411]. Due to the disruption caused in that instance, the prohibition was found to be reasonable. Certainly, however, if the use of a copier or camera, for example, is not disruptive, I do not believe that a prohibition concerning the use of such a device would be reasonable or consistent with law.

In my opinion, the use of one's own digital camera would not ordinarily be disruptive, and if that was so in the situation that you described, the action of the official in my view would have been unreasonable.

Lastly, I note that the use of digital cameras to copy government records has become common and, in some instances, mutually beneficial and recommended. For instance, when an agency does not have a photocopier that can accommodate oversized records, such as maps, the use of a digital camera has served the interests of both the agency and the public.

I hope that I have been of assistance.

RJF:tt

cc: Deputy Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 15, 2004

Mr. Charles A. Fiegl
The Times Herald
639 Norton Drive
Olean, NY 14760

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

Dear Mr. Fiegl:

I have received your letter of February 20 and the materials attached to it.

You have sought an advisory opinion concerning the propriety of a denial of access to a "report of the investigation" of the Olean School District's Superintendent prepared by a law firm retained by the District. You wrote that the Board of Education "spent about $50,000 on the investigation" and that, following a review of the report, the Superintendent's contract was terminated. The termination agreement between the Superintendent and the District authorizes him to remain as a consultant until June, 2005 and receive "about $197,000 in salary and benefits."

The records access officer for the District wrote that the record in question:

> "...is not available for release because no such report was filed with the District. Rather, the results of the inquiry by the District's attorneys were delivered to the Board during an oral, executive session briefing. The materials on which the briefing was based constitute both privileged attorney work product and information that would, if disclosed, result in an unwarranted invasion of personal privacy and impair both present and imminent collective negotiations."

In this regard, while I am not aware of the specific content of the report, I offer the following comments.

First, that the report was "not filed with the District" does not in my view constitute a justification for a denial of access. The Freedom of Information Law is applicable to all agency records, and§86(4) defines the term "record" expansively to mean:

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

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)].

In short, I believe that the report constitutes a District record subject to rights conferred by the Freedom of Information Law, irrespective of its physical location.

Second, with respect to the contention that the report consists of attorney work product that is exempt from disclosure, the issue in my opinion involves whether or the extent to which the report represents material that could only be the product of an attorney that is reflective of legal expertise.

By way of general background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 3101(c) of the Civil Practice Law and Rules (CPLR) authorizes confidentiality regarding the work product of an attorney.

Since it serves as a barrier to disclosure, it is emphasized that the courts have narrowly construed the exemption concerning attorney work product. It has been held that only the work product that involves the learning and professional skills possessed only by an attorney is exempt from disclosure [see Soper v. Wilkinson Match, 176 Ad2d 1025 (1991); Hoffman v. Ro-San Manor, 73 AD2d 207 (1980)]. Insofar as the contents of the report do not reflect the specialized skill that can be offered only by an attorney, I do not believe that the report can be withheld based on a contention that it consists of attorney work product.

Further, §3101(c) is intended to shield from an adversary, typically in a litigation context, records that would result in a strategic advantage, as the case may be. Reliance on that provision in the context of a request made under the Freedom of Information Law is in my view dependent in part upon a finding that a record has not been disclosed, particularly to an adversary. It is unclear whether the report may have been disclosed to the Superintendent. If that occurred, I do not believe §3101(c) would serve as a basis for a denial of access.

It is possible or perhaps likely that some aspects of the report involve expertise or service that only an attorney could render. To that extent, I believe that a denial of access would be proper. To the extent that it does not consist of a product that could only be prepared by an attorney, I believe that the remaining provisions of the Freedom of Information Law would determine rights of access.

To the extent that is so, and in consideration of the remaining reasons for denial offered by the District, §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." 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].

Next, §87(2)(c) permits an agency to deny access to records insofar as disclosure "would impair present or imminent contract awards or collective bargaining negotiations." Based on the information provided, it is difficult to envision how a report pertaining to a superintendent would be pertinent to collective bargaining negotiations with a public employee union. For that reason, it does not appear that §87(2)(c) would serve as a basis for a denial of access.

Lastly, in any instance in which records sought pursuant to the Freedom of Information Law are withheld, the applicant for the records has the right to appeal the denial in accordance with §89(4)(a). Further, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, specify that an agency must inform the applicant of the right to appeal [see 21 NYCRR §1401.7; also Barrett v. Morgenthau, 144 AD2d 1040, 74 NY2d 907 (1990)]. The District's records access officer failed to do so in his response to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Olczak
Joseph Mahar

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 15, 2004

Ms. Kari 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:

As you are aware, the Committee on Open Government has received your correspondence which focuses on the "Freedom of Information Law as it relates to Crime Victims' Rights."

You referred to newspaper articles that include information which, in your view, might "compromise [a criminal] investigation or trial" and asked why "the public's 'right to know' prevail[s] and become[s] more important than a crime victim's and/or defendant's right to a fair, complete, and un-compromised investigation or trial." One of the articles indicates that records, specifically statements made to police officers, were obtained from the "County Clerk's Office."

You raised a series of questions concerning the foregoing pertaining to the intent, implementation and interpretation of the Freedom of Information Law. In this regard, I offer the following comments.

First, while your criticism is thoughtfully expressed, it does not appear that the disclosure to which you referred or the problems that you believe may be created by those or similar disclosures involve the Freedom of Information Law.

That statute is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

Based on the foregoing, the Freedom of Information Law applies to records maintained by a police department or the office of a district attorney, for example. It does not apply, however, to the courts.

Although the courts fall beyond the coverage of the Freedom of Information Law, court records are, in most instances, accessible pursuant to other statutes. Perhaps the most widely applicable provision concerning access to court records is §255 of the Judiciary Law. In brief, that statute requires a clerk of a court to search for and make available the records in his or her possession. There are instances in which other statutes forbid the disclosure of court records. Detailed records relating to matrimonial proceedings are available only to the parties and their attorneys pursuant to §235 of the Domestic Relations Law; records that identify or tend to identify victims of sex offenses are confidential under §50-b of the Civil Rights Law; when records involve a criminal proceeding that has been dismissed in favor of the accused, they are generally sealed in accordance with §160.50 of the Criminal Procedure Law.

In the context of your remarks, records made available would not have been disclosed due to the Freedom of Information Law. Rather, it appears that the records were disclosed pursuant to the Judiciary Law, §255.

When a request is made to an agency, the Freedom of Information Law in most situations governs rights of access. Although that statute is based on a presumption of access, there are exceptions, and I believe that they address your concerns. The problem, at least from your perspective, likely involves disclosures made based on rights of access conferred by other statutes. I note as a general matter that when records are filed with a court or accessible under the Freedom of Information Law, they are available to any person, without regard to one's status or interest [see e.g., M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984) and Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976)]. Further, if, for example, a record that ordinarily could be withheld under the Freedom of Information Law is introduced into evidence or reflects a statement made during a public judicial proceeding, the agency in possession of the records loses the ability to withhold the records [see Moore v. Santucci, 151 AD2d 677 (1989)].

Assuming that the Freedom of Information Law governs rights of access, rather then a statute dealing with court records, perhaps the most significant exception relative to your concerns is §87(2)(e). That provision states that an agency may withhold records that:

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

> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

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

In consideration of that provision, it has been found that:

> "[t]he question is whether the nature of the records sought and the timing of the FOIL request rendered those records exempt from disclosure under FOIL. The Court of Appeals, in *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572, 419 N.Y.S.2d 467, 393 N.E.2d 463 noted:
>
> > '[T]he purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution'" [Pittari v. Pirro, 258 AD2d 202, 204 (1999)].

The "timing" of a request is significant in determining rights of access as well as the ability to deny access, for the court found that "[i]f a criminal proceeding is pending, mandating FOIL disclosure would interfere with the orderly process of disclosure in the criminal proceeding set forth in CPL article 240" (id., 205).

In addition to §87(2)(e), §87(2)(b) authorizes an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." That provision might be asserted in a variety of contexts, i.e., in relation to the identities of victims, witnesses, persons interviewed by a law enforcement agency, etc. Section 87(2)(f) permits an agency to withhold records or portions of records when disclosure "could endanger the life or safety of any person." The proper assertion of that exception would be dependent on the facts and the effects of disclosure.

In short, when no other statute governs access to records, I believe that the Freedom of Information Law provides an agency with the flexibility and the authority to deny access to records in a manner consistent with your concerns. I note that the Freedom of Information Law, however, is permissive. Stated differently, an agency *may* deny access in accordance with the exceptions referenced earlier, but it is not required to do so.

Lastly, as I understand your comments, you suggested that an agency might choose to disclose records because a court may assess attorney's fees payable by an agency to a person whose

request was improperly denied. In my experience, especially in relation to situations involving law enforcement records, agencies have not been motivated to disclose records based on the possibility that a court might award attorney's fees to a person who "substantially prevails" in a challenge to a denial of access. As you correctly suggested, if an agency has a reasonable basis for denying access, even if it cannot meet its burden of defending secrecy, a court cannot award attorney's fees based on the direction provided in §89(4)(c) of the Freedom of Information Law. On average, approximately thirty-five judicial decisions are rendered annually regarding the Freedom of Information Law throughout the entire state, and the award of attorney's fees is, in fact, rare.

I hope that the preceding comments serve to enhance your understanding of the Freedom of Information Law and a recognition that that statute is not necessarily the basis for disclosure or records in every instance.

If you would like to discuss the matter, or if I can be of assistance, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 15, 2004

Ms. Barbara B. Zagar
[redacted]

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

Dear Mr. Zagar:

I have received your letter and the materials attached to it. You have asked whether Planned Parenthood Mohawk Hudson, Inc. ("PPMH") is required to respond to a request made under the New York Freedom of Information Law. You indicated that PPMH receives "federal title X monies" and enclosed commentaries regarding the laws in other states.

In this regard, each state has enacted a statute dealing with access to records, and each such statute is different. It is clear in my view, however, that PPMH is not subject to or required to respond to a request made pursuant to the New York Freedom of Information Law.

That statute is applicable to agency records, and §86(3) defines the term "agency to mean:

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

Based on the foregoing, an agency is an entity of state or local government. A corporation, such as PPMH, is not a governmental entity and therefore is not an "agency" that is required to give effect to the Freedom of Information Law. I note that many private organizations receive funding from the government, but that the receipt of government funds does not transform such organizations into governmental entities or bring them within the scope of the Freedom of Information Law.

In short, because of PPMH is not a government agency, I do not believe that it falls within the coverage of the requirements imposed by the New York Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Director, Planned Parenthood Mohawk Hudson, Inc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 15, 2004

Ms. Donna Pagliaro
[redacted]

The staff of the Committee on 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. Pagliaro:

I have received your letter and the materials attached to it. You have asked whether it is "the opinion of the State that [your] requests ...are so unreasonable that the Incorporated Village of East Rockaway feels they need to withhold this from [you]." The request involves an attempt to obtain the names and salaries of public employees and the Village attorney, as well as sign permits and applications "for the political signs installed by the Village Pride Party."

If my understanding of the matter is accurate, your requests, in my view, are not unreasonable. In this regard, I offer the following comments.

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

Second, with certain exceptions, the Freedom of Information Law 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.

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.

I note, too, that it has been held that records indicating payments made to a village attorney are accessible [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

Third, an application for or permit issued granting the placement of a political sign must, in my opinion, be made available. In short, there appears to be nothing in personal about those records; they relate to political party activity. That being so, I do not believe that any of the grounds for denial would be applicable in relation to those records.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice 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, copes of this opinion will be sent to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Hon. Joseph F. Carrigan
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1415609

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March 15, 2004

Hon. Mary Ann Roberts
Village Clerk
Village of Ossining
Municipal Building
16 Croton Avenue
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 Ms. Roberts:

I have received your letter of February 18 in which you sought an advisory opinion concerning a request made pursuant to the Freedom of Information Law. The request involves "letters that the Mayor has received praising his performance as Mayor."

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 point out that the introductory language of §87(2) refers to the ability to withhold records "or portions thereof" that fall within the grounds for denial of access that follow. Therefore, an agency is required to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

The only ground for denial pertinent to the matter in my view 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." It has consistently been advised that a written communication from a member of the public reflective of criticism or praise or in which he or she is making a complaint may be withheld to the extent that disclosure would identify the author of the communication. In the context of the request at issue, I believe that the Village is permitted to delete the names, addresses or other personally identifying details regarding those who praised the Mayor in writing.

Although the comments pertain to the Mayor, I do not believe that disclosure would result in an unwarranted invasion of his privacy. 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].

In this instance, the substance of the letters would appear to be relevant to the performance of the Mayor's duties. If that is so, I do not believe that that disclosure would result in an unwarranted invasion of his privacy.

Lastly, I note that §87(2)(g), the exception regarding "inter-agency and intra-agency materials", pertains to communications between or among government agency officers or employees. Since the authors of the letters are not government officers or employees, that provision would not serve as a basis for a denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO - 14570

From: Robert Freeman
To: [redacted]
Date: 3/16/2004 10:50:28 AM
Subject: Dear Mark:

Dear Mark:

I have received your inquiry concerning a request for names and birth dates of children by a parochial school to be used in its recruiting efforts.

From my perspective, the request may be denied for two reasons. First, §4173 of the Public Health Law indicates that birth records are generally available only to the subjects of the records or the parents of minors. Second, §89(2)(b)(iii) of the Freedom of Information Law states that an "unwarranted invasion of personal privacy" includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."

In short, it is clear in my view that the records in question may be withheld.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14571

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

March 16, 2004

E-Mail

TO: Megan Coleman [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. Coleman:

I have received your inquiry in which you asked where you might find "a list of records that are available to the public."

In this regard, there is no such list. The Freedom of Information Law does not identify the records that are accessible to the public. On the contrary, the Law is structured in the reverse. Rather than indicating the records that are public, the Law provides, in brief, that all government records are accessible to the public, except those records or portions of records that fall within a series of exceptions.

Please note that a great deal of material pertaining to the Freedom of Information Law is accessible *via* our website. The full text of the Law can be reviewed, and the website includes a basic guide to the Law, "Your Right to Know." Additionally, this office has prepared thousands of legal advisory opinions that are indexed by subject matter. If you have questions concerning particular records or issues, it is likely that you can acquire information by means of a review of opinions that are accessible online.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14572

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

March 24, 2004

E-Mail

TO: John Collins [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. Collins:

As you are aware, I have received your inquiry concerning the fee assessed by a school district when records were made available to you. You wrote that "When [you] got the documents, it was clear that no copying had been done" and that "these were original documents."

It is your view that you have "paid 'twice' for public documents", and you asked whether an agency, such a school district, can "charge...for doing something that they obviously didn't do."

In this regard, I believe that the only fee that can be assessed by an agency involves the duplication or reproduction of records. Specifically, §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge a fee for copying, either twenty-five cents per "photocopy" up to nine by fourteen inches or the "actual cost of reproduction" concerning other records, such as tape or video recordings, computer disks and the like.

Based on the language of the law, unless a copy of a record is made, I do not believe that an agency may charge a fee when records are made available pursuant to the Freedom of Information Law. It has been suggested that if copies of records are made in anticipation of requests for records, an agency may charge a fee for copies. In the situation that you described, however, that does not appear to have been so, and the agency did not make copies of the records sought either in response to your request or in anticipation of the receipt of a request. If that is so, again, I do not believe that any fee could have been charged.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14573

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

March 24, 2004

Mr. Victor Gonzalez
82-A-1196
Greenhaven Correctional Facility
P.O. box 4000
Stormville, NY 12582-0010

Dear Mr. Gonzalez:

I have received your letter which is dated March 2 but did reach this office until March 18. You have appealed to the Committee on Open Government in relation to requests for records that were apparently denied by the New York City Police Department and the Office of the New York County District Attorney.

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

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

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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, I believe that the persons designated to determine appeals at the New York City Police Department and the Office of the New York County District Attorney are, respectively, Jonathan David and Gary J. Galperin.

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-14574

41 State Street, Albany, New York 12231
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March 24, 2004

Mr. Paul Palmieri
The Coalition of Landlords,
Homeowners, and Merchants, Inc.
28 East Main Street
Babylon, NY 11702

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

Dear Mr. Palmieri:

I have received your letter of February 24 and the materials relating to it. You have sought an opinion concerning the propriety of a denial of a request by the Town of Brookhaven under the Freedom of Information Law.

The request involved a list of names and addresses of applicants for rental permits. In response, the Town Clerk wrote as follows:

> "The Town Attorney has advised that request must be denied due to the fact that it is an unwarranted invasion of personal privacy. In substantiation of this decision the Code of the Town of Brookhaven, Chapter 82-11 states that rental registration forms and the rental occupancy permit applications are exempt from disclosure under the Freedom of Information Law on the grounds that such disclosure would constitute an unwarranted invasion of personal privacy, sighting [sic] as its authority New York State Public Officers Law, Chapter 87, Subdivision 2, paragraph (b).
>
> "Additionally, under the New York State Public Officers Law Chapter 87, Subdivision 2, Paragraph (a) all records are available except when they are specifically exempt by statute. The Town of Brookhaven Code is such a statute and therefore this denial is also substantiated by the New York State Public Officers Law."

In this regard, I offer the following comments.

First, based on the judicial interpretation of the Freedom of Information Law, the conclusion that the Brookhaven Town Code is a statute that can exempt records from disclosure is erroneous.

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

It has been held by several courts, including the state's highest court, the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Therefore, the provision of the Town Code cited in response to your request does not serve as a valid basis for a denial of access.

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

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

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

irrelevant; when records are accessible, once they are disclosed, the recipient may do with the records as he or she sees fit.

Section 89(2)(b)(iii), however, represents what might be viewed as an internal conflict in the law. As indicated above, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. Nevertheless, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

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

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

In addition, it was held that:

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

As such, there is precedent indicating that an agency may inquire with respect to the purpose of a request when the request involves a list of names and addresses. Lastly, the provisions in the Freedom of information Law pertaining to privacy in my view involve intimate or personal matters. I do not believe that they apply to business enterprises.

I note that 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 consideration of the foregoing, insofar as those identified are not natural persons, but rather are commercial enterprises or individuals acting in a business capacity, I do not believe that disclosure would constitute an unwarranted invasion of personal privacy, even if the request involves a commercial or fund-raising purpose.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Stanley Allan
Thomas Ventura

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14525

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March 24, 2004

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

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

Dear Mr. Sobota:

I have received your letter of February 25 in which you sought an advisory opinion concerning requests for certain records of a school district that you represent.

The requests involve "correspondence and communications" pertaining to two grievances initiated against the district by a teachers' association. The only records falling within the scope of the requests at this juncture are grievance forms, responses by administrators denying the grievances, and letters of appeal by the teachers' association. The grievances relate to "Parent Teacher Conference Day" and a "Detailed Lesson Plan."

You wrote that the district "would be inclined to grant the FOIL request, but for" a provision in the teachers contract stating that:

> "The Chief Executive Officer shall be responsible for accumulating and maintaining an Official Grievance Record which shall consist of the written grievance, all exhibits, transcripts, **communications**, minutes and/or notes of testimony, as the case may be, written arguments and briefs considered at all levels other than Stage 1A and all written decisions at all stages. ... The Official Grievance Record shall be available for inspection and/or copying by the Aggrieved Party, the Grievance Committee, and the Board, but **shall not be deemed a public record**" [emphasis yours].

From my perspective, insofar as a contractual provision limits rights of access conferred by a statute, such as the Freedom of Information Law, it is void and unenforceable.

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

The Court of Appeals has held that a request for or a guarantee 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 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 this instance, the element of the contract to which you referred created an exception to rights of access that does not exist in the Freedom of Information Law. That being so, again, I believe that it is invalid and unenforceable. Moreover, a review of the exceptions to rights of access appearing in §87(2) of the Freedom of Information Law indicates, in my view, that none could justifiably be asserted.

In short, notwithstanding the language of the contract, I believe that the records at issue must be disclosed to any person seeking them pursuant to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3779
FOIL-AO-14576

41 State Street, Albany, New York 12231
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March 29, 2004

Chairman William J. Ryan
County Board of Legislators
Westchester County
800 Michaelian Office Building
148 Martine Avenue
White Plains, NY 10601

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

Dear Chairman Ryan:

I have received your letter of February 27 and the materials attached to it.

You wrote that the Westchester County Medical Center several years ago was a part of the government of Westchester County but was "spun off and became the Westchester County Health Center Corporation ('WCHCC'), a public benefit corporation created in accordance with the provision of Article 10C of the New York State Public Authorities Law." Although the WCHCC is a corporate entity separate from the County, you indicated that the County "continues to provide various forms of financial assistance to WCHCC, including being a guarantor to certain financial obligations of WCHCC."

In this regard, you wrote that:

> "Currently, WCHCC is experiencing severe financial difficulties and finds itself faced with several difficult financial choices which must be made in order to meet its financial obligations. Information including, but not limited to, marketing strategy, analyses, evaluations and other financial reviews and proposals must be reviewed in order to determine what options are available to WCHCC.
>
> "In light of these critical financial decisions and the potential significant impact upon the County should WCHCC fail to meet its financial obligations, the County Board has held (and will be holding) meetings to discuss issues relating to the administration and

> financial condition of the WCHCC. For example, matters relating to WCHCC personnel, lease agreement, and various other administrative and financial alternatives will need to be discussed before any determinations by WCHCC and/or the County could be finalized.
>
> "Clearly these discussions and certain detailed documentation relating to WCHCC's current and future status are of general public interest. Furthermore, any final determinations by the County in connection with WCHCC would have to be addressed by the full County Board at a meeting open to the general public. The dilemma concerns the extent to which the County Board is required to conduct its deliberative process regarding its final determination in a forum that is open to the general public. If certain information revealed to the County Board as part of the deliberation process were released to the general public, such information could be utilized by WCHCC's competitors to make WCHCC lose its competitive edge or to taint WCHCC's reputation. In addition, despite the County Board's policy that discussions be open to the general public, the County Board does not want to unnecessarily expose either WCHCC or the County to any liability resulting from the release of confidential information which could be discussed in a public forum."

In consideration of the foregoing and your intent to comply with law, you have sought "guidance as to the circumstances under which it would be appropriate to hold an open meeting or enter into executive session to discuss matters relating to WCHCC's financial conditions."

As you are aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as the County Board of Legislators and the governing body of WCHCC, must be conducted open to the public, except to the extent that there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during executive sessions. In most instances the grounds for entry into executive session relate to some sort of harm that might arise by means of public discussion. For example, it has been held that, §105(1)(d) pertaining to "proposed, pending or current litigation" is intended to enable a public body to discuss its litigation strategy in private so as not to divulge its strategy to its adversary [see e.g., Weatherwax v. Town of Stony Point, 97 AD 2d 840 (1983)]. Similarly, (105)(1)(h) authorizes a public body to discuss the proposed acquisition, sale or lease of real property, " but only when publicity would substantially affect the value" of the property."

Discussions concerning the financial condition of a public corporation must generally be conducted in public, for none of the grounds for entry into executive session would ordinarily apply. In this instance, however, the State legislature appears to have recognized that WCHCC, unlike most governmental entities, carries out its functions in competition with private sector organizations. The

statute to which you referred that created the WCHCC, §3304 of the Public Authorities Law provides as follows in subdivision (11)(b):

> "In addition to the matters listed in section one hundred five of the public officers law, the corporation may conduct an executive session for the purpose of considering marketing strategy or strategic marketing plans, analyses, evaluations and pricing strategies of the corporation, relating to business development, which, if disclosed, would be likely to injure the competitive position of the corporation."

The provision quoted above, like most of the grounds for entry into executive session, includes language relating to the possibility of harm that could result by means of disclosure or public discussion. Specifically, insofar as public discussion "would be likely to injure the competitive position" of WCHCC when its "marketing strategy or strategic marketing plans, analysis, evaluations and pricing strategies" are considered, §3304(11)(b) authorizes entry into executive session. In essence, subdivision (11)(b) creates a ninth ground for conducting an executive session that is unique to and may be asserted only in connection with the functions of the WCHCC.

I note that subdivision (11)(a) contains language concerning access to records pertaining to WCHCC and permits a denial of access to a variety of records insofar as disclosure "would be likely to injure the competitive positions of the corporation." That provision is analogous to §87(2)(d) of the Freedom of Information, which authorizes 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."

Although §87(2)(d) refers to a "commercial enterprise", it has been advised by this office and held judicially that records may be withheld when a governmental entity functions in competition with private entities and disclosure would cause substantial injury to the competitive position of that governmental entity(see e.g., Syracuse & Oswego Motor Lines, Inc. v. Frank, Sup. Ct., Onondaga Cty., October 15, 1985]). For example, the State Insurance Fund performs its duties in competition with private insurance carriers; public transportation authorities may in some cases compete with private bus companies.

Based upon my understanding of the functions of the WCHCC, and particularly in view of the terms of §3304 of the Public Authorities Law, it appears that WCHCC functions in competition with private entities. When that is so, and when disclosure would cause harm to its competitive position, subdivision (11) of §3304 permits the holding of executive sessions or a denial of access to records relative to its "marketing strategy or strategic marketing plans, analysis, evaluations and pricing strategies or pricing commitments."

I hope that I have been of assistance. Should any questions arise concerning the preceding commentary, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Charlene Indelicato, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14577

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March 29, 2004

Ms. Sonja Pascatore
[redacted]

The staff of the Committee 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. Pascatore:

I have received your letter and the materials attached to it. You requested "action sheets" relating to "Special Education IEP approvals for 1973 - 1991" from the Jamestown School District. Although you read of records characterized as "action sheets" in newspaper articles and were initially informed that those records would be reviewed by staff prior to disclosure, you were later informed that no such records could be found for the period to which you referred.

In an effort to learn more of the matter, I contacted Ms. Karen Briner Peterson, the District's records management officer. In short, she indicated that no records known as action sheets are maintained by the District concerning the period of your interest.

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

When discussing your request with Ms. Peterson, she said that she has had a variety of communications with you and that the specific information of your interest cannot be located with reasonable effort. When that is so, a request would not "reasonably describe" the records as required by §89(3) of the Freedom of Information Law. In Konigsberg v. Coughlin, it was found that an agency could not reject a request due solely to its breadth, but 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'])"[68 NY 2d 245, 250 (1986)].

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

While I am unfamiliar with the recordkeeping systems of the District, to the extent that 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, when records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, a request would not in my opinion meet the standard of reasonably describing the records.

Ms. Peterson indicated that thousands of records would have to be reviewed individually in order to locate and retrieve the items in which you are interested. If that is so, I do not believe that your requests would "reasonably describe" the records sought or that the District staff would be required to engage in an effort of that nature to satisfy your request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Karen Briner Peterson

FOIL-AO-14578

From: Robert Freeman
To: [redacted]
Date: 4/1/2004 9:17:30 AM
Subject: Dear Ms. Guenste:

Dear Ms. Guenste:

I have received your inquiry. In short, there is nothing in the Freedom of Information Law that requires the Town Clerk to transmit minutes of meetings by email. However, there is nothing in that law or any other that would forbid the clerk from sending them by email. Often sending records via email is the easiest method of making them available, and that practice is becoming increasingly common and accepted. That being so, certainly the Clerk may choose to send the minutes to by means of email.

I hope that I have been of assistance.

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

CC: townclerk@townofwallkill.com

FOIL-AO-14579

From: Robert Freeman
To: [redacted]
Date: 4/5/2004 10:06:54 AM
Subject: Dear Mr. Miller:

Dear Mr. Miller:

I have received your inquiry concerning where statutes other than the Freedom of Information Law prescribe a fee for copies greater than twenty-five cents per photocopy.

There are several statutes that prescribe higher fees, but there is no list of such provisions. Since you referred to the State Police, I note that §66-a of the Public Officers Law specifies that the Division of State Police may charge a search fee of fifteen dollars per accident report, "with no additional fee for a photocopy." That provision also states that the same fee shall be charged for investigative reports.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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41 State Street
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Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-14580

From: Robert Freeman
To: rcblaker@kidspeace.org
Date: 4/5/2004 8:55:30 AM
Subject: Dear Ms. Blaker:

Dear Ms. Blaker:

I attempted to reach you by phone last week without success to discuss a request by a law firm made under the Freedom of Information Law. The request involved a child who had been placed at your agency, Kidspeace.

In my view, the Freedom of Information Law likely would not apply. That statute pertains to records maintained by entities of state or local government; it does not appear that Kidspeace is a government agency. If that is so, Kidspeace's records would not be subject to the Freedom of Information Law.

Even if the Freedom of Information Law applied, I note that attorneys have no special rights of access. Under that law, every member of the public has the same rights. Further, when that law does apply, records identifiable to a child placed in a facility could in my view be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" or perhaps because other laws prohibit disclosure absent a court order (see e.g., Social Services Law, §372).

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
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FOIL-AO-14581

From: Robert Freeman
To: [redacted]
Date: 4/5/2004 8:33:35 AM
Subject: Dear Ms. Bartholomew:

Dear Ms. Bartholomew:

I attempted to reach you last week by phone without success. You have asked if I know of any statute in New York that "would allow a judge to ban the media from publishing the name of an alleged rape victim."

In short, I know of no such provision. It is noted that section 50-b of the state Civil Rights Law prohibits government officers, i.e., police officials, court officers or a district attorney, from disclosing information that would identify or tend to identify a victim of a sex offense. However, there are many instances in which members of the news media and others acquire the name of such a victim. So long as they do so legally, i.e., so long as they do not steal it from a government record, I do not believe that they can be prohibited from publishing or publicizing the name.

You might recall a recent case in which the attorney for the Speaker of the Assembly plead guilty to sexual misconduct involving an Assembly staff person. Although the government could not disclose her identity, she was captured on film and shown on three TV stations. One of the stations aired her voice but clouded her face; another showed her face; and the third showed her face and printed her name below it on the screen.

In short, the statutory prohibition in New York applies to disclosure by the government. Further, I do not believe that a prohibition extending to the news media would be constitutional.

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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14582

41 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 6, 2004

Hon. Clara G. Smith
Village Clerk
Village of Ardsely
507 Ashford Avenue
Ardsley, NY 10502

The staff of the Committee 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:

As you are aware, I have received your letter and the materials attached to it. Their contents relate to a series of requests made under the Freedom of Information law by a resident of the Village.

Having discussed the matter with you and Mr. Lawerence Tomasso, the Building Inspector/Code Enforcement Officer, it is my understanding that the Village has agreed to make the records requested available to the applicant. However, you raised a series of issues relating to the requests, and Mr. Tomasso indicated that the applicant has asked to have the ability to inspect original documents rather than copies.

In this regard, I offer the following comments.

First, although it appears that you are aware of the judicial direction involving this principle, I note that if a copy of a record has been made available to an applicant or that person's representative in the past, there is no obligation to make a second copy available, unless it can be demonstrated in evidentiary form that neither the applicant nor that person's representative any longer maintain possession of a copy of the records [see Moore v. Santucci, 151 AD2d 677, 678 (1989)].

Second, although the courts are not subject to the Freedom of Information Law, court records are generally available under other provisions of law. In this instance, it is my understanding that some of the records requested from Village offices were filed with the Village Justice Court. In that circumstance, the records would appear to be available from the court pursuant to §2019-a of the Uniform Justice Court Act. Copies of those records maintained by other Village offices, even

though they may have originated from the court, would constitute agency records subject to rights conferred by the Freedom of Information Law [see Newsday v. Empire State Development Corp., 98 NY2d 746, 359 NYS2d 955 (2002)]. In my opinion, copies of records maintained by the Village that are accessible from the court would be equally available from Village offices.

Third, Mr. Tomasso explained that the file containing the original records that have been requested includes evidentiary material. He explained that the evidentiary material might in some way be damaged or disrupted, and, therefore, could not be used if the contents of the original file are made available. He also indicated that copies of records within that file have been or would be produced, accompanied by a written certification that they are true copies of the original records. With that assurance, I believe that it would be reasonable and consistent with law to make copies available, rather than permitting inspection of the original records within the file. In that circumstance, the applicant would not in any way be denied access to the records of her interest.

Next, several elements of the request form prepared by the Village are, in my opinion, outdated. For instance, the phrase "part of investigatory files" appeared in the Freedom of Information Law as originally enacted in 1974; that language has not been part of the Law since 1978. The equivalent provision, §87(2)(e), indicates that records "compiled for law enforcement purposes" may be withheld under circumstances enumerated in that provision.

Lastly, the form indicates that a person denied access to a record has the right to appeal the denial to the records access officer. In this regard, the regulations promulgated by the Committee on Open Government, which have the force of law, specify that the records access officer and the person designated to determine appeals cannot be the same individual (see 21 NYCRR §1401.7). I note, too, that §89(4)(a) of the Freedom of Information Law concerning the right to appeal a denial of access states that the appeal may be made to the head or governing body of an agency (i.e., a board of trustees in a village) or a person designated by the agency's head or governing body.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence Tomasso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14583

41 State Street, Albany, New York 12231
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April 6, 2004

Mr. Davidson Goldin
NY1 News
75 Ninth Avenue, 6th Floor
New York, NY 10011

The staff of the Committee 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. Goldin:

As you are aware, I have received a variety of materials from you relating to a denial of your request by the Empire State Development Corporation for certain video recordings of "closed, non-public meetings."

By way of background, the response to your request states that the tapes were "reviewed by the Lower Manhattan Development Corporation ('LMDC'), a subsidiary of the New York State Urban Development Corporation ('UDC'), doing business as the Empire State Development Corporation ('ESDC')." The tapes were prepared in connection with the "LMDC Memorial Competition" and involved separate meetings between a panel of thirteen jurors and Governor Pataki, Mayor Bloomberg and former Mayor Guilianni on August 8, 2003. The jurors were designated to "evaluate and review" entries in a competition to select the World Trade Center site Memorial.

According to a news release announcing its members, the jury consisted of:

> "...thirteen individuals representing various points of view--including world renowned artists and architects, a family member, a Lower Manhattan resident and business owner, representatives of the Governor and Mayor, and other prominent arts and cultural professionals. In addition, David Rockefeller, prominent philanthropist, distinguished statesman, long-time leader in the downtown business community, and visionary behind the World Trade Center, will serve as an honorary member of the jury."

The ESDC denied your request, indicating that:

> "[t]he requested videotapes consist of recordings of closed, non-public, meetings. As such, they are exempt from disclosure pursuant to the Freedom of Information Law (Public Officers Law, section 84 et. seq.), section 87, subsection 2, subdivision (g), which provides that an agency may deny access to records or portions thereof that:
>
> "(g) are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government."

From my perspective, it is questionable whether §87(2)(g) or any exception to rights of access appearing in the Freedom of Information Law could be asserted to justify a denial of access to the records sought. In this regard, I offer the following comments.

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

Second, as indicated above, §87(2)(g) pertains to "inter-agency or intra-agency materials." The term "agency" is defined in §86(3) of the Freedom of Information Law 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, such as the ESDC.

The status of the jury in consideration of that provision is not, in my view, entirely clear. Although it includes representatives of the Governor and the Mayor of New York City, it consists largely of prominent citizens who are not employed by the government. Some are renowned for their expertise in the architectural and arts communities; others are leaders in the business, not-for-profit and academic communities; another is the spouse of a person killed on 9/11 who serves on the

LMDC Families Advisory Council. In short, the membership of the jury represents a cross section of what might be viewed as the community of New York City.

If the jury is not characterized as an agency, I do not believe that the tapes would be either inter-agency or intra-agency materials. If that is so, §87(2)(g) would not serve as a basis for a denial of access.

I note that Xerox Corporation v. Town of Webster [65 NY 2d 131 (1985)] dealt with reports prepared "by outside consultants retained by agencies" (id. 133). In such cases, it was found that the records prepared by consultants should be treated as if they were prepared by agency staff and should, therefore, be considered intra-agency materials falling within §87(2)(g). However, based on the news release, the jury could not, in my view, be characterized as a consultant. As the term "consultant" is ordinarily used and according to an ordinary dictionary definition of that term, a consultant is an expert or a person or firm providing professional advice or services. As I understand the composition of the jury, while it clearly consists of well-respected members of the community who may enjoy expertise in a variety of areas, its members are not in the business of preparing recommendations to the government or others for gain or livelihood. Further, in the context of the Xerox decision, I believe that a consultant would be person or firm "retained" for compensation by an agency to provide a service. It is my understanding that the committee served voluntarily and without compensation. For the foregoing reasons, I do not believe that the jury could be considered a consultant or that the tapes would be equivalent to records prepared by the staff of an agency for purposes of the assertion of §87(2)(g).

Third, even if the communications reflected on the tapes between the jury and the Governor and Mayor Bloomberg could be characterized as inter-agency material, it is unlikely that their content could be withheld in their entirety. In this vein, 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 [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.).

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).

Again, it is questionable in my view whether the records at issue, in consideration of the composition and role of the jury, would constitute inter-agency or intra-agency materials. If they do not, I do not believe that any ground for denial of access could be asserted. If the records are considered to fall within the exception regarding those materials, for the reasons expressed by the state's highest court, portions might properly be withheld, while the remainder would be available under §87(2)(g)(i).

I note, too, that Mr. Giuliani was not a government officer or employee when his meeting with the jury occurred. That being so, the exchange between him and the jury would not involve communications between or among government officials, and I do not believe that §87(2)(g) or any other exception to rights of access could be asserted to withhold the tape recording of the meeting or interview involving the jury and Mr. Giuliani.

Lastly, the response to your request concluded that, based on the assertion of §87(2)(g), "the video tapes are not disclosable pursuant to the Freedom of Information Law." In view of the language of the law and a decision rendered by the Court of Appeals, that is not so. Even when an agency has the authority to deny access, and I am not suggesting that to be clearly so in this instance, it is not required to do so. As indicated by the Court:

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within an agency's discretion to disclose such records...if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Anita W. Laremont
Antovk Pidedjian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14584

41 State Street, Albany, New York 12231
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April 6, 2004

Michael J. Grygiel, Esq.
McNamee, Lochner, Titus & Williams, P.C.
75 State Street
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, unless otherwise indicated.

Dear Mr. Grygiel:

I have received your correspondence in which you requested an advisory opinion concerning an event, the death of the Reverend John A. Minkler, which, in your words, generated "recent - and extensive - local press coverage."

According to your letter:

> "Reverend Minkler was found deceased in his apartment on or about February 16, 2004, together with a bottle of pills and certain documents, including an apparent suicide note, which were also present in the apartment. [Your] understanding is that, upon being called to the scene, the Watervliet Police Department took possession of these documents, including the suicide note. [Your] further understanding is that the documents (or copies thereof) have been forwarded to both the Albany County District Attorney's office and the Albany County Coroner for their review in investigating the circumstances of Reverend Minkler's death. Upon information and belief, the Albany County Coroner is waiting for the results of toxicology lab reports in order to determine the cause of Reverend Minkler's death, which preliminary reports have indicated is a suicide."

Assuming the accuracy of the facts as you presented them, and assuming further that it is concluded that Reverend Minkler's death "was a suicide and did not involve criminal activity", you have sought my opinion concerning public rights of access to the documents, particularly the suicide

note. You noted that District Attorney Paul Clyne in a radio interview broadcast on February 24 stated, in your words, "that under no circumstances would his office release the suicide note...unless and until the note became evidentiary material used in a public proceeding." Other news reports indicate that if the suicide note is not used in a public proceeding, it will remain confidential unless the family of the deceased authorizes disclosure.

From my perspective, there are several issues relating to the matter. Although it is emphasized that I have no familiarity with or knowledge of the content of the materials at issue, I believe that they are subject to rights of access conferred by the Freedom of Information Law. This is not to suggest that they must be disclosed, but rather that an unequivocal or blanket denial of access by the District Attorney is inconsistent with the Freedom of Information Law and its judicial construction. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all records maintained by an agency, such as the office of a district attorney. Section 86(4) of that statute defines the term "record" expansively to mean:

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

In a case in which an agency claimed, in essence, that it could remove various documents from the coverage of the Freedom of Information Law, the Court of Appeals found that:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]).

> Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of 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)].

Based on the foregoing, it is clear in my opinion that the documents at issue, including the suicide note, constitute agency records subject to whatever rights of access may exist under the Freedom of Information law.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 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). 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 inquiry, the District Attorney has merely indicated that the records will not be disclosed, unless they are used in a public proceeding. No basis for a denial of access among the grounds for denial appearing in §87(2) of the Freedom of Information Law has been cited.

In a similar vein, the Court of Appeals has held that a request for or a claim or 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."

It has also been held that the law, not the "preference" of persons in some way related to an event, serves as the means of determining public rights of access. 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'."

In this instance, while there may be sympathy for the family of the deceased, I do not believe that they, through the District Attorney, have the authority to block the disclosure of records or portions of records maintained by an agency.

Third, two of the grounds for denial of access are, in my view, pertinent to an analysis of rights of access.

Section 87(2)(e) permits an agency to withheld records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

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

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

It is questionable, in my opinion, whether the records at issue may be characterized as having been "compiled for law enforcement purposes." It has been held, for example, that minutes of meetings of municipal boards pertinent to or used in a criminal investigation were not "compiled" for a law enforcement purpose and were accessible under the Freedom of Information Law (see King v. Dillon, Sup. Ct., Nassau Cty., December 19, 1984). Frequently, contracts, books of account, travel records and the like may be pertinent to or used in a criminal investigation. Those kinds of records are generally available to the public, and in my opinion, they are not transformed into records compiled for law enforcement purposes that may be withheld if they become relevant to an investigation. Similarly, I do not believe that records prepared by members of the public, including suicide notes, can in every instance be considered to have been compiled for law enforcement purposes and, therefore, potentially deniable under §87(2)(e). Even if the records could properly be characterized as having been compiled for law enforcement purposes, it is questionable how or why disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

It is possible in some instances that those records or perhaps portions of them may be withheld pursuant to one or more of the remaining grounds for denial, and that may be so in relation to the instant situation, depending on the contents of the records.

Most significant in my opinion are §§87(2)(b) and 89(2), both of which authorize an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Essentially the same language is found in the federal Freedom of Information Act (5 USC §552) and other statutes in the United States concerning public access to government records. Although some have criticized that standard, contending that it is vague, I view it not as vague but rather as flexible. It enables agency officials as well as the courts to consider the specific contents of records, the facts, and the effects of disclosure in determining the extent to which records must be disclosed or may be withheld.

To suggest that every suicide note or the suicide note at issue and the other documents to which you referred, irrespective of their content, are beyond public rights of access fails to consider the specific terms of the Freedom of Information Law and the direction provided by the courts.

I note that there is little precedent concerning the privacy of the deceased extant in judicial decisions rendered under the Freedom of Information Law. Having discussed the matter with persons in New York and from other jurisdictions over the course of years, there is no clear or uniform view regarding the extent to which the privacy of the deceased may be protected. Some contend that when a person dies, the ability to assert either §§87(2)(b) or 89(2)(b) of the Freedom of Information Law no longer exists. Others have suggested that particular time limitations be used to draw a line of demarcation between the ability to withhold and the obligation to disclose records

pertaining to the deceased. Some have offered that records pertaining to the deceased may be withheld when disclosure would disgrace the memory of the deceased or others who are living. In short, there is no universally accepted standard relative to records relating to deceased persons.

In my view, which I believe is consistent with the direction provided by the courts, records must be reviewed individually and in their entirety to consider their specific contents and the effects of disclosure. I do not believe that a blanket denial of access or rejection of a request without such a review would be proper.

If, for example, a suicide note merely states: "I killed myself because the world is a terrible place", there is nothing intimate or intensely personal in a statement of that nature. To the extent that a suicide note or similar document provides a statement of that nature, I do not believe that any of the grounds for denial of access could validly be asserted. If, however, the note states: "I killed myself because my mother never loved me and never will", it might be contended that disclosure would constitute an unwarranted invasion of personal privacy, not with respect to the deceased, but with respect to the mother. The records in this instance might consist of two sentences or several pages of material, and their content in my opinion must be considered and reviewed to determine whether or the extent to which they may justifiably be withheld.

There have been allegations that the suicide note or other records might include reference to Bishop Hubbard or others. Without knowing the contents of any such references, I cannot offer specific guidance. Nevertheless, it is possible that personally identifiable details or portions of records may be deleted to protect privacy, in which case the remainder may be available. Also, as you indicated, there has been a great deal of public interest in and extensive publicity concerning the death of Reverend Minkler, the Albany Diocese and Bishop Hubbard. In my view, as more information is made available and in the public domain, the more difficult it may become to demonstrate that disclosure would indeed result in an unwarranted invasion of personal privacy.

Lastly, I recognize that certain records maintained by the Coroner are accessible as of right pursuant to §677(3)(b) of the County Law only to a district attorney or the personal representative or next of kin of the deceased. In my view, however, the records of your interest fall beyond the coverage of §677. The introductory language of subdivision (1) of §677 refers to "[t]he writing made by the coroner..." While an autopsy report and records prepared by the Coroner may constitute such writings that need not be disclosed to the public, the writings prepared by the deceased or other members of the public in my opinion are not subject to the limitations imposed by §677 of the County Law. Rather, I believe that they are subject to rights of access conferred by the Freedom of Information Law.

In sum and to reiterate, the suggestion by the District Attorney that the records at issue are in their entirety exempt from disclosure is, in my view, inconsistent with law. The contents of the records, pertinent facts, and the effects of disclosure must be considered in my opinion to determine whether or the extent to which they may justifiably be withheld 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. Paul Clyne, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 8, 2004

Mr. Scott Frauenhofer
Editor-in-Chief
Generation Magazine
114 Student Union University at Buffalo
Buffalo, NY 14260

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

Dear Mr. Frauenhofer:

I have received your letter and the materials attached to it. You have sought an advisory opinion concerning the "University at Buffalo's Undergraduate Student Association's compliance with New York State's Freedom of Information Law."

Among the attachments is a request for six categories of records. Since four of the six were granted, it appears that the status of the Student Association as an entity subject to the Freedom of Information Law is not at issue. Rather, it appears that the issue involves rights of access to the remaining two categories of records, "complete time sheets for the 2003-04 school year" pertaining to a particular employee and "cellular telephone bills and records for the 2003-04 school year". Both categories were withheld on ground that "these types of intra-agency or inter-agency materials are excluded" and in the case of the time sheets, because those records would, if disclosed "constitute an unwarranted invasion of personal privacy."

As inferred above, the Student Association in my view constitutes an "agency" required to comply with the Freedom of Information Law, and I note that it has been held that an equivalent entity is an "agency" subject to that statute (see Stony Brook Statesman v. Associate Vice Chancellor for University Relations, Supreme Court, Ulster County, January 22, 1996). Similarly, it has been found by the state's highest court, the Court of Appeals, that an analogous entity

functioning within a public college or university that exercises decision making authority is a public body subject to the state's Open Meeting Law [see Smith v. CUNY, 92 NY2d 707 (1999)]. While that decision involved the Open Meetings Law, based on its thrust and rationale, I believe that the same conclusion, that the entity is an agency, would be reached relative to the applicability of the Freedom of Information Law.

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

Although two of the grounds for denial relate to attendance records or time sheets, neither in my opinion would justify a denial of access.

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

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

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

Time sheets could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning leave time or absences, the times that employees arrive at or leave work, or which identify employees by name would constitute "statistical or factual" information accessible under §87(2)(g)(I).

Also relevant is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." This office has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of agency employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett Co. v. County of Monroe, 59 AD2d 309 (1977), aff'd 45 NY2d 954 (1978); Capital Newspapers v.

Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)].

In a decision pertaining to a particular police officer and records indicating the days and dates he claimed as sick leave, which was affirmed by the State's highest court, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

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

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates and times of attendance or absence, would not in my view represent a personal detail of an individual's life and would be relevant to the performance of one's official duties. Therefore, I do not believe that §87(2)(b) could be asserted to withhold that kind of information contained in an attendance record.

In short, I believe that time sheets, attendance and similar records must in this instance be disclosed, subject to the qualifications described above.

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

The other ground for denial of relevance is §87(2)(b), which, as in the case of time sheets, involves unwarranted invasions of personal privacy.

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

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

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

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

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

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

This is not to suggest, however, that the numbers appearing on every phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to contact recipients of public assistance or persons seeking certain health

services or counseling. It has been advised in the past that if an agency employee contacts 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 listed on a bill, i.e., the last four digits. For instance, disclosure of numbers called by a caseworker who phones applicants for or recipients of public assistance might identify those who were contacted. In my view, the numbers could likely be deleted in that circumstance to protect against an unwarranted invasion of personal privacy due to the status of those contacted. Similarly, if a law enforcement official phones informants, disclosure of the numbers might endanger an individual's life or safety, and the numbers might justifiably be deleted pursuant to §87(2)(f) of the Freedom of Information Law.

In the case of phone calls made to great variety of persons in a broad variety of contexts, unlike the health care worker who routinely phones a class of persons having a particular status, the calls made in that circumstance would likely involve an assortment of issues and persons who do not fall within any special identifiable class or status. If that is so, disclosure of a phone number would not alone signify a personal detail involving the recipient of a call. Further, as suggested previously, disclosure of the number would not necessarily indicate who received the call, nor would it disclose anything about the nature of the call of a conversation.

In sum, subject to the unusual kinds of exceptions discussed earlier, it appears that phone bills should be disclosed under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: George H. Pape, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 8, 2004

Mr. Calvin Combo
95-A-6640
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

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

Dear Mr. Combo:

I have received your letter in which you asked for assistance regarding your unanswered Freedom of Information Law appeal to the Office of Mental Health. You were granted access to portions of your mental health record, and therefore, you appealed. As of the date of your letter to this office, however, you had not received a response.

In this regard, I offer the following comments.

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

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

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

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

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

Second, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential. Nevertheless, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records, and rights of access would be conferred by that law, rather than the Freedom of Information Law. It is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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April 8, 2004

Mr. Frederick W. McMillian
Cortland County jail
54 Greenbush Street
Cortland, NY 13045

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

Dear Mr. McMillian:

I have received your letter in which you requested assistance in obtaining the name of the records access officer and the regulations promulgated by the Cortland County Jail. You have been denied access based on §87(2)(g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, §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 my view, a record indicating the name of the records access officer or a copy of the regulations would not constitute inter-agency or intra-agency materials that may be withheld.

Second, §1401.9 of the regulations states in relevant part that:

> "Each agency shall publicize by posting in a conspicuous location and/or by publication in a local newspaper of general circulation... The name, title, business address and business telephone number of the designated records access officer."

From my perspective, the provision quoted above indicates an intent to enable the public to contact the records access officer directly and to ensure that the records access officer's name and phone number should be readily available.

Third, 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.

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

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

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

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence Knickerbocker

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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April 8, 2004

Mr. John Standley
84-B-1584
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. Miloro:

I have received your letter in which you asked for assistance with respect to your request made to the NYS Division of Parole. You received a letter from the Division indicating that you would receive a response within approximately thirty days. As of the date of your letter, you had not received a response.

In this regard, I offer the following comments.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14589

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

April 8, 2004

Mr. Charles Miloro
02-A-0260
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. Miloro:

I have received your letter in which you asked for assistance with respect to your request for records made to the Queens County District Attorney's Office. You received a response indicating that you would receive a response within sixty days. As of the date of your letter, you had not received a response.

In this regard, I offer the following comments.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-14590

From: Robert Freeman
To: jmercer
Date: 4/8/2004 8:23:16 AM
Subject: Fwd: Re: Town Board Submissions to the Supervisor

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

>>> Robert Freeman 4/7/04 5:28:37 PM >>>
Hi - -

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

>>> "Supervisor Susan Cockburn" <tomsupervisor@frontiernet.net> 4/7/04 5:04:21 PM >>>

Hi Susan - -

There are patches of blue, and perhaps spring is really on its way. Let us hope.

With respect to your question, insofar as communications between or among Board members, including you as Supervisor, consist of opinions, recommendations, advice and the like, they may be withheld under §87(2)(g) of the FOIL concerning "intra-agency materials". The same provision specifies, however, that other aspects of inter or intra-governmental communications consisting of statistical or factual information, policies or final determinations, for example, must be disclosed.

It is emphasized, too, that the FOIL is permissive; although an agency, such as a town, may withhold records or portions of records in some circumstances, it is not required to do so. If you want to disclose the opinions and recommendations exchanged between yourself and Board members, there is nothing in the law that would prohibit you from doing so. Further, if the substance of the materials will be discussed publicly at one or more open meetings, there may be no good reason for denying public access.

Your message and my response are intermingled on my screen, and I hope that this reaches in a manner that's understandable.

Talk to you soon.
Bob

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14591

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

April 9, 2004

Mr. William R. Phillips
75-A-0322
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508

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

Dear Mr. Phillips:

I have received your letter in which you complained that the NYS Division of Parole does not respond to your Freedom of Information Law requests and appeals. You have asked that this office "alleviate this abhorrent practice."

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. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 9, 2004

Mr. Julio Arce
92-A-9982
Clinton Correctional Facility
Box 2001
Dannemora, NY 12929

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

Dear Mr. Arce:

I have received your letter in which you complained that you have not received responses to your Freedom of Information Law requests directed to your correctional facility and the New York City Police Department.

In this regard, I offer the following comments.

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

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

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

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

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

You have also requested that the fees for copies be waived. Here I point out that there is nothing in the Freedom of Information Law that 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14593

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

April 9, 2004

Mr. Nathaniel Jay
02010298- E143A
100 Larman Avenue
East Meadow, NY 11554

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

Dear Mr. Jay:

I have received your letter in which you complained that the New York State Grievance Committee for the Tenth Judicial District has not responded to your Freedom of Information Law request.

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

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

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

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

Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. It is noted that the Grievance Committee functions within a court, the Appellate Division, and, therefore, in my opinion is not subject to the Freedom of Information Law. As stated in our letter to you of October 27, 2003, records pertaining to the discipline of attorneys fall within the coverage of §90(10) of the Judiciary Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14594

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

April 9, 2004

Mr. Ray Walters
02-A-0752
Cayuga Correctional Facility
P.O. Box 1150
Moravia, NY 13118

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

Dear Mr. Walters:

I have received your letter in which you asked for assistance concerning your efforts in gaining access to records concerning your arrest from the New York City Police Department.

You requested various documents pertaining to your arrest. The Police Department denied access and you appealed. Your appeal was denied and you initiated an Article 78 proceeding. However, your documents relating to the Article 78 proceeding were seized and lost by staff of the Department of Correctional Services. You have asked what other "avenues are at your disposal in an attempt to receive these documents."

In this regard, I offer the following comments.

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

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

In considering the records falling within the scope of your request, relevant is a decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

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

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

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

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

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or

factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

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

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews,

> and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

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

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

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

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

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

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

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

Lastly, you have asked if a detailed index similar to that required in Vaughn v. Rosen (484 F.2d 920), a decision rendered under the federal Freedom of Information Act, would be available to you. Please be advised that 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." Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index.

Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were

materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14595

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
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April 9, 2004

Mr. David Wood
84-A-4819
Franklin Correctional Facility
P.O. Box 10
Malone, NY 12953

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

Dear Mr. Wood:

I have received your letter in which you complained that the NYS Division of Parole has not responded to your request for minutes of your parole hearing.

In this regard, I offer the following comments.

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

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

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

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

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

It is noted that the person designated to determine appeals by the NYS Division of Parole is Terrence Tracy, Counsel.

You also requested that any fee for copying be waived. In this regard, I point out that there is nothing in the Freedom of Information Law that 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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14596

41 State Street, Albany, New York 12231
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April 9, 2004

Mr. Tyrone Ford
03-R-5164
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. Ford:

I have received your correspondence in which you complained with respect to a denial of access to records by the New York City Police Department.

As I understand that matter based on your correspondence, you requested policies and procedure manuals pertaining to "Internal Affairs Investigative Procedures" and "Buy and Bust cases." The request was denied because it would "[r]eveal non-routine investigation techniques."

In this regard, I offer the following comments.

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

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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

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

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

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

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

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

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.

> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

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

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

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

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

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

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

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

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

> "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).

Lastly, since you referred in your letter to a request for a "master list of all public records", it is assumed that the request pertains to the list required to be prepared pursuant to §87(3)(c) of the Freedom of Information Law. That provision 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)©) 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-14597

From: Robert Freeman
To: sboatwright@nycedc.com
Date: 4/12/2004 9:35:59 AM
Subject: Dear Ms. Boatwright:

Dear Ms. Boatwright:

I have received your inquiry in which you asked whether the office of a borough president is "considered an exempt entity under 'Agency' section 86(3) Public Officers Law, Article 6."

From my perspective, the office of a borough president is clearly an "agency" required to give effect to the Freedom of Information Law. That term is defined to include "any state or municipal ....office...performing a governmental or propriety function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The office of a borough president clearly performs a governmental function for the City of New York, and it is neither part of the judiciary nor the State Legislature. Therefore, in my view, such an entity is not exempt from the Freedom of Information Law, but rather is required to comply with that statute.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14598

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April 13, 2004

Mr. Michael Murray
97-A-5479
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

Dear Mr. Murray:

I have received your letter in which you request transcripts of your preliminary hearing and arraignment hearing held in the Albany City Court.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. As such, this office does not maintain possession of records generally and, therefore, does not have the records of your interest. However, I would like to offer the following comments.

The provision upon which you relied in seeking the records is not applicable. The federal Freedom of Information Act (5USC §§552) applies only to federal agencies. Similarly, the New York Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

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

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

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

Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., 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 city court, it is suggested that a request for records be made to the clerk of the court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14599

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April 14, 2004

Mr. Clifford Levy
The New York Times
229 West 43rd Street
New York, NY 10036

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

Dear Mr. Levy:

I have received your correspondence in which you questioned the propriety of a denial of a request made pursuant to the Freedom of Information Law for certain data maintained by the State Department of Health.

In a letter addressed to you by the Department's records access officer, reference was made to your request for "information including all payments by the New York Medicaid program to doctors, clinics hospitals and all other providers that participate in the New York Medicaid program..." He added that the request involves "computer database information with each payment on a separate line in the database", including "the type of service rendered, date rendered and the amount of the payment for that service." In denying the request, the records access officer cited §87(2)(a) of the Freedom of Information Law, which relates to records that "are specifically exempted from disclosure by state or federal statute." In turn, he referred to two statutes, 42 U.S.C. §1396a(a)(7) and §369(3) of the Social Services Law. The former states that:

> "A State plan for medical assistance must -
> (7) provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan."

The latter, which was renumbered as subdivision (4) of §369 in 1992, provides that:

> "Any inconsistent provision of this chapter or other law notwithstanding, all information received by social services and public health officials and service officers concerning applicants for

> and recipients of medical assistance may be disclosed or used only for purposes directly connected with the administration of medical assistance for needy persons."

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 issue involves the intent of the two statutes cited in the denial of your request. Both exempt records from disclosure concerning applicants for and recipients of medical assistance when the records are "directly connected with the administration of medical assistance for needy persons." If those statutes are intended to protect personal privacy by ensuring that the identities of applicants and recipients cannot become known to the public, the denial of your request would, in my view, be inconsistent with law. If, however, the intent is construe the exception to rights of access expansively to encompass virtually all information relating to the program, the denial of access would appear to be proper. Based on the practices of the Department of Health and the availability of a variety of data on its website, it appears that those statutes, as implemented by the Department, are not intended to shield information that pertains to or describes the program; rather, it appears that they are intended to protect the privacy of applicants and recipients.

Enclosed are samples of data accessible via the Department's website. One involves the "Monthly Average Medicaid Beneficiaries by Category of Service and Aid Category", which includes the monthly average number of beneficiaries broken down by service category into numerous kinds of service, such as hospital inpatient, hospital outpatient, free standing clinic, skilled nursing facility, dental, drugs and supplies, home health services, lab and x-ray, and several others. Those figures are further broken down under two headings, medicaid and subsistence and medicaid only, and those headings are subject to additional analysis by indicating figures for TANF (temporary assistance for needy families) children, TANF adults, safety net children, safety net adults, SSI aged, and SSI blind and disabled. Another printout relates to the same service categories and how particular services are counted, i.e, as days, claims/visits, procedures, prescriptions, etc., with totals referring to the same categories of applicants or recipients as those indicated in the first sample. A third contains a variety of detailed information relating to Medicaid applicants and recipients.

Other data accessed from the Department or by use of its website could be used or cited to offer the same contention, that the prohibitions contained in both the federal and state statutes have been implemented by the Department so as to ensure the protection of personal privacy, not to shield or prohibit the disclosure of detailed information "connected with the administration of medical assistance for needy persons."

A review of those statutes suggests that the prohibition regarding disclosure is intended and has been implemented to exempt from disclosure only that information which, to use the term found in those statutes, is "directly" connected with the administration of the program and which could identify applicants or recipients. A contrary conclusion in my view would suggest that the data

found on the Department's website has been made available to the general public in a manner contrary to both federal and state law.

Assuming that the Department is not in contravention of law when it makes available the kinds of data accessible on its website, I do not believe that disclosure of the information sought would be exempt from disclosure under the statutes referenced in the letter denying access or, therefore, §87(2)(a) of the Freedom of Information Law. The data that you have requested, as I understand it, would consist of a further breakdown of data made available by the Department, and those data would not identify either applicants for or recipients of assistance under the Medicaid program.

I note that the New York Times Company several years ago made a similar request to the Department of Health for various items maintained on a database known as "SPARCS" that incorporated data submitted to the Department by hospitals, residential health care facilities and providers of ambulatory surgery. It was conceded by the *Times* that certain identifying data, such as names and social security numbers of those receiving care, could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)(b)]. Although the Department agreed to disclose the names of hospitals and insurers, as well as other "nondeniable SPARCS data" including the zip code of a patient's residence, his or her gender, race and ethnicity, the month and year of a patient's admission and discharge, and the number of preoperative and postoperative days of care, it denied access to the names of physicians who performed certain procedures, contending that disclosure of physicians' names could lead to the identification of particular patients. Nevertheless, the court determined that the likelihood of identification of a patient was based on "speculation", and it was "not persuaded that the additional disclosure of the physician identifier will result in an unwarranted invasion of personal privacy" [New York Times Company v. New York State Department of Health, 243 AD2d 157, 160 (1998)].

Lastly, the Court of Appeals, the state's highest court, confirmed its 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).

In sum, in consideration of the disclosures routinely made by the Department of Health and the direction given by the Court of Appeals indicating that exceptions to rights of access to records

must be "narrowly construed", I believe that the Freedom of Information Law, rather than 42 U.S.C. 1396a(a)(7) or §369(4) of the Social Services, governs rights of access. If that is so, based on the language of that statute and New York Times, supra, the information sought should be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Robert "Jake" LoCicero
Records Access Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14600

41 State Street, Albany, New York 12231
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April 14, 2004

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 a variety of correspondence from you concerning your requests for records directed to the New York City Police Department and the New York City Board of Correction.

With respect to your request for a copy of an arrest record of a particular individual directed to the New York City Police Department, in its response to your appeal, based on the information you provided, it was stated that the records access officer conducted a diligent search, but was not able to locate the records. You indicated that you had no additional information with respect to that individual. With respect to your request for various records concerning the Correction Foundation and annual reports prepared by the New York City Board of Correction, Cathy Porter, the FOIL Officer, indicated that that office does not maintain any of the documents that you requested. You also wrote that you have made several Freedom of Information Law requests to the Board of Correction seeking its annual reports, and except for Ms. Porter's response, all have gone unanswered. 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, having spoken with Mr. Richard Wolf of the Board of Correction, he indicated that the Correction Foundation no longer exists and, as indicated by Ms. Porter, that agency does not maintain the records of your interest. With respect to your request for annual reports, Mr. Wolf indicated that due to budget reductions, the Board has insufficient staff resources to generate annual

reports. As such, that office does not maintain the records of your interest and have not prepared annual reports for the years to which you referred.

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

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

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

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14601

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April 14, 2004

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 in which you requested an advisory opinion "concerning the propriety" of the State Commission of Correction "demanding payment for its annual reports requested by a member of the public." You indicated that "as a member of the public and a taxpayer – notwithstanding the fact [you are] presently imprisoned – [you] have the right to the annual report free of charge." You also indicated that you did not request the annual reports pursuant to the Freedom of Information Law.

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law that requires that a person indicate that he or she is making a request pursuant to that statute. However, in consideration of the definition of the term "record", all agency records are subject to the Freedom of Information Law. Therefore, when an agency receives a request for records, the agency can assume that the request is made under the Freedom of Information Law.

Second, 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 member of the public, a taxpayer 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,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14602

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

April 15, 2004

Mr. Robert Vasquez
95-A-6961
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. Vasquez:

I have received your letter in which you complained that you are encountering problems in receiving a document concerning a missing piece of mail that you and a correction officer signed. You stated that the document that you received had the correction officer's comments redacted. You also requested a copy of a report that you filed concerning an assault and were told that it did not exist.

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. Without additional information concerning the nature of the documents, I cannot offer specific guidance regarding the propriety of the redaction.

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, as requested, enclosed is an explanatory guide concerning the Freedom of Information Law and a copy of the supplement to the Committee's annual report, which includes summaries of judicial decisions.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 15, 2004

Mr. James Ainoris
02-A-2961
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411

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

Dear Mr. Ainoris:

I have received your recent letter in which you are "formally requesting an investigation in regards to [your] request for specific 'public' information pertaining to the radiological contamination of the 'Peconic River and surrounding Parklands', which have been directed to the NYS Department of Health and the Suffolk County Health Department. As of the date of your letter to this office, you had not yet received responses to your requests.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to "investigate" or otherwise 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. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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-14604

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April 15, 2004

Mr. Brian Keebler
02-A-2076
Franklin Correctional Facility
P.O. Box 10
Malone, NY 12953-0010

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

Dear Mr. Keebler:

I have received your correspondence and a variety of materials in which you raised questions concerning your requests to various entities concerning records of a criminal investigation, grand jury records, pre-sentence reports and other issues.

In this regard, please be advised that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. As such, the following general comments will address the issues falling within the jurisdiction of this office.

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

Since you referred to grand jury related records, it is my view that those records may be withheld when requested under the Freedom of Information Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law, states in relevant part that:

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

Further, "subdivision three" of §190.25 includes specific reference to the district attorney. As such, grand jury minutes and related records would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

You also referred to a "pre-sentence report". Here I direct your attention to §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports and memoranda. That provision 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 from a probation agency outside 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. Further, Matter of Thomas, 131 AD 2d 488 (1987), in my view confirms that a pre-sentence report may be made available only by a court or pursuant to an order of the court.

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

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

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

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

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

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

The remaining relevant ground for denial is §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

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

introduced into evidence or disclosed during a public judicial proceeding should be available. However, in the same decision, it was also found that:

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

You also complained that the Sullivan County District Attorney's Office has not responded to your requests. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of

Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, you requested a copy of warrants and court orders from the Rockland County Office of the District Attorney and were informed that it did not possess those 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,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14605

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

April 16, 2004

E-Mail

TO: Janon Fisher [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. Fisher:

I have received your letter in which you sought clarification concerning agencies' responsibilities "at the end of the seven day statutory response period" and asked whether an agency is "required to inform the requester of the proper appeal procedures."

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.

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)].

Also with respect to an appeal, 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)].

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1416

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

April 16, 2004

Mr. David Marcus
03-A-3351
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. Marcus:

I have received your letter in which you requested an advisory opinion concerning your request directed to the Warden at Rikers Island. Specifically, you requested a variety information concerning your commitment at Rikers Island.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In consideration of the nature of the records sought, which primarily involve dates of commitment and discharge, it does not appear that any ground for denial would be applicable.

Second, although the person in receipt of your request should, in my view, have responded in a manner consistent with the Freedom of Information Law, I note that each agency is required to designate one or more persons as "records access officer" (see 21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be directed to that person.

Since Rikers Island is part of the New York City Department of Correction, it is suggested that you resubmit your request to the Department's records access officer at 60 Hudson St., 6th Floor, New York, NY 10013.

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-14607

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

April 16, 2004

Mr. Ralph R. Martinelli
Publisher
Martinelli Publications
40 Larkin Plaza
Yonkers, NY 10701

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

Dear Mr. Martinelli:

I have received your letter and the correspondence attached to it. You have requested an advisory opinion concerning the propriety of a response to a your request for records by the Nassau County Police Department in which you were informed that certain police reports were being withheld due to the pendency of an investigation, but that upon its completion, you could resubmit a request. When doing so, you were informed that you "will need an original notarized authorization from an involved party."

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

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

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant. In short, when records are available under the Freedom of Information Law, they are accessible to any member of the public, and an agency, in my opinion, cannot require that permission from an "involved party", notarized or otherwise, be submitted as a condition precedent to disclosure.

The only instance in which permission or authorization of that kind would be proper would involve a situation in which a record pertaining to an individual could be withheld from the public, but not from that individual, on the ground that disclosure would constitute "an unwarranted invasion of privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. In that kind of situation, §89(2)(c) of the Freedom of Information Law provided that:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision...
>
> ii. when the person to whom a record pertains consents in writing to disclosure..."

I note that I received a copy of a determination of an appeal sent to you by the Office of the Nassau County District Attorney which apparently involved a request for records pertaining to incidents that were the subject of your request to the Police Department. The determination by the Assistant District Attorney indicates that the incidents resulted in a trial and a conviction. If that is so, I do not believe that the Police Department may withhold records or portions thereof containing information included within public court records or which were introduced during a public judicial proceeding [see Moore v. Santucci, 151 AD2d 677 (1989)].

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 Police Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Thomas C. Krumpter, Detective Sergeant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14608

41 State Street, Albany, New York 12231
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April 16, 2004

Mr. David C. Moore
92-A-6533
Upstate Correctional Facility
309 Bare Hill road
Malone, NY 12953

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

Dear Mr. Moore:

I have received your letter in which you questioned the propriety of denials of your requests submitted to your facility for attendance records and letters that you wrote that the were confiscated and then used at your tier hearings. Your requests were denied based on a claim of "security reasons."

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 attendance records pertaining to public employees must be disclosed under the Freedom of Information Law.

With respect to the letters that you wrote, I am unaware of their contents and whether the letters were considered contraband. Again, you indicated that your request was denied for security reasons.

From my perspective, one of the issues may be 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 the letters constitute "records", 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)].

A letter on which writing appears may be contraband, but it would also appear to constitute a "record."

If indeed the letters can be characterized as records, I do not believe, under the circumstances, that your request could properly have been denied. As you indicated, you wrote whatever appears in the letters. In short, it is difficult to envision how disclosure of the letters prepared by you could pose a threat to the security of the facility.

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-1/1609

41 State Street, Albany, New York 12231
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April 16, 2004

Mr. Robert Ferrara
83-A-1067
Woodbourne Correctional Facility
Box 100
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. Ferrara:

I have received your letter in which you complained that you are having difficulty in obtaining the "differential rates of release to parole and work release between men and women who were convicted of a homicide against an abusive spouse." You indicated that you cannot believe that such figures are not compiled.

You also stated that you enclosed other material related to your requests, but you did not. As such, I can only offer the following general comments.

In this regard, the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency is not required to create a record in response to a request. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1461O

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

April 19, 2004

Mr. Michael R. Kindred
97-A-6458
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 information presented in your correspondence.

Dear Mr. Kindred:

I have received your letter in which you asked for an advisory opinion concerning your unanswered requests directed to the City of Albany Police Department and the County of Albany District Attorney's Office.

In this regard, I offer the following comments.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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-1461l

41 State Street, Albany, New York 12231
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April 19, 2004

Mr. Norman A. Alfred, Jr.
03-12639
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. Alfred:

I have received your letter in which you asked for assistance in "obtaining copies of the original statements by the complainant and any additional witnesses." You indicated that you received a copy of the felony complaint, but did not receive the statements you requested.

In this regard, I offer the following comments.

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

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

Based on the foregoing, insofar as witnesses' statements are submitted into evidence or disclosed by means of a public judicial proceeding, I believe that they must be disclosed.

On the other hand, if witness statements have not been previously disclosed, two grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As a general

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

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

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

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

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

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

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

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

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

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

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1416/2

41 State Street, Albany, New York 12231
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April 20, 2004

Mr. Robert F. Izzo
[redacted]

The staff of the Committee 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. Izzo:

I have received your letter concerning requests made to the Town of Big Flats pursuant to the Freedom of Information Law. You questioned the propriety of deletions from "cellular phone billing records" and asked how you might "craft a succinct request" in consideration of responses by the Town indicating that your requests are "not reasonably described."

First, with respect to the deletions from the phone bills, you wrote that you have discussed the issue "with government attorneys who opined that as the telephone calls placed and received were taxpayer funded, they were discoverable via the Freedom of information process." While that may generally be so, I do not believe that it is so in every instance.

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, there are potentially several that might be cited to deny access to portions of the bills.

Often the most significant are §§87(2)(b) and 89(2)(b), both of which pertain to the ability to deny access insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village

Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

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

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended by some that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call. When phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call. Therefore, an indication of the phone number would ordinarily disclose 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.

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

That provision might also apply when government officials perform functions related to emergency situations and 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.

The remaining exception of possible significance, §87(2)(i), states that an agency may withhold records or portions thereof which "if disclosed would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." By disclosing email addresses, for example, viruses could be transmitted or other incursions might occur that could result in the harm south to be avoided by the provision cited above. Similarly, cell phones now perform functions additional to those typical of the traditional telephone. They may be used to transmit email or photographs; they can connect to the internet; they can store a variety of information. Moreover, the charges for the use of cell phones involve not only the calls made from a cell phone, but incoming calls as well. That being so, the public pays for air time. Again, persons other than government officials could make calls at significant taxpayer expense and in a manner that could jeopardize government functions.

Second, as you may be aware, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. The Court of Appeals, the state's highest court, has held that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the recordkeeping systems of the Town, to extent that the records sought can be located with reasonable effort, I believe that 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, a request would not in my opinion meet the standard of reasonably describing the records. It is possible that records falling within the scope of a request may be maintained in several locations by a variety of units within Town, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding a certain topical area, since the beginning of its existence, in a single file it may be a simple task to locate the records. If, however, records are not maintained by subject, but rather are kept chronologically, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

In short, in order to reasonably describe records of your interest, a request should be made in a manner that is consistent with an agency's filing, record keeping and retrieval systems.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Theresa Dean

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1461 3

41 State Street, Albany, New York 12231
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April 20, 2004

Mr. Born Allah Wright
94-A-2919
Upstate Correctional Facility
P.O. box 2001
Malone, NY 12953

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

Dear Mr. Wright:

I have received your letter in which you posed hypothetical questions concerning the records access officer at your facility, who, you alleged, fails to respond or ignores your requests for records even though you have sufficient fees in your account to pay for copies of the 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. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 20, 2004

Mr. Arnold A. Bernstein
94-A-2845
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508

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

Dear Mr. Bernstein:

I have received your letter in which you explained your difficulty in receiving your medical records from your correctional facility under the Freedom of Information Law. You were advised that the Medical Department has promulgated its own regulations which, you suggested, increases the cost of medical records. You asked if "their self-exclusion from the state statute [is] lawful."

In this regard, I offer the following comments.

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. In this instance, I believe that the authority to assess a fee different from that referenced in the Freedom of Information Law is based on a federal law, the Health Insurance Portability and Accountability Act (HIPAA). If that is so, it appears the Department's action would be consistent with law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 20, 2004

Mr. Deshon Holloway
96-A-5863
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. Holloway:

I have received your letter in which you complained concerning your unsuccessful attempts to acquire records from the records access officer at your facility. It appears that you have been barred from gaining access to records because you have failed to return records that have been made available for inspection. You stated that you are indigent and contend that fees should be waived.

In this regard, having reviewed our letter to you on August 21, 2002, I cannot offer any further guidance concerning the records access officer's refusal to process your Freedom of information Law. I have enclosed a copy of that letter.

With respect to fees, 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,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1461/6

41 State Street, Albany, New York 12231
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April 20, 2004

Mr. James Rizzo
95-A-3842
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118-1150

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

Dear Mr. Rizzo:

I have received your correspondence in which you indicated that Mr. Anthony Annucci granted your appeal following a denial of access by the records access officer at the NYS Department of Correctional Services central office and you asked why your facility records access officer cannot release the records of your interest. In addition, you requested an advisory opinion concerning the Penal Law as it pertains to the unlawful prevention of public access to records.

In this regard, I offer the following comments.

First, having received a copy of the appeal determination to which you referred, it appears that copies were forwarded to various people, including the records access officer at your facility and Central Files. While I am unaware of where the record is maintained, since your request was made to the records access officer at the central office, that person, in my opinion, would be responsible for ensuring that the record that was determined by Mr. Annucci to be available be forwarded to you.

Second, when an agency indicates that it cannot locate or does not maintain a record requested under the Freedom of Information Law, §89(3) enables the applicant for the record to seek a certification in which it is asserted by the agency "that it does not have possession of such record or that such record cannot be found after diligent search." Section §89(8) of the Freedom of Information Law and §240.65 of the Penal Law deal with "unlawful prevention of public access to records." The latter states that:

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

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

You also asked how §240.65 can be enforced. In my view, enforcement of that statute would involve a complaint made to and action taken by a district attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

April 20, 2004

Mr. Jeremiah Young-Flynn
02-R-3998
Bare Hill Correctional Facility
Caller Box 20
Malone, NY 12953

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

Dear Mr. Young-Flynn:

I have received your letter in which you requested assistance concerning "denials of information for filing a 440 motion to overturn a conviction." In addition, you also complained that the New York City Department of Correction has not responded to your Freedom of Information Law requests and that St. Vincent's Hospital is charging a fee for medical records.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. Since §440 of the Criminal Procedure Law pertains to a motion to vacate or set aside a sentence, issues involving that statute are beyond the expertise or jurisdiction of this office.

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

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

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

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

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

Lastly, with respect to the waiver of fees for medical records, a different statute, §18 of the Public Health Law would be pertinent. 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 note, too, that St. Vincent's Hospital, a private facility, is not subject to the Freedom of Information Law. That law applies only to government agencies.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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April 20, 2004

Mr. Roger Andrew
91-A-1750
Upstate Correctional Facility
P.O. Box 2000
Malone, NY 12953

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

Dear Mr. Andrew:

I have received your letter in which you requested assistance in gaining access to "facility security files" and the "I.G. office file" pertaining to you. You stated that you have been trying to secure a copy of these files for several months.

In this regard, without having specific knowledge concerning the contents of "facility security files", I cannot offer specific guidance. However, I offer the following general comments.

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

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

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

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

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

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

Several grounds for denial may be pertinent with respect to records 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. Those provisions might apply as a basis for withholding names or other identifying details pertaining to witnesses or informants, for example.

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)].

Another 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.

With respect to "facility security files", depending upon their contents, many of the grounds for denial cited previously may be pertinent. Another possible ground for denial is §87(2)(f), which permits an agency to withhold to the extent that disclosure "could endanger the life or safety of any person." The capacity to withhold on that basis would also be dependent upon the contents of the files.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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April 21, 2004

Mr. William Pelzer
03-A-3518
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. Pelzer:

I have received your letter in which you asked how you could receive records concerning disciplinary actions and psychiatric evaluations pertaining to police officers, as well as disciplinary actions brought against judges and assistant district attorneys of Suffolk County. You also stated that you were denied access to grand jury minutes and asked how you can acquire those minutes.

In this regard, it is noted 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. As such, you should direct requests to the records access officer at the agency that you believe maintains the records of your interest.

With respect to the substance of your requests, I offer the following comments.

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

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed

to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady , 93 NY2d 145, 156- 157 (1999)].

Based on the foregoing, I believe that the records of your interest pertaining to police officers would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

With respect to disciplinary actions brought assistant district attorneys, I believe that the Freedom of Information Law would be the governing statute, and that final determinations reflective of findings of misconduct would be available. Pertinent to an analysis of rights of access would be two of the grounds for denial.

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

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

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

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

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

In terms of the judicial interpretation of the Freedom of Information Law, in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In contrast, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal

privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

With respect to disciplinary action brought against judges, again, relevant in this instance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §45 of the Judiciary Law, which deals with records of the Commission on Judicial Conduct and is entitled "Confidentiality of records." Subdivision (1) of that statute provides that:

> "Except as hereinafter provided, all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential and shall not be made available to any person except pursuant to section forty-four of this article, the commission and its designated staff personnel shall have access to confidential material in the performance of their powers and duties. If the judge who is the subject of a complaint so requests in writing, copies of the complaint, the transcripts of hearings by the commission thereon, if any, and the dispositive action of the commission with respect to the complaint, such copies with any reference to the identity of any person who did not participate at any such hearing suitably deleted therefrom, except the subject judge or complainant, shall be made available for inspection and copying to the public, or to any person, agency or body designated by such judge."

The provision in §44 relating to public access to records states in relevant part that:

> "After a hearing, the commission may determine that a judge be admonished, censured, removed or retired. The commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the chief judge of the court of appeals who shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the judge involved. Upon completion of service, the determination of the commission, its findings and conclusions and the records of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the court of appeals."

Based on the foregoing, only after the completion of a proceeding and service upon a judge who is the subject of a proceeding in which it is determined that he or she should be "admonished, censured, removed or retired" would records of the Commission be accessible to the public. If no

such determination has yet been reached, or if a complaint is dismissed, I believe that the records must remain confidential.

With respect to your request for grand jury minutes, §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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14620

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

April 21, 2004

Mr. Barry Auston
92-A-8889
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. Auston:

I have received your letter in which you requested assistance concerning your Freedom of Information Law request directed to the NYS Division of Parole. You indicated that you requested "written reasons as to why [your] clemency was denied."

In this regard, I offer the following comments.

First, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information responsive to a request, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. In short, while agency staff could provide the information sought, they would not be required to prepare a record containing the reasons for the decision. In short, if there is no record containing the reasons, the Freedom of Information Law would not apply.

Second, the determination itself, a denial of clemency, has apparently been disclosed. The underlying reasons, if expressed in a record or records, would likely involve opinions or recommendations. If that is so, §87(2)(g) would be pertinent. 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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14621

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

April 21, 2004

Mr. Daniel Dublino
02-B-2269
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

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

Dear Mr. Dublino:

I have received your letter in which you asked that I "make a determination to release" records "without any blacked out portions." You indicated that you requested an "ASAT Intake" form and a "Chronological Entry Sheet." The records were provided, but many portions were redacted and you were given no explanation as to the reason.

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.

Without specific knowledge of the contents of the records sought, I cannot conjecture as to the propriety of the redactions. 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.

Of likely relevance under the circumstances is §87(2)(g). That provision enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

The other issue pertains to the absence of a reason for the redaction. 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 reason 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. When records or portions of records are withheld, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14622

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

April 21, 2004

Mr. Steven Collazo
97-A-6812
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. Collazo:

I have received your letter in which you appealed a denial of access by your facility relating to a "medical order" concerning your diet.

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 or otherwise enforce that statute or to compel an agency to grant or deny access to records. However, I offer the following comments.

First, 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 facility 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, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access

to medical records than the Freedom of Information Law. It is suggested that when requesting medical records pertaining to yourself you should make specific reference to §18 of the Public Health Law in any request for those records.

Lastly, with respect to an appeal, I note that appeals are made under §18 of the Public Health Law with respect to denials of access to records maintained by health care facilities. Section 18(1)(c) of the Public Health Law defines "health care facility" or "facility" to mean a hospital, a home care services agency, a hospice, a health maintenance organization, or a shared health facility, as those terms are defined in other provisions of the Public Health Law. Having conferred with a representative of the Access to Patient Records Division of the State Department of Health, it was advised that a medical treatment unit at a correctional institution is neither a "health care facility" nor a "facility" as those terms are defined in the Public Health Law. Consequently, an appeal would not be directed to the Department of Health; rather, I believe that an appeal would be made to the person designated by the Department of Correctional Services. For your information, the person so designated is Anthony J. Annucci, Counsel.

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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April 22, 2004

Mr. Trysone Brown
96-A-0382
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

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

Dear Mr. Brown:

I have received your letter in which you requested assistance in gaining access to a variety of records from the New York City Police Department, the New York County District Attorney's Office and the New York County Supreme Court. You complained that your requests to these entities have not been answered.

In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

Lastly, you stated that you should be given a full list of documents and "a statement of law as to why [they are] not allowed" and "a description of those documents." 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1416 24

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

April 22, 2004

Mr. Alexander Faison
02-A-6146
Mt. McGregor Correctional Facility
Box 2071
Wilton, NY 12831

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

Dear Mr. Faison:

I have received your letter in which you requested assistance concerning your requests and appeals made under the Freedom of Information Law to the New York City Police Department. You complained that you were denied access or received no replies to your inquiries.

In this regard, having reviewed our files concerning appeals, it was found that the New York City Police Department forwarded to the Committee two determinations of your appeals. It is noted that the address the New York City Police Department used for you is erroneous. Since correctional facilities do not forward mail to inmates, I have enclosed copies of those letters for your review.

You also requested "a complete itemized inventory and denial of factual justification of total or part denial of" documents directed to the New York City Police Department. 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1416 25

41 State Street, Albany, New York 12231
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April 22, 2004

Mr. DeAndre Williams
99-A-0052
Upstate Correctional Facility
P.O. box 2001
Malone, NY 12953

Dear Mr. Williams:

I have received your letter and the attached materials. You have again asked for assistance concerning requests made to the Mt. Vernon Police Department and the Westchester County District Attorney's Office pursuant to the Freedom of Information Law.

Having reviewed advisory opinions written to you in the past, it appears that your concerns have been addressed. I have enclosed copies of those opinions for your review.

The only remaining point that I can offer is 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 regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO - 310
OML-AO - 3784
FOIL-AO - 14626

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April 22, 2004

Mr. Tim O'Brien
Staff writer
Times Union
News Plaza
Box 15000
Albany, NY 12212

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

Dear Mr. O'Brien:

As you are aware, I have received your letter in which you sought an advisory opinion relating to requests made to Rensselaer County under the Freedom of Information Law.

One request involved "records pertaining to the Rensselaer County Local Conditional Release Commission and its decision to vote to release inmate Mary Beth Anslow." You also referred in that request to the requirement that a record indicate the manner in which each Commission member voted, and you focused on records pertaining to the Commission's deliberations. In the other request, you asked for "records pertaining to any and all decisions [made by the Commission] to release inmates within the past five years." The County denied access to the records in question on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" in accordance with §87(2)(b) of the Freedom of Information Law. You also referred to the §96 of the Public Officers Law as it relates to inmates.

In this regard, I offer the following comments.

First, §96 is part of the Personal Privacy Protection Law, which is Article 6-A of the Public Officers Law. That statute applies only to state agencies [see definition of "agency", §96(1)] and does not apply to a county or its records. In contrast, the Freedom of Information Law, based in its definition of the term "'agency", applies to entities of both state and local government.

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 ability

to withhold "records or portions thereof" that fall within the scope of the exceptions to rights of access that follow. The phrase quoted in the preceding sentence indicates that a single record may include information accessible to the public, as well as information that may be withheld. It also requires that an agency review records sought, in their entirety, to determine which portions, if any, may properly be withheld.

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

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

In the context of your request, all of the records that you requested have been withheld. While I am not suggesting that they must be disclosed *in toto*, based on the direction given by the Court of Appeals, the records must be reviewed for the purpose of identifying those portions that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision, an agency may deny access records under an exception "as long as the requisite particularized showing is made" (id., 277).

With respect to the privacy of inmates, while some aspects of records, such as those containing intimate or highly personal details, might properly be withheld based on considerations of privacy and §87(2)(b), others, in my view, must be disclosed. 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.).

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. 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)].

While the records sought are not videotapes or similar depictions, I believe that the principles discussed in the decisions cited above are applicable, that a blanket or categorical denial of access to the records sought is inconsistent with law, and that the ability to protect an inmate's privacy is far from absolute.

I point out that the fact of person's commitment in a county jail must be included in a record accessible to the public that includes a variety of information. Specifically, §500-f of the Correction Law, which pertains to county jails, states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what any by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record, and shall be kept permanently in the office of the keeper."

In short, a variety of information concerning any person confined in a county jail is clearly public.

Consideration should also be given, in my view, to the privacy of others. While I am not familiar with the nature of the records used in the Commission's deliberative process, they might include letters or similar communications from friends, relatives, neighbors, etc. who expressed their opinions concerning the release of Ms. Anslow or other inmates. I believe that personally identifying details pertaining to members of the public who transmitted such communications may be deleted on the ground that disclosure would constitute an unwarranted invasion of those persons' privacy.

Also potentially 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.

When Commission members transmit opinions or recommendations among one another, or when other government officers or employees offer opinions concerning an inmate's release, I believe that those opinions may be withheld. For instance, in a case in which a district attorney sent a recommendation to the Parole Board regarding the release of a certain inmate, it was determined that the record could be withheld [Ramalho v. Bruno, 273 AD2d 521 (2000)]. However, statistical or factual information contained within those kinds of communications must generally be disclosed pursuant to §87(2)(g)(i), and in addition, §87(2)(g)(iii) requires that "final agency...determinations" be made available. From my perspective, any determination by the Commission to grant or deny an inmate's release would constitute a final agency determination that must be disclosed. Moreover, assuming that a determination of that nature does not include intimate, personal information, I believe that it would be available in its entirety. If it does contain intimate, personal information, I believe that that portion may be redacted.

Third, although you did not raise any issue directly relating to the Open Meetings Law, I believe that its provisions are pertinent and related to the records sought. As you may be aware, that statute is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the provisions of §§271 and 272 of the Correction Law, which respectively describe the creation and organization of local conditional release commissions and their functions, powers and duties, it is clear in my view that those entities constitute public bodies that fall within the coverage of the Open Meetings Law. While it is likely that some of the Commission's discussions and deliberations may validly occur in private, other aspects of its duties must, in my view, be performed in public and result in the creation of records accessible to the public.

I point out that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, 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 activities of the Commission, it would appear that only one of the grounds for entry into executive session, §105(1)(f), would be pertinent to its duties. That provision authorizes a public body to conduct an executive session to discuss:

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

I would conjecture that a local conditional release commission might in some instances discuss, for example, the medical history of an inmate or perhaps a victim or that person's relations. In that event, I believe that an executive session could properly be held.

The other vehicle for excluding the public from a meeting involves "exemptions," and §108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session.

Relevant in the context of the matter is §108(1) of the Open Meetings Law, which exempts from the coverage of that statute "judicial or quasi-judicial proceedings..." From my perspective, it is often difficult to determine exactly when public bodies are involved in a quasi-judicial proceeding, or where a line of demarcation may be drawn between what may be characterized as quasi-judicial, quasi-legislative or administrative functions. I believe, however, that one of the elements of a quasi-judicial proceeding is the authority to take final action. While I am unaware of any judicial decision that specifically so states, there are various decisions that infer that a quasi-judicial proceeding must result in a final determination reviewable only by a court. In a decision that described a particular body indicated that "[T]he Board is a quasi-judicial agency with authority to make decisions reviewable only in the Courts" [New York State Labor Relations Board v. Holland Laundry, 42 NYS 2d 183, 188 (1943)]. Further, in a discussion of quasi-judicial bodies and decisions pertaining to them, it was found that "[A]lthough these cases deal with differing statutes and rules and varying fact patterns they clearly recognize the need for finality in determinations of quasi-judicial bodies..." [200 West 79th St. Co. v. Galvin, 335 NYS 2d 715, 718 (1970)].

According to §272 of the Correction Law, a local conditional release commission has the power to determine that certain persons sentenced within a county are eligible for conditional release, to revoke conditional release, and to authorize its members to administer oaths and take testimony of persons under oath. In consideration of those powers, I believe that the deliberations

of such a commission leading to a determination to grant or revoke conditional release may be characterized as quasi-judicial and exempt from the requirements of the Open Meetings Law. Nevertheless, its other business, such as policy making, the development of rules and procedures, and the taking of action could not be so characterized in my opinion, and could only validly occur during meetings held in compliance with the Open Meetings Law. 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)].

In short, while I believe that the Commission may deliberate in private when considering the release of an individual, it can take action or vote only at a meeting held in accordance with the Open Meetings Law.

Section 106 of that statute requires the preparation of 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."

In view of the foregoing, a motion to enter into executive session, as well as any other action taken during an open meeting, must be memorialized and included within minutes. Further, 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. While the Commission might in some instances have the authority to take action during executive session, for reasons described earlier, I do not believe that a record indicating the nature of its action, i.e., to grant or deny conditional release, could justifiably be withheld under the Freedom of Information Law.

Lastly, the Freedom of Information Law has since its enactment included what some have considered an "open vote" requirement. Section 87(3)(a) provides that:

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

Based upon the foregoing, when a final vote is taken by an agency, such as the Commission, 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 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Conditional Release Commission
Thomas N. Cioffi

STATE OF NEW YORK
DEPARTMENT OF STATE
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April 22, 2004

Mr. Eric Bashford
[redacted]

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

Dear Mr. Bashford:

I have received your letter in which you questioned the propriety of a fee assessed by the Westchester County Planning Department in response to a request for copies of certain records made pursuant to the Freedom of Information Law.

According to your letter, you asked "to inspect certain maps and photos", and the County "charged [you] $75 to comply and then a separate charge was imposed for the copies that [you] requested." You indicated that it is your understanding that an agency may charge a fee for copies, but that you are unaware of the authority of an agency to charge "a 'search fee' of $75 or any other amount."

From my perspective, no fee may be charged for searching for or inspecting records. As you suggested, the only fee that can be charged pertains to the reproduction of records. In this regard, I offer the following comments.

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

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

> only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS2d 214, 226 AD2d 339 (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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

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

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

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

Based upon the foregoing, a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or disk) to which data is transferred. If, for example, the duplication of the data involves a transfer of data

from one disk to another, computer time is minimal, likely a matter of seconds. If that is so, the actual cost may involve only the cost of the disks.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals, 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)].

In short, the fee charged by the County appears to be excessive and inconsistent with the Freedom of Information Law and its judicial interpretation.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Planning Department

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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April 22, 2004

Mr. John Farrell
02-A-4930
Bare Hill Correctional Facility
Caller Box 20
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. Farrell:

I have received your letter in which you state that you have filed various Freedom of Information Law requests and appeals and have received limited or no responses to those requests. You indicated that you "have heard that [the Committee on Open Government] was initiated primarily to compel disclosure of 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 and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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April 22, 2004

Mr. Stuart M. Ebanks
[redacted]

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

Dear Mr. Ebanks:

I have received your letter in which you asked for assistance in gaining access to reports from the Statewide Central Register of Child Abuse and Maltreatment. You were denied access on the ground that the reports were unfounded.

In this regard, I offer the following comments.

Although the Freedom of Information Law generally deals with rights of access to agency records, relevant in this instance is §87 (2)(a) of that statute, which provides that an agency may deny access to records or portions thereof that "are specifically exempted from disclosure by state or federal statute...". Section 422 of the Social Services Law is a statute which pertains specifically to the statewide central register utilized by an agency having responsibility regarding such matters. Subdivision (4)(A) of section 422 states that reports as well as information concerning those reports are confidential, and may be disclosed only under specified circumstances listed in that statute. One of those circumstances involves disclosures to " any person who is the subject of the report or other persons named in the report" [§422 (A)(d)]. In addition, subdivision (7) of section 422 states:

> "At any time, a subject of a report and other persons names in the report may received, upon request, a copy of all information contained in the central register; provided, however, that the commissioner is authorized to prohibit the release of date that would identify the person who made the report or who cooperated in a subsequent investigation or the agency, institutes, organizations, program or other entity where such person is employed or with which he is associated, which he reasonably finds will be detrimental to the safety or interests of such person."

Based on the foregoing, although a report may generally be available to a parent, those portions that would, if disclosed, identify the source of the report may be withheld to protect that person's privacy and safety.

Lastly, I note that subdivision (5) of §422 of the Social Services Law generally prohibits the disclosure of reports that have been determined to be unfounded. As such, if the reports were unfounded, it appears that they cannot be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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April 23, 2004

Mr. Jorge Sprau
Upstate Correctional Facility
86-A-7925
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. Sprau:

I have received your letter in which you requested an advisory opinion with respect to the availability of "misconduct complaints filed against a couple of correctional officers."

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

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

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

> 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)].

Based on the foregoing, I believe that the records of your interest would be exempt from disclosure pursuant to §50-a of the Civil Rights 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-14631

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April 23, 2004

Mr. Theodore Price
02-B-1431
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. Price:

I have received your letter in which you indicate that you have requested records under the Freedom of Information Law from the Office of the Corporation Counsel in Syracuse. As of the date of your letter, you had not received any responses to your requests.

In this regard, I offer the following comments.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mary Ann Doherty

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 26, 2004

Mr. Barry Mitchell
03-A-4319
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. Mitchell:

I have received your letter in which you requested advice concerning your right to obtain various records pertaining to your arrest. You indicated that you were told that you had no right to that information.

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

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

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for

> exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

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

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

In the context of your request, I am not suggesting that the records in question must necessarily be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

Second, from my perspective, unless an arrest or booking record has been sealed pursuant to §160.50 of the Criminal Procedure Law, it must be disclosed. Under that statute, when criminal charges have been dismissed in favor of an accused, the records relating to the arrest ordinarily are

sealed. In those instances, the records would be exempted from disclosure by statute [see Freedom of Information Law, §87(2)(a)].

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

With respect to the names of witnesses, complainants or victims, rights of access, or conversely, the ability to deny access, would in opinion be dependent on attendant facts. In some situations, a denial of access to the name of a complainant or victim may be appropriate. Under §50-b of the Civil Rights Law, police and other public officers are prohibited from disclosing the identity of the victim of a sex offense. Additionally, §87(2)(b) and (f) of the Freedom of Information Law provide respectively that an agency may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" or "endanger the life or safety of any person." There are often situations in which names or other identifying details pertaining to witnesses or victims may be withheld under those provisions. Again, I am not suggesting that the name of a victim may be withheld in all circumstances, but rather in those situations in which the exceptions cited above could justifiably be asserted.

Often most relevant is §87(2)(e), which permits an agency to withhold records that are:

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

The ability to deny access to records is dependent on the effects of disclosure. Only to the extent that the harmful effects described in subparagraphs (i) through (iv) would arise may §87(2)(e) be asserted.

In the context of criminal proceedings, a variety of information is routinely disclosed. An arraignment, for example, occurs during a public judicial proceeding, and information equivalent to that disclosed during an arraignment must, in my view, be disclosed by a police department or prosecutor. It has been held that once information has been disclosed during a public judicial proceeding, the grounds for denying access under the Freedom of Information Law no longer apply [see Moore v. Santucci, 151 AD2d 677 (1989)]. In sum, I believe that a blanket denial of a request for the kinds of records that you described would be inconsistent with law and that an agency must review the records to ascertain the extent to which they may properly be withheld.

Also pertinent with respect to internal governmental reports, memoranda and notes 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.

Lastly, the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)] may 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 possess 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 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,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 26, 2004

Mr. Phillip Sayles
00-A-4256
Mt. McGregor Correctional Facility
Box 2071
Wilton, NY 12831

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

Dear Mr. Sayles:

I have received your correspondence in which you complained that Albany County Clerk's Office is charging twenty-five cents per page for its "subject matter list." You indicated that according to §87(1)(b)(iii) of the Freedom of Information Law, "any person may request the Subject Matter List at no charge."

In this regard, I offer the following comments.

Section 86(4) of the Freedom of Information Law defines the term "record" to mean:

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

Therefore, when an agency receives a request for a subject matter list, which is a record produced by the agency, 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 or indicates that a copy of a subject matter list must be provided at no charge. 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 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 the foregoing serves to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Thomas G. Clingan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14634

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April 26, 2004

Mr. Elmer Heffelmire
92-B-1195
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. Heffelmire:

I have received your correspondence in which you complained that you were denied access to records by your correctional facility and that you have not received a response to your appeal. You also asked what does "unlawful prevention of public access records consist of."

In this regard, I offer the following comments.

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

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

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

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

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

Second, when an agency indicates that it cannot locate or does not maintain a record requested under the Freedom of Information Law, §89(3) enables the applicant for the record to seek a certification in which it is asserted by the agency "that it does not have possession of such record or that such record cannot be found after diligent search." In addition, §89(8) of the Freedom of Information Law and §240.65 of the Penal Law deal with "unlawful prevention of public access to records." The latter states that:

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

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. Having reviewed the materials attached to your correspondence, it appears that the facility does not maintain or cannot locate some of the records of your interest. As such, it does not appear that §89(8) of the Freedom of Information Law would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-14635

From: Robert Freeman
To: [redacted]
Date: 4/27/2004 9:02:50 AM
Subject: Hi Jon - -

Hi Jon - -

I clearly remember you and hope that you are happy and well.

Your questions deal with rights of access to autopsy and police reports relating to an open murder investigation. You wrote that the event occurred in 1996 and that the "prime suspects" have been named by the police on several occasions in the news media.

In this regard, first, under the County Law, §677, autopsy reports are available as of right only to the next of kin and the district attorney; any others would need a court order to attempt to obtain those records when they are withheld by a coroner or medical examiner. This is not to suggest that a coroner or medical examiner, a police department or a district attorney could not choose to disclose an autopsy report; rather I am suggesting that you would not have a right to gain access to the report.

With respect to police records relating to the incident, several provisions might be pertinent. As you may recall, the NY FOIL is based on a presumption of access; records or portions of records may be withheld only in accordance with the exceptions to rights of access listed in §87(2) of the law. Most are based upon potentially harmful effects of disclosure.

Perhaps most significant in the context of your inquiry is §87(2)(e), which authorizes an agency to withhold records "compiled for law enforcement purposes" to the extent that disclosure would interfere with an investigation or judicial proceeding, identify a confidential source, etc. Another exception that may be pertinent involves the protection of privacy, which might enable an agency to withhold portions of records that identify witnesses, persons interviewed, etc.

From my perspective, as time passes, and as more information is made public (i.e., the names of suspects), the ability of an agency to deny access decreases.

For fuller explanations, it is suggested that you go to the index to FOIL opinions on our website and click on to "A" for "autopsy report" and "L" for "law enforcement purposes." Opinions prepared within the past ten years are accessible in full text, and they should offer additional guidance concerning developments in case law and what you might properly expect.

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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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14636

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April 27, 2004

Mr. John Mandala
89-A-1920
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. Mandala:

I have received your letter in which you sought an advisory opinion concerning a request you submitted to the Division of Parole. You requested a variety documents concerning Parole Board members, such as salaries, educational backgrounds, age, marital status, political affiliations, county of residence, health/retirement and other benefits, psychological history, criminal history, special training and schooling, as well as federal and state income tax paid by each commissioner. You also requested specific sections of law which contain employment requirements and qualifications for Board members, as well as the NYS Division of Parole training manual for parole commissioners.

In this regard, I offer the following general comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request for information. I would conjecture that many aspects of your request, such as psychological histories and income tax paid by Board members, would not be maintained by the Division of Parole. I note, too, that §259-b(4) of the Executive Law specifies that members of the board "shall not hold other public office" and "cannot serve as a representatives of any political party..."

Second, with respect to salary information, §87(3)(b) provides in relevant part that:

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

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

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. Relevant to the matter is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

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

I note that it has been held that disclosure of a public employee's general educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Further, §259-b(2) of the Executive Law states that:

> "Each member of the board shall have been awarded a degree from an accredited four-year college or university or a graduate degree from such college or university or accredited graduate school and shall have had at least five years experience in one or more of the fields of criminology, administration of criminal justice, law enforcement, sociology, law, social work, corrections, psychology, psychiatry or medicine."

In Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that portions of resumes must be disclosed. The Committee's opinion stated that:

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

"The Opinion further stated that:

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

In short, I believe that a public employee's educational background, as well as other items pertinent to that person's employment, must be disclosed. However, from my perspective, the age, marital status or other personal details concerning a public employee are largely irrelevant to the performance of their official duties and, therefore, would, if disclosed, constitute an unwarranted invasion of personal privacy.

Lastly, with respect to your request for the training manual for parole commissioners, while instructions to staff that affect the public and final agency policies or determinations are generally accessible under subparagraphs (ii) or (iii) of §87(2)(g) of the Freedom of Information Law, if such records exist, there may be instances in which those records or portions thereof may be withheld.

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

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

> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

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

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

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the investigative techniques or procedures contained in the records sought incident and the ensuing investigation could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

The other provision that may be pertinent as a basis for denial is §87(2)(f). Again, that provision permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." If, for example, disclosure of an instruction to staff or policy would jeopardize the lives or safety of public employees or others, the cited provision might be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14637

41 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 27, 2004

Mr. Richard Morgan
03-A-4932
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

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

Dear Mr. Morgan:

I have received your letter in which you complained that your Freedom of Information Law requests directed to various entities have not been answered.

In this regard, I offer the following comments.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14638

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 27, 2004

Mr. Cerious McCray
00-A-2361
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. McCray:

I have received your letter in which you complained that your Freedom of Information Law requests have been ignored or denied. You also stated that the New York City Police Department has "failed to provide evidentiary proof that they conducted a 'diligent search' for the requested 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. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification. I note that the state's highest court has held that certification is not required to be issued or prepared by the person who actually made the search [Rattley v. New York City Police Department, 96 NY2d 873 (2001)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14639

41 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 27, 2004

Mr. Frank Troiano
92-A-8408
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 information presented in your correspondence.

Dear Mr. Troiano:

I have received your letter in which you requested copies of your plea bargain and sentencing minutes from the Greene County Court and the County Attorney's Office to no avail. You indicated that copies were supplied to you years ago, but have since been lost.

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, along with you, should prepare affidavits so stating that can be submitted to the office of the county attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14641

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 28, 2004

Mr. Ron J. Venticinque
00-A-3176
Auburn Correctional Facility
135 State Street
Auburn, NY 13024

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

Dear Mr. Venticinque:

I have received your letter in which you requested assistance concerning requests directed to various governmental agencies, as well as the Bronx Legal Aid Society, the Bronx Supreme Court and three hospitals. You indicated that many of your requests have gone unanswered,

In this regard, I offer the following comments.

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

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

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

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

Based on the provisions quoted above, the courts 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. Additionally, I note that federal agencies are subject to the federal Freedom of Information Act, not the New York Freedom of Information Law.

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

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

Third, Metropolitan Hospital and Coney Island Hospital are part of the New York City Health and Hospitals Corporation. Therefore, I believe that they are units of an agency required to comply with the Freedom of Information Law.

Fourth, 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 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.

A different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you renew your request and make specific reference to §18 of the Public Health Law in any request for medical records.

With respect to requests made to Our Lady of Mercy Hospital, since that hospital is a private entity, the Freedom of Information would not be applicable. However, §18 of the Public Health Law would apply, and I believe that a request could be made pursuant to that statute.

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

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

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

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

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

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

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1642

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 28, 2004

Mr. Larry G. Mack
[redacted]

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

Dear Mr. Mack:

I have received your letter and the materials attached to it. As I understand the situation, it was alleged in a written complaint that a named individual engaged in fraud and violation of the Penal Law. Although the matter was investigated, it appears that a decision was made not to prosecute.

As you are aware, the Freedom of Information Law is based on a presumption of access and states, in brief, that government records must be disclosed, unless one or more exceptions to rights of access listed in §87(2) of that statute can be asserted. It appears that the first ground for denial of access, §87(2)(a), is particularly relevant in the situation described in the correspondence. That provision pertains to records that "are specifically exempted from disclosure by statute or federal statute."

One such statute is §160.50 of the Criminal Procedure Law, which deals with the "termination of a criminal action or proceeding against a person in favor of such person." In those cases, the records pertaining to the matter are sealed and, therefore, exempted from disclosure. I note that subdivision (3), paragraph (i) of §160.50 states that "a criminal action or proceeding against a person shall be considered terminated in favor of such person where....prior to the filing of an accusatory instrument in a local criminal court against such person, the prosecutor elects not to prosecute such person." The facts as indicated in the correspondence suggest that the records at issue would have been sealed. For your information, when the conclusion of a proceeding involves a conviction, either by plea agreement or a trial, a record reflective of the conviction is accessible to the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1416(13

41 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 28, 2004

Mr. Jose Rodriguez
1410370319
1600 Hazen Street
East Elmhurst, NY 11307

The staff of the Committee on Open 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 your Freedom of Information Law request directed to the New York City Police Department was acknowledged, stating that it would take 120 days for staff to search and review the records of your interest to determine which records or portions of records would be responsive to your 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.

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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lieutenant Michael Pascucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14644

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 28, 2004

Mr. Lawrence Squittieri
03-R-0995
Bare Hill Correctional Facility
Caller Box 20
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. Squittieri:

I have received your letter in which you requested assistance in obtaining information from the Parole Office at your correctional facility. Specifically, you raised a series of questions concerning presumptive release and merit time.

In this regard, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information responsive to a request, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. In short, while agency staff could provide the information sought, they would not be required to prepare a record or answer questions. In short, if there is no record, the Freedom of Information Law would not apply.

I hope that the foregoing serves to clarify your understanding of the law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1464S

41 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 28, 2004

Mr. Benjamin Grimes
00-A-1447
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. Grimes:

I have received your letter in which you requested assistance in gaining access to records that indicate visits made to you at the Rensselaer County Jail. As of the date of your letter to this office, you had not received a response to your request.

In this regard, I offer the following comments.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, 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 list exists, none of the grounds for denial would be applicable.

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

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

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

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

> (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1460

41 State Street, Albany, New York 12231
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April 28, 2004

Mr. Ishmiel Drumgoole
93-B-1395
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 information presented in your correspondence.

Dear Mr. Drumgoole:

I have received your letter in which you asked for assistance concerning your Freedom of Information Law requests directed to your court appointed attorney which have not been answered.

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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14647

41 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 28, 2004

Mr. Kasiem Chaves
84-A-2179
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. Chaves:

I have received your letter in which you asked whether you must appeal a denial of access for records or whether you may "file a mandamus motion with a court without being in violation of not having exhausted administrative remedies."

I believe that an initial denial of access must be appealed and that the appeal must be denied in order to exhaust one's administrative remedies. When that occurs, a judicial proceeding may be initiated.

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

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

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

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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)].

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).

Lastly, I point out 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 point out, too, that the lower court in Floyd, supra, determined that the records should have been disclosed by virtue of the agency's failure to respond, but that the Appellate Division modified

that aspect of the decision. Although the Appellate Division confirmed that a failure to respond to an appeal within the statutory time constitutes a constructive denial of access, thereby resulting in the exhaustion of one's administrative remedies and the right to initiate an Article 78 proceeding, it was also found that such failure did not automatically require that the agency disclose the requested records. Specifically, in rejecting the Supreme Court's automatic grant of access, the Appellate Division found that:

> "We think this is too rigid an interpretation of the statute. As a textual matter, if the effect of failure to comply were as Special Term interpreted it, it would have been more appropriate for the statute to say that if (A) the agency did not furnish the explanation in writing then (B) the agency must provide access to the material sought. Instead, however, the statute is phrased in the alternative form of requiring the agency within seven days to do either (A) or (B). As a textual matter there would appear to be no particular reason to say that failure to do either (A) or (B) would require the agency to do (B) rather than (A), which is the choice Special Term made.
>
> "More important, as a policy matter, we do not think the statute should be interpreted so rigidly to require the result directed by Special Term. We recognize the importance of prompt response by the agency to the request for information. Such responsiveness and accountability are the very point of FOIL. But the same statute also expresses the public policy that some kinds of material should be exempt from disclosure. Both policies must be considered. To say that even the slightest default in timely explanation destroys the exemption seems to us too draconian. We think the seven-day limitation should be read as directory rather than mandatory, and that the consequence of failure by the agency to comply with the seven-day limitation is that the applicant will be deemed to have exhausted his administrative remedies and will be entitled to seek his judicial remedy" (id., 87 AD 2d 388, 390).

I note that at the time of the decision, the statutory time for responding to an appeal was seven days; it is now ten business days.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14648

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 28, 2004

Mr. James Twitty
01-A-3177
Southport Correctional Facility
Box 2000
Pine City, NY 14871

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

Dear Mr. Twitty:

I have received your letter in which you complained that your Freedom of Information Law requests directed to the Queens County District Attorney's Office were acknowledged, stating that it would take sixty days for staff to research and review the records of your interest to determine which records or portions of records would be responsive to your requests.

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

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

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

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.

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)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14649

41 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 29, 2004

Mr. Ramel Narine
97-A-7651
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. Narine:

I have received your letter in which you complained that on several occasions you wrote to the NYS Division of Parole for various records and have only received one reply indicating that your "request would be reviewed" and that you "can expect a response in thirty days." As of the date of your letter to this office, you had not received a response. As such, you have requested that this office forward those records to you.

In this regard, it is noted that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office does not maintain records generally, and, therefore, does not possess the records of your interest. However, I offer the following comments.

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

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

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

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

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

The person designated by the NYS Division of Parole to determine appeals is Terrence X. Tracy, Counsel.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14650

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

April 29, 2004

Mr. Frank Hart
02-A-1351
Bare Hill Correctional Facility
181 Brand 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. Hart:

I have received your letter in which you complained that you have not received any responses to your Freedom of Information Law requests for your mental health records.

In this regard, I offer the following comments.

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

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

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

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

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

Second, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If the Washington Correctional Facility maintains the records as a facility, I believe that it would be required to disclose the records to you to the extent required by §33.16 of the Mental Hygiene Law. Alternatively, it is possible that the records in question were transferred when you were placed in a state correctional facility. If that is so, the records may be maintained by a different agency. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1416 51

41 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 29, 2004

Mr. Lawrence Devers
00-A-5790
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. Devers:

I have received your letter in which you sought assistance in obtaining videotapes of events occurring at your facility. As of the date of your letter to this office, you had received no response to your requests.

In this regard, I offer the following comments.

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

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

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

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

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

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 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. 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14652

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 29, 2004

Mr. Demaine Jackson
02-B -0887
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

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

Dear Mr. Jackson:

I have received your letter in which you requested advice concerning records maintained by the Workers' Compensation Board. It appears that you possess a variety of personal materials concerning another person's case and would like to know if they are the same documents that are filed with that agency.

In this regard, I offer the following comments.

To put the matter in perspective, the Freedom of Information Law pertains to all agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Pertinent in this instance is §87(2)(a) which states that an agency may deny access to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §110-a of the Workers' Compensation Law, prohibits disclosure of personally identifiable information about a claimant contained in a workers' compensation record. Therefore, unless the records relate to you, the Board would be prohibited from disclosing the information to you.

However, §110-a(3) states in relevant part that:

> "...a person who is the subject of a workers' compensation record may authorize the release, re-release or publication of his or her record to a specific person not otherwise authorized to receive such record, by submitting a written authorization for such release to the

board on a form prescribed by the chair or by a notarized original authorization specifically directing the board to release workers' compensation records to such person."

As such, if the person to whom the records pertain submits an authorization to the Board, you would be permitted to acquire the information of your interest.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14653

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April 29, 2004

Mr. Louis Wilner
91-A-9011
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. Wilner:

I have received your letter in which you stated that you requested your sentencing transcripts from your correctional facility and were told that the facility was not furnished a copy of the transcripts as required by §380.70 of the Criminal Procedure Law. You asked if you would be able to obtain them from the court.

In this regard, I offer the following comments.

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

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

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

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

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 rights of access to those records. It is suggested that you submit a request to the clerk of the court and cite 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-14654

From: Robert Freeman
To: [redacted]
Date: 4/29/2004 3:47:29 PM
Subject: Dear Ms. Harrington:

Dear Ms. Harrington:

I have received your inquiry concerning access to financial disclosure statements filed by the town assessor.

As you aware, the Freedom of Information Law is based on a presumption of access, requiring that records be disclosed, except to the extent that one or more grounds for denial of access might properly be asserted.

If the Town's disclosure statements are similar to most others or are based on the format appearing in the General Municipal Law, they are accessble to the public, except those portions that indicate the value of an asset or liability. For example, on my disclosure statement, the public has the right to know that I own shares in a particular corporation, but the portion of the form indicating the value or category of value of the shares is deleted. Also, a public employee in most instances may ask that portions of the statement that have no material bearing on the performance of his or her duties may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

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

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

April 30, 2004

Mr. Kelvin Subgidio
99-A-6747
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

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

Dear Mr. Subgidio:

I have received your letter in which you complained that the Rockland County District Attorney's Office has been ignoring your requests for records. You also attached a copy of a Freedom of Information Law request directed to the Rockland County Court for grand jury records.

In this regard, I offer the following comments.

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

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

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

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

Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law.

Second, with respect to your request for grand jury records, §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 records would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

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

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

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

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

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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14656

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

April 30, 2004

Mr. Kristofer Surdis
99-R-1010
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. Surdis:

I have received your letter in which you complained that your requests directed to the Town of Ulster Police Department have been ignored. You indicated that you have requested records pertaining to various incidents occurring between October 1, 1992 and the present.

In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

While I am unfamiliar with the recordkeeping systems of the Town, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request,

to that extent, the request would not in my opinion meet the standard of reasonably describing the records. If an office maintains all of its records regarding telephonic bomb threats in a single file, it may be a simple task to locate the records. If, however, records are not maintained by subject, but rather are kept chronologically, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

Lastly, it is possible that records involving matters as long as twelve years ago might have been destroyed. Insofar as requested records no longer exist, the Freedom of Information Law would not apply.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Chief of Police
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-1657

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

April 30, 2004

Mr. Zsolt Racz
03-A-5353
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. Racz:

I have received your letter in which you asked whether various opinions that allow "wavier for copying fees and requiring access for free inspection" apply to inmates. You also asked "if any Law requires meaningful answer/response, decision to FOIL requests."

In this regard, I offer the following comments.

First, §87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying, and the regulations promulgated by the Committee on Open Government state in part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3). In my view, neither the Law nor the regulations require that records be transferred from their usual locations to accommodate an applicant at a site convenient to the applicant. In short, while inmates may be indigent or unable to travel, I do not believe that an agency is required to make records available at other than its designated or customary locations.

Second, I point out that there is nothing in the Freedom of Information Law that 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 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.

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

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

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

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

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

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14658

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

May 4, 2004

Mr. Leon Korobow
[redacted]

Dear Mr. Korobow:

I have received your letter and the materials attached to it. The materials include records that were made available to you by the NYS Department of Environmental Conservation, but which were withheld by the Village of Great Neck on the ground that they consist of "inter-agency or intra-agency materials." You have asked that I offer an "assessment of the denial "of access by the Village.

Access to the records at issue was considered in an advisory opinion addressed to you in January. At that time, the exception to rights of access concerning inter-agency and intra-agency materials, §87(2)(g) of the Freedom of Information Law, was considered in detail, particularly in relation to the construction of that provision by the Court of Appeals, the state's highest court. The decision rendered in Gould v. New York City Police Department [89 NY2d 267 (1996)] was cited, and passages in that decision were quoted to offer three essential points; first, that exceptions to rights of access must be narrowly construed and can only be proper where the material requested "falls squarely within the ambit" of an exception (id., 275); second, that elements of inter-agency or intra-agency materials, notably statistical or factual information, must be disclosed, even if the records do not relate to a matter that is considered final; and third, that the purpose of the exception is to enable government agencies to "safeguard internal deliberations" that reflect "opinions, ideas or advice exchanged as part of the consultative or deliberative process" (id., 276-277).

Having reviewed the records at issue, little of their content could, in my view, be considered to reflect a "consultative or deliberative process" or consist of opinions or advice. While minimal portions of the records might justifiably have been withheld pursuant to §87(2)(g), the remainder in my opinion should have been disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Richard E. Deem

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14659

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

May 4, 2004

Mr. Tyrone Pallins
90-A-2725
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 Pallins:

I have received your letter in which you indicated that you have not received any response to your request for your case records reviewed by the Parole Board.

In this regard, I offer the following comments.

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

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

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

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

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

Second, it is unclear whether you have a right to all of your case records. The regulations promulgated by the Division of Parole state in relevant part that you may obtain "those portions of the case record which will be considered by the board or authorized hearing officer or pursuant to an administrative appeal of a final decision of the board..." [9 NYCRR §8000.5(c)(2)(i)]. Other materials are exempt from disclosure under other provisions of the regulations.

As suggested above, the regulations appear to recognize due process, for you should have the ability to gain access to records "to be considered" at a hearing. Further, the exceptions described in the regulations are, in my view, consistent with the grounds for withholding records appearing in §87(2) of the Freedom of Information Law. For instance, diagnostic opinions could likely be withheld under §87(2)(g) of the Freedom of Information Law; records identifying sources of information obtained upon a promise of confidentiality could likely be withheld under §87(2)(b) or (e)(iii); information which if disclosed would endanger the life or safety of any person could be withheld pursuant to §87(2)(f); and pre-sentence reports and memoranda are exempt from disclosure pursuant to §390.50 of the Criminal Procedure Law and, therefore, §87(2)(a) of the Freedom of Information Law.

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14060

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

May 4, 2004

Mr. Darren L. Knight
96-A-7776
Eastern New York 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 information presented in your correspondence.

Dear Mr. Knight:

I have received your letter in which you asked whether under the Freedom of Information Law you may obtain "Grand Jury Instructions."

In this regard, although the Freedom of Information Law is based upon a presumption of access, the first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law, states in relevant part that:

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

Since the provision quoted above pertains not only to testimony, but "any matter attending a grand jury proceeding", I believe that the records in question would be exempted from rights conferred by the Freedom of Information Law.

Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14601

41 State Street, Albany, New York 12231
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May 4, 2004

Mr. Norman Schachter
02-A-3134
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. Schachter:

I have received your letter in which you requested information on how you may obtain oaths of office for state judges and district attorneys. You also raised questions concerning the requirements to hold positions as judges and district attorneys.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. As such, questions concerning the requirements to hold various positions in government are outside the jurisdiction and expertise of this office.

However, concerning the subject of oaths of office, I sought to research the matter and found direction in §10 of the Public Officers Law. 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."

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1462

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

May 4, 2004

E-MAIL

TO: Teresa Babcock <babcockt@canton.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 Ms. Babcock:

As you are aware, I have received your letter in which you questioned the propriety of a denial of a request for certain "fund raising records" maintained by a school district. The district official apparently wrote that "Technically, I don't think the school has to redo any records that are already in existence." You wrote that the official's response "relates to the fact that some of the fund raising records have student names" and you were informed that those records "cannot be released or reviewed due to FERPA law."

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all records kept by or for an agency, such as a school district. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I point out that the introductory language of §87(2) refers to an agency's ability 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 the State Legislature recognized that there are records that include both information available to the public, and perhaps portions of those records that may be withheld. That language also imposes an obligation on an agency to review requested records in their entirety to determine which portions if any, may justifiably be withheld.

Second, relevant in the context of your inquiry is the initial ground fro denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the federal Family Education Rights and Privacy Act ("FERPA"; 20 U.S.C. §1232g). FERPA generally provides parents of minor students with rights of access to education records identifiable to their children. Concurrently, it prohibits the disclosure of information that is personally identifiable to a student unless the parent of the student consents to disclosure. I point

out that the regulations promulgated by the U.S. Department of Education pursuant to FERPA define the phrase "personally identifiable information" to mean any information that would make a student's identity easily traceable (see 34 C.F.R. §99.3).

If students' names or other identifiers can be deleted from an existing record so that the identities of the students would not be easily traceable, I believe that the district would be required to do so and to disclose the remainder. The deletion of those details would not require that the district "redo" its records; rather, the district would be disclosing portions of an existing record.

If students' names are listed alphabetically on a record and deletion of identifying details would not serve to protect their privacy, an Appellate Division decision, a decision rendered by the state's second highest court, required that the district delete the identifying details and then "scramble" the list. By scrambling the list, there was no possibility that a student would be identified [see Kryston v. Board of Education, East Ramapo School District, 430 NYS2d 688, 77 AD2d 896 (1980)].

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1416

41 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 4, 2004

Ms. Francine J. George
[redacted]

The staff of the Committee on 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. George:

I have received your correspondence, as well as the materials relating to it. You have requested "consideration" relative to your requests for information made to the Department of Public Service.

Based on a review of your initial request, I would like to offer clarification. I note at the outset that the title of the Freedom of Information law may be misleading. In short, that statute does not require that government agencies provide information *per se* or that agency staff must offer information in response to questions. Rather, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. In the first aspects of your request, three items (a) through (c), you sought information by rasing questions. While an agency may choose to provide information by answering questions, it is not obliged to do so to comply with the Freedom of Information Law. In item (d), you requested a "manifest" identifying all of the materials sought in items (a) through (c). If such a record exists, the Freedom of Information Law would be applicable. If, however, if no such "manifest" or list of records exists, the Department would not be required to prepare a record on your behalf that contains the information of your interest.

In the future, rather than seeking information by raising questions, it is suggested that you request existing records. I point out, too, that §89(3) states that an applicant must "reasonably describe" the records sought. Therefore, a request should include detail sufficient to enable agency staff to locate and identify the records.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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)].

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: John P. Starrs

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14604

41 State Street, Albany, New York 12231
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May 5, 2004

Mr. Ricardo Burgos
87-B-2016
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. Burgos:

I have received your letter in which you complained that you have not received a response from the NYS Department of Correctional Services concerning your Freedom of Information Law request for "the names of all former Deputy Counsels and Counsels to NYSDOCS within the last seven to five years."

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 he approximate date when such request will be granted or denied..."

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

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

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

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

Second, §87(3)(b) of the Freedom of Information Law has long required that agencies maintain and make available a record that includes employees' names and titles. Insofar as there are records containing the items of your interest, I believe that they must be disclosed.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-14065

From: Robert Freeman
To: townclerk@townofwallkill.com
Date: 5/5/2004 12:41:57 PM
Subject: Dear Ms. Ingrassia:

Dear Ms. Ingrassia:

I have received your inquiry concerning access to "the Paid Tax roll with amounts paid."

In this regard, when the Freedom of Information Law (FOIL) applies, relevant would be the provision indicating that a list of names and addresses may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy, when the list would be used for a commercial or fund-raising purpose. However, if the information is contained within an assessment roll, that record, in my view, would be accessible. In short, the assessment roll is independently available under a different statute, §516 of the Real Property Tax Law. When a record is accessible under a provision of law separate from the FOIL, none of the exceptions in FOIL can be asserted to deny access.

I hope that I have been of assistance. If you would like to discuss the matter or if there are additional 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

FOIL-AO-
14606

From: Robert Freeman
To: jmercer
Date: 5/5/2004 11:33:05 AM
Subject: Fwd: Dear Mr. Buglione:

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

>>> Robert Freeman 5/5/2004 11:32:35 AM >>>
Dear Mr. Buglione:

Technically, I believe that you are correct. The FOIL pertains to all agency records and provides that all such records are available, except "records or portions thereof" that fall within the grounds for denial of access that are listed in §87(2). Based on the direction given in the law, I believe that an agency must retrieve the records sought, review them in their entirety, and determine which portions, if any, may justifiably be deleted or redacted prior to disclosure of the remainder.

In short, while the summaries made available to you might accurately represent the contents of the actual evaluations, I believe that you have a right to gain access to the evaluations themselves, after the appropriate deletions have been made.

I hope that I have been of assistance.I

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

FOIL-AO- 14667

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

May 5, 2004

[redacted]

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

Dear [redacted]

As you are aware, I have received your letter and the correspondence relating to it. The matter relates to "[y]our rights as parents with respect to accessing [y]our daughter's records from the Lake George Central School District."

In brief, your daughter qualified to apply for selection to the District's chapter of the National Honor Society. You wrote that she is in the top ten percent of her class, "has a full resume of activities and service to school and community, and to [y]our knowledge has no discipline record or other maladjustments." Despite her stellar record, her application was rejected, and although the reasons were given to you verbally based on faculty evaluations, you did not feel that those comments accurately reflected your daughter's personality or attitude. Following an attempt to appeal the decision, you were told "that all records had been destroyed according [to] the school's regular, routine, long-standing procedure of immediately purging all materials after student notification." You referred to the NYS Records Retention Deposition Schedule, which indicates that "National Honor Society student selection records' must be retained for "1 year after end of school year."

You have questioned the propriety of the District's actions and raised a variety of questions. In this regard, I offer the following comments.

First, the Freedom of Information Law, the statute within the advisory jurisdiction of this office, does not deal with the preservation or destruction of records. More relevant in my view is the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made,

> produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

In view of the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. I note that the provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives.

Reference was made in a response to your attorney by the President of the Board of Education to Decision No. 14,889 rendered by the Commissioner of Education, which also pertained to an application to the National Honor Society that was rejected. While I must, in good faith, respect the Commissioner's decision, I do not understand how the provisions of the Arts and Cultural Affairs could have been essentially ignored. The decision states that:

> "Respondent [the school district] asserts that destruction of the evaluative materials is routine practice in the district, and complies

> with NHS procedures as set forth in the NHS Handbook.. Respondent used the 15th Edition of the NHS Handbook (1997), which respondent indicates is the most recent edition. The Handbook at pp.90-91 recognizes that most faculty councils do not retain their working papers after making the final selection decisions. This procedure is thus not in violation of NHS procedures and requirements, and I decline to order any changes to this procedure."

From my perspective, the guidelines issued by the National Honor Society are not law and are not binding. In my opinion, what should be controlling are provisions promulgated by the State Education Department. Again, you referred to a portion of the Records Disposition Schedule ED-1 that pertains to kinds of records at issue and prescribes the retention period as follows:

> "National Honor Society student selection records including but not limited to information on qualifications of eligible students, teacher ratings of students, school's honor society committee voting records and list of students selected for membership: 1 year after end of school year."

While the decision rendered by the Commissioner did not refer to the portion of the schedule quoted above and did not reject it, the retention period of one year after a school year would appear to have been applicable in the context of the situation that you described.

Absent the ability to gain access to the records that you have requested, there appears to be little or no accountability relative to the Honor Society selection process.

Second, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency, such as a school district, is not required to create a record in response to a request. Therefore, insofar as records that you have sought no longer exist, 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) 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.

Third, the Freedom of Information Law pertains to all existing records maintained by or for an agency and defines the term "record" expansively to include:

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

The Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Further, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Also pertinent is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "FERPA". In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of

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

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

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld from the public in order to comply with federal law. Concurrently, if a parent of student requests records pertaining to his or her child, the parent ordinarily will have rights of access to those portions of records that are personally identifiable to their children.

I point out that the federal regulations exclude from the definition of "education records" :

> "Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record..." [34 CFR 99.3(b)(1)].

In consideration of the direction provided by FERPA, any notes or other records prepared by a teacher or administrator identifiable to your daughter that have been revealed or disclosed to any other person would in my view constitute education records that would be available to you as a parent. I note that the term "disclosure" is defined in the federal regulations to include not only releasing a written document, but also verbally indicating the content of a written document. In addition, if, upon review of education records, you as a parent consider the contents to be inaccurate, you have the right to request to amend the record (34 C.F.R. §99.20 and 21). If the request is denied, you would have the right to a hearing.

On the other hand, if, for example, an administrator or teacher prepares notes of a meeting and does not share or disclose the notes to any other person, FERPA would not apply. In that scenario, even though FERPA would not apply to the notes, due to the breadth of the definition of "record" in the Freedom of Information Law, the notes would fall within the scope of that statute. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently,

all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Assuming that the Freedom of Information Law governs rights of access rather than FERPA, pertinent to an analysis of rights of access to notes or similar records 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 affecr the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

If notes taken at a meeting merely consist of a factual rendition of what was said or what transpired, they would consist of factual information available under §87(2)(g)(i), except to the extent that a different ground for denial could be asserted [i.e., §87(2)(b) concerning the protection of privacy]. Insofar as notes might include expressions of opinion, or conjecture on the part of the author, they would fall within the scope of the exception.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Board of Education
Louis Buck
Michael J. Muller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14668

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

May 5, 2004

Ms. Brenda Hogans
03-G-1103
Beacon Correctional Facility
P.O. Box 780
Beacon, NY 12508-0780

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

Dear Ms. Hogans:

I have received your letter in which you asked for assistance concerning your request directed to the Schenectady County Court for "grand jury allocution" and "plea allocution minutes"

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

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

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

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

Based on the provisions quoted above, the courts and are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records.

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

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14609

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

May 6, 2004

Mr. Bernard Johnson
99-A-6283
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. Johnson:

I have received your letter in which you asked what steps to take if you receive no response to your appeal from the New York City Police Department.

As indicated in our letter to you dated February 20, 2004, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm
cc: Jonathan David

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14670

41 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 10, 2004

Mr. Michael J. Chowka III
BOP Reg. No. 09712-052
FCI Ray Brook
P.O. Box 9009
Ray Brook, NY 12977-9009

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

Dear Mr. Chowka:

I have received your letter in which you asked for assistance in obtaining your entire police file, including all traffic stops and tickets issued to you, from the Catskill Police Department. The materials attached to your letter indicate that certain records were made available to you and that the Police Department does not possess any other records relative to your request. It was also indicated that records may exist on older computer programs but they are not accessible at this time for there is no way to retrieve them.

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, with respect to traffic stops and tickets issued to you, it appears that 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 Police Department, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. If the Department maintains all of the traffic stops and traffic tickets issued to you in a single file, it would be a simple task to locate the records. If, however, records are not maintained in your file, but rather are kept chronologically, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

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

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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Roger A. Masse, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14671

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May 10, 2004

Mr. Edward J. Rubeo
[redacted]

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

Dear Mr. Rubeo:

As you are aware, I have received your correspondence and the materials related to it. I hope that you will accept my apologies for the delay in responding. Please note that the staff of the Committee consists of four, one of whom has been on leave for a month, and that staff receives approximately 7,000 telephone inquiries and prepares some 800 written advisory opinions annually. In fairness, responses to requests for opinions are prepared in the order in which the requests are received.

I point out, too, that although the Lieutenant Governor is a member of the Committee, she is not "directly responsible for enforcing the Freedom of Information Law." While this office has the authority to issue advisory opinions, neither the Committee nor any other agency has the authority or the responsibility to enforce the law. It is our hope, however, that the opinions rendered by this office are educational and persuasive, and that they enhance compliance with and understanding of the Freedom of Information Law.

By way of background, you wrote that:

> "A tractor-trailer accident had temporarily forced the closing of portions of the Henry Hudson Parkway and the Cross Bronx Expressway near the George Washington Bridge. I turned off the nearest exist, at West 79th Street, where a young policeman was directing traffic. He motioned for me to turn north onto Riverside Drive - then promptly issued me a summons when I obeyed his order.

> "I noticed that the 'No Left Turn' signs at the intersection were not pointing toward Riverside Drive, as the officer claimed. He refused to examine the signs with me, explaining that they had been ambiguously oriented so that he could capriciously ticket motorists traveling in any direction. He alleged that this had been done in response to letters from local residents who were interested in decreasing the volume of traffic on that particular block. As the officer described it, the NYPD had been ordered to invent reasons to ticket as many drivers as possible.
>
> "The installation of 'No Left Turns' at West 79th Street and Riverside Drive appears to violate State and federal regulations (NYSMUTCD and MUTCD, respectively). I photographed the intersection from all angles to document their placement. I later learned that the signage had been changed immediately before the NYPD's brief ticketing spree, and altered again immediately afterward."

The events as you described them precipitated requests for records made to several New York City agencies, as well as the New York State Department of State. In consideration of the events and the issues raised in your correspondence, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there are no records indicating the reason for prohibiting a left turn at a certain intersection or which offer "proof" that any such reasons are valid, an agency would not be required to create records that contain information responsive to a request.

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

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

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

The definition of "record", particularly as it has been construed by the Court of Appeals, the state's highest court, is pertinent in relation to your request for a "traffic ticket book". The New York City Police Department denied your request for that item because it "is not in the possession or control of this Department." Essentially the same contention was made in Gould v. New York City Police Department [89 NY2d 267 (1996)] in response to a request for police officers' memo books, which are also known as "police activity logs." In rejecting the Department's position, the Court found that:

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

I am unaware of whether the traffic ticket book is the same as a police activity log or memo book. Nevertheless, based on the direction provided by the Court of Appeals, the principle would be the same, that a traffic ticket book, while in the physical possession of an officer, clearly constitutes an agency record that falls within the scope of the Freedom of Information Law. The extent to which its contents must be disclosed will be considered later in this opinion

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

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

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

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

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

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 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)].

Next 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, supra, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for

> exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

Relevant with respect to many of your requests, and especially in relation to the requests made to the New York City Department of Transportation and the Police Department is §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. 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.

In Gould, supra, the Court of Appeals specified that factual information within certain police reports must be disclosed, unless a separate exception to rights of access may properly be asserted, even though the reports did not relate matters determined to be final. The Court also emphasized that the purpose of the exception involves the ability of government officials to engage in the deliberative process, to offer opinions, advice, recommendations and the like. To the extent that communications between or among agencies or which may be contained in a police officer's memo book or similar document contain commentary reflective of the deliberative process, I believe that they may be withheld. However, other aspects of the documentation, such as statistical or factual information, must generally be disclosed.

While I believe that the Police Department could properly have withheld certain other records that you requested, others, in my view, must be disclosed.

Since elements of the request involve a police officer, pertinent is §87(2)(a), which concerns records that "are specifically exempted from disclosure by state or federal statute. One such statute is §50-a of the Civil Rights Law, which states that personnel records pertaining to police officers that are "used to evaluate performance toward continued employment or promotion" are confidential. Records falling within the coverage of that statute cannot be disclosed, unless a police officer consents to disclosure or a court orders disclosure.

Motor vehicle accident reports, however, are clearly available and have been accessible pursuant to §66-a of the Public Officers Law for more than sixty years. Moreover, the Court of Appeals has held that accident reports are available to any person [Scott, Sardano & Pomeranz v. Records Access Officer, 65 NY2d 294 (1985)]. Traffic tickets, summonses or other records indicating an arrest are, in my view, accessible to the public, unless the records have been sealed pursuant to §160.50 of the Criminal Procedure Law. Under that statute, when criminal charges have been dismissed in favor of an accused, the records relating to the arrest ordinarily are sealed. In those instances, the records would be exempted from disclosure by statute [see Freedom of Information Law, §87(2)(a)]. Although arrest records are not specifically mentioned in the current Freedom of Information Law, the original Law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. In my opinion, even though reference to those records is not made in the current statute, I believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it was held by the Court of Appeals several years ago that, unless sealed under §160.50 of the Criminal Procedure Law, records of the arresting agency identifying those arrested must be disclosed [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)]. That decision involved speeding tickets issued by the State Police.

With respect to complaints regarding traffic in a neighborhood, it has been advised that personally identifying details pertaining to a complainant may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." The remainder of those records, however, would appear to be accessible.

In short, I believe that the "ticket books" must be disclosed, except to the extent that there may have been a dismissal of a charge.

Although the Department denied access to the records described above on the ground that the records were compiled for law enforcement purposes and disclosure would interfere with an investigation or judicial proceeding in accordance with §87(2)(e), I do not believe that it could justify denying access on the basis of that provision.

You asked whether it is the responsibility of the Mayor of New York City to "furnish information stored in any Executive Branch agency." In my view, the Mayor is not required to do so. While many agencies may fall under the umbrella of the executive, I believe that they are independently responsible for responding to requests and complying with the Freedom of Information Law. As indicated earlier, when a request is initially denied by an agency, the person denied access has the right to appeal to the head of the agency, such as the Police Commissioner or the Commissioner of the Department of Transportation, or to a person designated by the head of the agency.

I note, too, that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as records access officer. The records access officer has the duty of coordinating an agency's response to requests, and requests for records generally should be addressed to that person. As the coordinator of an agency's response, I believe that the records access officer must engage in efforts to ensure that staff complies with the obligations imposed by the Freedom of Information Law. You referred, for example, to the Department of Motor Vehicles. In my view, you need not know the name of an agency's records access officer in order to request records. A request addressed to the records access officer should be sufficient to guarantee a proper response.

Lastly, as indicated in its recent annual reports to the Governor and the State Legislature, the Committee on Open Government agrees with your contention that the Freedom of Information Law is lacking in enforcement capability. Recommendations have been made to provide a court with greater discretion to award attorney's fees to a person who challenges a denial of access to records in court, and we are studying other means of adding teeth to the law.

I note that provisions in the Freedom of Information and the Penal Law deal with "unlawful prevention of public access to records." The latter states that:

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

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

I hope that I have been of assistance, and again, I apologize for the delay in response.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jonathan David
Lt. Michael Pascucci
Anne Taylor
John Watson
Loraine Wilson

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May 10, 2004

Mr. Howard Norton
[redacted]

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

Dear Mr. Norton:

I have received your letter and the materials attached to it.

In brief, when records that you requested were determined to be available under the Freedom of Information Law by the Town of Islip, you were informed that the fee for copies would be twenty-five cents per photocopy, and that "your request for certification of fifteen pages is subject to a fifteen dollar ($15.00) certification fee." The fee for certification is based on §8009(3) of the Civil Practice Law and Rules (CPLR), entitled "Oaths; acknowledgments; certification or exemplification", which states that:

> "Any authorized officer is entitled, for the services specified, to the following fees...for certifying or exemplifying a typewritten or printed copy of any document, paper, book or record in his custody, twenty-five cents for each folio with a minimum of one dollar."

You also referred to §67-a of the Public Officers Law, which provides that:

> "Whenever there shall be presented to any public officer for certification or exemplification, a previously prepared legibly typewritten or printed copy of any document, paper, book or record in such officer's custody, the fees in such case, for certification or exemplification, shall be at the rate of three cents for each folio; but the minimum total charge for certification or exemplification in all cases shall be twenty-five cents."

You have asked whether those provisions, or 21 NYCRR §1408.3, a portion of the regulations promulgated by the Committee on Open Government, would govern in a situation in which a certification is sought pursuant to §89(3) of the Freedom of Information Law. The regulations indicate that "[t]here shall be no fee charged for...any certification pursuant to this part." Section 89(3) states in relevant part that "[u]pon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested...."

From my perspective, the functions and intent of §8009(3) of the CPLR, §67-a of the Public Officers Law, and the Freedom of Information Law and its implementing regulations are different. That being so, I believe that the regulations promulgated pursuant to the Freedom of Information Law apply in the context of your question and that no fee may be charged for certification.

Section 8009(3) is derived from earlier provisions that were repealed. In consideration of those provisions and §2309 of the CPLR, which was derived from the same earlier provisions, it appears that the intent of each of those provisions involves ascertaining the truth. Much of the commentary relates to oaths. As you know, an oath involves a person swearing that he or she will impart the truth. As it pertains to certifications, it appears that §8009(3) involves an intent to guarantee that the contents of records can be relied upon because the contents are accurate and reflect the truth in some sort of civil action or proceeding.

Section 67-a involves documentation that was "previously prepared" and "presented to" a public officer for certification. I note that §67-a was enacted in 1920, and that its language has remained unchanged. At the time of its enactment, there were no photocopy or machines or similar devices, and I believe that certification as envisioned by that statute involved a personal, word for word review of the contents of a document.

In contrast, the Freedom of Information Law pertains to records in the custody and control of and copies prepared by an agency. Copying records under that statute generally involves electronic reproduction, either by means of a photocopier or a computer. Further, in the only provision in the Freedom of Information Law that envisions a particular fee, §87(1)(b)(iii), refers to a fee for copying, or the actual cost of reproducing any other record (i.e., a record that cannot be photocopied, such as a tape recording). Perhaps most importantly in the context of your question, unlike §8009(3) and §67-a, the intent of which would appear to be truth in the case of the former and accuracy in the latter, the Freedom of Information Law requires that records be made available, irrespective of the "truth" or accuracy of their contents. If a record requested under the Freedom of Information Law indicates that two plus two equals five, it must be disclosed, unless there is an exception to rights of access that may properly be asserted [see §87(2)]. If a person seeks a certification under the Freedom of Information Law when a copy is made available, the certification merely indicates that the agency has made a true copy of its record; the certification made under that law has no connection or relevance to the accuracy of the content of the record.

In short, I do not believe that either CPLR, §8009(3) or §67-a of the Public Officers Law authorizes the imposition of a fee for a certification sought pursuant to §89(3) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michelle Remsen
Erin A. Sidaras

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May 11, 2004

Mr. Paul E. Levitt
Vitale and Levitt, P.C.
445 Broad Hollow Road
Suite 124
Melville, NY 11747

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

Dear Mr. Levitt:

I have received your letter and the materials attached to it.

You referred to an advisory opinion addressed to Mr. John Claasen on February 18 pertaining to his request for records maintained by the Huntington Housing Authority relating to properties owned by "real estate concerns." Although the addresses of the properties were disclosed, the inspection sheets were withheld on the ground that they constitute intra-agency materials falling within the scope of §87(2)(g) of the Freedom of Information Law. I advised that the content of those materials is the key element in determining the extent to which they may be withheld, and that those portions consisting opinion, advice or recommendations could be withheld, but that those consisting of statistical or factual information must be disclosed, unless a different exception to rights of access may be asserted.

You referred to portions of the records prepared by the building inspector in which he offers his "personal observations", as well "Additional Comments." You wrote that those comments "could be used to identify the location of the subsidized housing unit inhabited by tenants receiving Section 8 subsidies." Although my opinion has not changed, I offer the following clarification.

First, it is reiterated that comments in the nature of opinions, advice, conjecture and the like offered on the forms by the building inspector may be withheld under §87(2)(g). However, it is reemphasized that other portions of the records consisting of statistical or factual information must, in my view, be disclosed, again, unless a ground for denial of access separate from §87(2)(g) may be asserted.

Second, as you suggested, the initial ground for denial may be relevant with respect to records relating to public housing. That provision, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." The only statute of which I am aware in the Public Housing Law that requires confidentiality, §159, provides guidance concerning the disclosure of information furnished by applicants for dwellings in projects maintained by public housing authorities. That statute states in part that:

> "[I]nformation acquired by an authority or municipality or by an officer or employee thereof from applicants for dwellings in projects of an authority or municipality or from tenants of dwellings thereof or from members of the family of any such applicant or tenant or from employers of such persons or from any third person, whether voluntarily or by compulsory examination as provided in this chapter, shall be for the exclusive use and information of the authority or municipality in the discharge of its duties under this chapter and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the authority, municipality or successor in interest thereof is a party or complaining witness to such action or proceeding."

Based on the language quoted above, a public housing authority or municipality can not disclose information identifiable to tenants that is acquired from tenants. Depending on the facts and the nature of the records, a name, an address or other details that could identify a tenant in public housing might properly be withheld.

Third, since the matter involves Section 8 housing, particularly pertinent in my opinion is the determination rendered in Tri-State Publishing, Co. v. City of Port Jervis (Supreme Court, Orange County, March 4, 1992). That decision includes excerpts from an advisory opinion that I prepared in 1991, and I believe that the court essentially agreed with the thrust of that opinion. Because tenants in section 8 housing must meet an income qualification, it has been consistently advised that, insofar as disclosure of records would identify tenants, they may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], even if the dwellings are not public housing units or under the jurisdiction of a housing authority. Conversely, following the deletion of identifying details pertaining to tenants, the remainder of the records, i.e., those portions indicating identities of landlords, contractors and the amounts that are paid, must be disclosed.

The court referred to concern with respect to what it characterized as a "hybrid situation" in which "a landlord owns one or more multiple dwellings where less than all units in each building are Section 8 units." The court determined that in that kind of situation, "it may reasonably be said that a subsidized tenant's identity would not be readily ascertainable." Based upon that finding, the court determined that the names of landlords and the addresses of multiple dwellings, as well as related information must be disclosed. I note that the court added that:

> "While certain of the information ordered disclosed could indirectly permit as astute and industrious individual to research the identity of Section 8 recipients, the speculative likelihood and remoteness of this occurrence especially in light of the statement of Petitioner that it is not interested in the names of the recipients, must be balanced against the presumption in favor of disclosure."

As I interpret the passage quoted above, disclosure in accordance with the court's order would not preclude an individual or firm from learning of the identities of section 8 tenants if such persons or entities demonstrated significant effort in attempt to gain such information. At the same time, the court recognized that the names of tenants were not requested by or of interest to the applicant, a newspaper. While Mr. Claasen is not associated with the news media, he specified that his interest involves "real estate concerns", rather than the identities of tenants.

From my perspective, in view of the court's recognition of the absence of any intent on the part of the applicant to ascertain the names of section 8 tenants, the Authority may withhold portions of the records that identify tenants. Nevertheless, in my opinion, the identity of a landlord must be disclosed, for payments are made by governmental entities to the landlord, irrespective of the landlord's income and financial standing. Other details, however, which if disclosed would make a tenant's identity ascertainable, could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Claasen

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May 11, 2004

Mr. Brewster Phillips
[redacted]

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

Dear Mr. Phillips:

I have received your letter in which you asked whether a transcript of a hearing precipitated by a grievance that resulted in an arbitration would be made available under the Freedom of Information Law. The grievance involves a school district and an employee organization. Although you are not involved in the proceeding, it is your belief that there may be information concerning the matter that may relate to an infringement of your rights.

Without additional information concerning the nature of the grievance, I cannot offer specific guidance. Nevertheless, I can offer the following general remarks.

First, the Freedom of Information Law pertains to all records of an agency, such as a school district, 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. 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 phrase quoted in the previous sentence evidences a recognition on the part of the State Legislature that a single record or report might include elements that are accessible to the public, and others that may properly be withheld. It also indicates that an agency must review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

Second, in my experience, grievances may involve a variety of subjects. If a grievance by an employee organization involves working conditions generally, for example, it is unlikely that there would be a basis for a denial of access. On the other hand, if the grievance focuses on a specific person or persons in relation to a matter that may be personal or intimate, it is likely that portions of a transcript, or depending on the circumstances, perhaps the entirety of the transcript, may be withheld on the ground that disclosure would constitute "an unwarranted invasion of

personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a teacher has claimed that the environment in a classroom has made her ill, information identifiable to that person could, in my opinion, be withheld based on considerations of privacy. Additionally, often others may testify or be identified during a hearing, such as other employees or students. In those instances, identifying details might be deleted to protect against an unwarranted invasion of the privacy of those persons.

Again, without detail concerning the nature of the grievance, I cannot advise with certainty. However, I hope that the foregoing will be of assistance to you.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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May 12, 2004

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:

As you are aware, I have received your letter. In your capacity as a new member of a board of education, you asked "what can and can not be discussed in executive session", and whether you may "discuss what was discussed in Executive Session with a BOE member or anyone else." You also asked: "What things need a unanimous vote?"

In this regard, first, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify the grounds for entry into executive session. That being so, a public body, such as a board of education, cannot enter into executive session to discuss the subject of its choice. Rather than listing the eight grounds for entry into executive session, I have enclosed a copy of the Open Meetings Law.

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

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

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

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

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result

in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

Third, while I am not an expert with respect to the Education Law, I know of no instance in which a board of education must vote unanimously. I note, too, that the Freedom of Information Law has long required in §87(3)(a) that a record must be prepared that indicates how each member of a public body cast his or her vote whenever a final action is taken. The record of members' votes is typically included within minutes of meetings.

Lastly, in consideration of your correspondence, I point out that Robert's Rules are not law. To the extent that they are inconsistent with law, I believe that they are of no effect, weight or value.

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

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May 12, 2004

E-Mail

TO: Michael D. Juliano, Sr. <LRFDOFFICE@aol.com>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Juliano:

As you are aware, I have received your letter sent on behalf of the Board of Fire Commissioners of the Lake Ronkonkoma Fire District. You asked whether you may require that "a FOIL requester pay a reasonable hourly rate for time spent searching, compiling and copying documents requested", and whether it is reasonable "to have a FOIL requester pay in advance for copies."

Based on the judicial interpretation of the Freedom of Information Law, an agency may require payment in advance of preparing copies of records, particularly when the request is voluminous (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982). However, I do not believe that a fee can be charged for search or other personnel or administrative costs associated with fulfilling a request for records.

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

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

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

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. 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 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.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 12, 2004

Hon. Rose Mary K. Luther
Town Clerk
Town of Richmond
P.O. Box 145
Honeoye, NY 14471

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

Dear Ms. Luther:

I have received your letter and apologize for the delay in response. You referred to a request for certain records and your response in which you indicated that the records would be made available for review at the Town Hall at a mutually convenient time, and that upon review, copies would be made on request. You have asked whether you have the right to request that the applicant view records at the Town Hall.

In this regard, often I believe that it is appropriate and beneficial, especially if a request involves a substantial number of records, to suggest that an applicant review them in person. In many instances, a review will enable the applicant to identify the records of critical interest. By so doing, rather than seeking copies of all records falling within the scope of a request, the request may be narrowed, thereby diminishing the burden imposed upon a government agency, as well as the cost of copying that would be borne by the applicant.

Nevertheless, I do not believe that an agency may require that an applicant for records review them in person at the agency's premises. Some applicants, due to employment schedules or physical condition, may not have the opportunity or ability to do so. Further, records may be requested by persons at a distance from an agency. For instance, if I requested records from the Town, I do not believe that I could be required to travel to the Town to review them. In that kind of situation, I believe that the Town would be required to prepare copies of the records sought upon payment of the appropriate fee and send them to me. I note that the Town could choose to require the payment of postage in that situation.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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May 12, 2004

[redacted]

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

Dear [redacted]

I have received your letter in which you complained that your requests for the application and associated notes for Medicaid benefits pertaining to you directed to the Orange County Department of Social Services have not been answered.

In this regard, I offer the following comments.

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

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

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

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

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

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

With respect to records maintained by a social services agency, §87(2)(a) of the Freedom of Information Laws pertains to records that "are specifically exempted from disclosure by state or federal statute." Several statutes within the Social Services Law prohibit public disclosure of records identifiable to either applicants for or recipients of public assistance (see e.g., Social Services Law, §§136 and 372). In my view, because the records in question are exempted from disclosure to the public, the Freedom of Information Law does not govern rights of access to them; rather, any rights of access would be conferred by the Social Services Law and applicable regulations.

With respect to access by the subject of case files, state regulations, 18 NYCRR §357.3, provide in relevant part that:

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

Based on the foregoing, if you are the subject of a case file, it is likely that you would have rights of access under the regulations cited above.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Margaret Kirchner, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 14, 2004

Mr. Stephen 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.

Dear Mr. Smith:

I have received your letter in which you raised questions concerning executive sessions held to discuss "personnel matters", as well as a retreat held in which the Superintendent's contract was discussed by the Board of Education of the Campbell-Savona Central School District. You also indicated that a consensus was reached at the retreat to renew the Superintendent's contract, that notes and written materials were produced at that meeting, and that it is your view that those materials should be made available to the public upon request. You stated that you wrote a letter to the Board President concerning these issues and that the Board met with its attorney in executive session to discuss your letter.

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. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

Further, even when §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as a "personnel matter" 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 "personnel matter" 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.

Third, the Open Meetings Law applies to all meetings of public bodies, and §102(1) 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 will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open

Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

From my perspective, insofar as the retreat dealt with the Superintendent's contract or any other matter of public business, it constituted a "meeting" that should have been conducted open to the public in accordance with the Open Meetings Law and preceded by notice given pursuant to §104 of that statute.

Next, if indeed a decision was made by "consensus" or otherwise, I believe that it must be memorialized in minutes.

Assuming that the retreat constituted a meeting and that a decision was made, minutes should have been prepared pursuant to §106 of the Open Meetings Law, which provides what might be characterized as minimum requirements concerning the contents of minutes and states in relevant part that:

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

> resolutions and any other matter formally voted upon and the vote thereon...
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Again, when a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

I note, too, that the law requires the maintenance of a record indicating the manner in which each member voted. Section 87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot.

If records of the proceedings were prepared, such as notes or other written materials, they would be subject to rights of access conferred by the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" to mean:

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

In view of the breadth of the definition of "record", notes or written materials, for example, would fall within the scope of rights of access.

The Freedom of Information Law is based on a presumption of access; all agency records are accessible, except to the extent that they may be withheld in accordance with one or more of the grounds for denial appearing in paragraphs (a) through (i) of §87(2). In my view, one of the grounds for denial would be pertinent in ascertaining rights of access to summaries or notes. Specifically, §87(2)(g) enables an agency to deny access to records that:

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

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

To the extent that notes or written materials consist of a factual rendition of what transpired, it appears that they would be available.

Lastly, §108 of the Open Meetings Law contains two vehicles under which the public may be excluded from a meeting. As suggested, earlier, an executive session may serve as one such vehicle. The other involves 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 matter 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 a public body 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 is not an issue. In that case, while the litigation exception for entry into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

Notwithstanding the foregoing, it has been advised by this office and held judicially that the authority to assert the attorney-client privilege as an exemption from the coverage of the Open Meetings Law is narrow. In a decision that cited an advisory opinion of the Committee, the court in White v. Kimball (Supreme Court, Chautauqua County, January 27, 1997) found that:

> "While there is no question that Executive Sessions can be conducted for proper reasons and that an exception exists under the Open Meetings Law for attorney-client privileged communications, the scope of that privilege is limited. Once the legal advice is offered, discussions with regard to substance (e.g.) the closing date of a bus system, do not fall within the privilege of the exception. See Exhibit C, April 8, 1996 Open Meetings Law Advisory Opinion #2595,

Robert J. Freeman, Executive Director of Committee on Open government at page 4:

> "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, if 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."

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Mr. Robert Plaskov

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 14, 2004

Mr. William Brooks
02-B-1739
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. Brooks:

I have received your letter in which you complained that you have not received responses to your Freedom of Information Law requests directed to the Monroe County District Attorney's Office and the Rochester Police Department for various police and investigative reports relative to your arrest. You also suggested that you should not have to pay for these documents.

In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

In the context of your request, I am not suggesting that the records in question must necessarily be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

In sum, I believe that a blanket denial of a request for the kinds of records that you described would be inconsistent with law and that an agency must review the records to ascertain the extent to which they may properly be withheld.

Next, I point out that there is nothing in the Freedom of Information Law that pertains to the waiver of fees. Further, in a recent 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)].

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 office of the district attorney.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 14, 2004

Mr. Paul Kingsley
01-B-2025
Oneida Correctional Facility
P.O. Box 44580
Rome, NY 13442-4580

Dear Mr. Kingsley:

I have received your recent correspondence in which you appealed a denial of access to records sought under the Freedom of Information Law by the Onondaga County Sheriff's Department.

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

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

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

I hope that the foregoing serves to 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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May 17, 2004

Mr. Barton D. Graham
Director
Student Advocate Group for Education, Inc,
1322 Mt. Zoar Road
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. Graham:

I have received your letter in which you sought an advisory opinion relating to a variety of questions pertaining to meetings of the Board of Education of the Elmira School District.

You referred initially to a minutes of a meeting indicating that a motion was made to enter into executive session "for the purpose of discussion a particular person" and asked whether a motion of that nature is adequate.

In this regard, by way of general 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.

The language of the exception to which you referred, §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..."

From my perspective, a proper motion for entry into executive session under the exception quoted above would include two elements: reference to the term "particular" in order to enable Board members and others in attendance that the subject focuses on a certain person or corporation, and one or more of the subjects indicated in that provision. For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. 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 matter that relates to a particular person, without more, 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.

If a public body "fails to identify one of the enumerated items in sec, 105 1. (f)", you asked whether all discussions then held [are] considered as being part of an open meeting." I must admit that I do not understand the question. If you are asking whether a failure to make a proper motion to enter into executive session nullifies the ability to conduct an executive session, I do not believe that would be the result. In my view, most important in ascertaining the propriety of an executive session is whether the subject or subjects fall within the scope of one or more among the eight grounds for entry into executive session listed in §105(1).

You asked what the consequences may be if a public body is "deliberately flouting applicable laws." If members of the public recognize that to be so, they may elect new members. There may be criticism by the public and the news media. Additionally, §107 of the Open Meetings Law states in part that:

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

However, the same provision states further that:

> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

I note that §107 also authorizes a court to award attorney's fees to the successful party.

Next, you raised several questions concerning the responsibility of a school district attorney to be knowledgeable and to provide proper services. Those questions do not deal directly with the laws within the scope of the advisory jurisdiction of this office. As such, I cannot appropriately answer.

You questioned the validity of a Board policy that requires that any matter discussed in executive session "must be treated as confidential; that is, never discussed outside of that executive session." While Board members are not ordinarily required to discuss or divulge what occurred during executive sessions, I do not believe that they are generally prohibited from doing so.

For purposes of considering the issue of "confidentiality", reference will be made to the Open Meetings Law, as well as the Freedom of Information Law. Both of those statutes are based on a presumption of openness. In brief, the former requires that meetings of public bodies, such as boards of education, be conducted open to the public, except when an executive session may properly be held under §105(1) or when a matter is exempt from its coverage; the latter requires that agency records be made available to the public, except to the extent that one or more grounds for denial access appearing in §87(2) may properly be asserted. The first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

Both the state's highest court, the Court of Appeals, and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

In like manner, in construing the equivalent exception to rights of access in the federal Freedom of Information Act, it has been found that:

> "Exemption 3 excludes from its coverage only matters that are:
>
> > *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes

> particular criteria for withholding or refers to particular types of matters to be withheld.
>
> "5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

In short, to be "exempted from disclosure by statute", both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records.

In contrast, when records are not exempted from disclosure by a separate statute, both the Freedom of Information Law and its federal counterpart are permissive. Although an agency *may* withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals has held that the agency is not obliged to do so and may choose to disclose, stating that:

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose. Stated differently, there is nothing inherently

confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).

The same analysis is applicable in the context of the Open Meetings Law. While that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has the right to do so. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

Since a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not "confidential." To be confidential, again, a statute must prohibit disclosure and leave no discretion to an agency or official regarding the ability to disclose.

By means of example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality. Again, the Freedom of Information Law states that an agency *may* withhold records in certain circumstances; it has discretion to grant or deny access. The only instances in which records may be characterized as "confidential" would, based on judicial interpretations, involve those situations in which a statute prohibits disclosure and leaves no discretion to a person or body.

In short, when a governmental entity may choose to disclose or withhold records or to discuss in issue in public or in private, I do not believe that the records or the discussion may be considered "confidential"; only when the government has no discretion and must withhold records or discuss a matter in private could the records or information be so considered.

Viewing the matter from a different vantage point, there are federal decisions indicating that general prohibitions against disclosure by government employees are unconstitutional. Although a board member is not an employee, but rather an elected member of the governing body of a public corporation, I believe that the thrust of case law is pertinent.

In Harman v. City of New York [140 F.3d 111 (2nd Cir. 1998)], the New York City Human Resources Administration (HRA) adopted an executive order that forbade its employees:

> "...from speaking with the media regarding any policies or activities of the agency without first obtaining permission from the agency's media relations department. The City contends that these policies are necessary to meet the agencies' obligations under federal and state law to protect the confidentiality of reports and information relating to children, families and other individuals served by the agencies" (id., 115).

I note that §136 of the Social Services Law prohibits a social services agency from disclosing records identifiable to an applicant for or recipient of public assistance. Additionally, §372 of the Social Services Law prohibits the disclosure of records identifiable to "abandoned, delinquent, destitute, neglected or dependent children..." As such, there is no question that many of HRA's records are exempted from disclosure by statute and are, therefore, confidential. Nevertheless, the proceeding in Harman was precipitated by commentary that was not identifiable to any particular child or family; rather it involved the operation of the agency. As specified by the Court:

> "...neither the Plaintiffs nor the public has any protected interest in releasing **statutorily confidential information**. Given the network of laws **forbidding** the dissemination of such information, Plaintiffs wisely concede this point. Therefore, we evaluate the interests of employees and of the public only in commenting on **non-confidential** agency policies and activities" (emphasis mine) (id., 119).

The Court in that passage highlighted the critical aspect of the point made earlier: that records may be characterized and exempted from disclosure by statute only when a statute forbids disclosure.

In finding that the order prohibiting speech that did not involve information that is exempted from disclosure by statute, the Court stated initially that:

> "Individuals do not relinquish their First Amendment rights by accepting employment with the government. See *Pickering v. Board*

> *of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811 (1968). However, the Supreme Court has recognized that the government 'may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.' *United States v. National Treasury Employees Union*, 513 U.S. 454, 465, 115 S. Ct. 1003, 1012, 130 L. Ed2d 964 (1995) (NTEU). In evaluating the validity of a restraint on government employee speech, courts must 'arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35"(id., 117).

In considering the "balancing test", it was held that "where the employee speaks on matters of public concern, the government bears the burden of justifying any adverse employment action" and that:

> "This burden is particularly heavy where, as here, the issue is not an isolated disciplinary action taken in response to one employee's speech, but is, instead, a blanket policy designed to restrict expression by a large number of potential speakers. To justify this kind of prospective regulation, '[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468, 115 S. Ct. at 1014 (quoting *Pickering*, 391 U.S. at 571, 88 S.Ct. at 1736)...
>
> > "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.') While the government has special authority to proscribe the speech of its employees , '[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.' *Rankin*, 483 U.S. at 384, 107 S. Ct. at 2896.
>
> "A restraint on government employee expression 'also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.' *NTEU*, 513 U.S. at 470, 115 S.Ct. at 1015. The Supreme Court has noted that '[g]overnment employees are often in the best position to know what

> ails the agencies for which they work; public debate may gain much from their informed opinions.' *Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994)..." (id., 118-119).

The Court found that the order, by requiring advance approval before an employee could comment, "is generally disfavored under First Amendment law because it 'chills potential speech before it happens', stating that:

> "The press policies allow the agencies to determine in advance what kind of speech will harm agency operations instead of punishing disruptive remarks after their effect has been felt. For this reason, the regulations ran afoul of the general presumption against prior restraints on speech" (id., 119).

It also viewed the matter from the perspective of the reality of the relationship between employers and employees, finding that:

> "Employees who are critical of the agency will naturally hesitate to voice their concerns if they must first ask permission from the very people whose judgments they call into question. Only those who adhere to the party line would view such a requirement without trepidation" (id., 120).

Again, a board member is not an employee, but rather an elected official. In my view, one of the responsibilities of elected officials involves speaking out on issues of concern to the public.

In generally rejecting the possibility that speech may be disruptive, it was stated that:

> "The City contends that employee speech will be permitted as long as it will not interfere with the efficient and effective operations of the agencies. We do not find this standard to be sufficiently definite to limit the possibility for content or viewpoint censorship. Because the press policies allow suppression of speech before it takes place, administrators may prevent speech that would not actually have had a disruptive effect. See e.g., *NTEU*, 513 U.S. at 475 n.21, 115 S.Ct. at 1017 n.21 ('Deferring to the Government's speculation about the pernicious effects of thousands of articles and speeches yet to be written or delivered would encroach unacceptably on the First Amendment's protections.'). Furthermore, the standard inherently disfavors speech that is critical of agency operations, because such comments will necessarily seem more potentially disruptive than comments that 'toe[] the agency line.' *Sanjour*, 56 F3d at 96-97 (striking down regulation that permitted reimbursement for only those speaking engagements consistent with the 'mission of the agency' as a restriction on anti-government speech).

> "The challenged regulations thus implicate all of the above concerns. By mandating approval from an employee's superiors, they will discourage speakers with dissenting views from coming forward. They provide no time limit for review to ensure that commentary is not rendered moot by delay. Finally, they lack objective standards to limit the discretion of the agency decision-maker. For these reasons we agree with the district court that 'ACS 101 and HRA 641 clearly restrict the First Amendment rights of City employees..."(id., 121).

It was emphasized by the court that the harm sought to be avoided must be real, and not merely conjectural:

> "...where the government singles out expressive activity for special regulation to address anticipated harms, the government must 'demonstrate that the recited harms are real, not merely conjectural, and that the regulations will in fact alleviate these harms in a direct and material way.' *NTEU* 513 U.S. at 475, 115 S.Ct. at 1017 (quoting *Turner Broad Sys. Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 624, 114 S.Ct. 2445, 2450, 129 L.Ed.2d 497 (1994) (plurality opinion)). Although government predictions of harm are entitled to greater deference when used to justify restrictions on employee speech as opposed to speech by the public, such difference is generally accorded only when the government takes action in response to speech which has already taken place. *NTEU*, 513 U.S. at 475 n.21, 115 S.Ct. at 1017 n.21. Where the predictions of harm are proscriptive, the government cannot rely on assertions, but must show a basis in fact for its concerns" (id., 122).

In a key statement that essentially summarizes its decision, the Court found that:

> "The executive orders reach more broadly to cover all information regarding any agency policy or activity. They thus have the potential to chill substantially more speech than is reasonably necessary to protect the confidential information" (id., 123) (i.e., information that is exempted from disclosure and which, pursuant to statute, cannot be disclosed).

In my opinion, in the context of school district business, matters would be "confidential" only on rare occasions. Those situations might involve information that is derived from student records or perhaps attorney work product or records subject to the attorney-client privilege. In most instances, however, there would be no prohibition against disclosure based on a statute that forbids release of records or their contents.

A general prohibition is in my view contrary to the holding rendered in Harman. It is vague, or in the words of Harman, not "sufficiently definite"; it is prospective and "chills speech before it

happens", for it does not focus on any harm that has actually occurred. In short, it stifles free speech in a manner that has been found to be unconstitutional.

What if, after an executive session, a member of the Board believes that the session or a portion of the session was improperly held? Would his or her disclosure of that opinion or the substance of the matter discussed result in a violation of law? Frequently executive sessions are convened for proper reasons, but the public body drifts into a new subject. My hope is that there will always be a member or other person present who is sufficiently knowledgeable regarding the permissible parameters of executive session and sufficiently vigilant to suggest that the executive session should end and that the body should return to an open meeting. But what if that does not happen? What if the public body rejects that person's efforts to return to the open meeting? What if there is simply an oversight and a realization after the executive session that the body should have engaged in a discussion in public? Would disclosure of a matter that should have been discussed in public but which was considered during a "properly convened" executive session constitute a violation of law?

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.

Lastly, you asked whether members of the public may "make a FOIL request verbally at public meetings." In my opinion, although an agency may choose to accept requests made in that manner, it would not be required to do so. Under §89(3) of the Freedom of Information Law, an agency may require that a request be made in writing. In addition, pursuant to the procedural

regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), an agency may establish the times and places during which requests for records can be made, i.e., regular business hours.

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-14683

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May 17, 2004

Mr. Stanley Wertheimer
[redacted]

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

Dear Mr. Wertheimer:

I have received your letter concerning a request for a list of those who voted in the Centerport Fire District on a bond issue. Although you had obtained such a list in the past, you were informed that no such record is "maintained by this office." You have asked whether such a record must be maintained and how, without the list, you can know that the vote "was legitimate."

In this regard, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) provides in part that an agency, such as a fire district, is not required to create a record in response to a request. If, for example, there is no "list of all the people" who voted concerning the bond issue, the District would not be required to create such a list on your behalf. Since there may be none, rather than requesting a "list", it is suggested that you request records identifying those who voted concerning the bond issue.

It is noted, too, that the Freedom of Information Law applies not only to records kept at the offices of an agency, but also to those kept elsewhere for an agency. That statute pertains to all agency records, and §86(4) defines the term "record" to mean:

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

Based on the foregoing, if records are kept by a person or firm for the District, they fall within the coverage of the Freedom of Information Law, regardless of their physical location.

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

Lastly, the Freedom of Information Law does not address issues involving the retention and disposal of records. Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

Based on the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials must "have custody" and "adequately protect" records until the

minimum period for the retention of the records has been reached. The functions of the Commissioner in relation to the foregoing are carried out by the State Archives, a unit of the State Education Department. A copy of the applicable retention schedule is likely maintained by the District clerk or administrator, or alternatively, it can be obtained from the State Archives, which can be reached at 474-6928.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 17, 2004

Bruce A. Jackson, 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, unless otherwise indicated.

Dear Dr. Jackson:

I have received your letter and a variety of correspondence related to it. The matter pertains to a request made under the Freedom of Information Law to Columbia-Greene Community College for newspaper articles that "describe the fiscal scandal(s) involving, Roger Van Winkle, President of Columbia Green [sic] Community College from 1978 to 1983." Although you were apparently informed during a telephone conversation that the articles exist and are maintained by the College, a letter addressed to you on May 4 by Counsel to the College indicates that "[t]he college maintains no file or record or list of newspaper articles involving Roger Van Winkle from 1981 to 1983."

You have sought assistance and a decision concerning the situation. In this regard, please note at the outset that neither myself nor the Committee on Open Government has the authority to render a "decision" that is binding. That being so, the following remarks should be characterized as advisory.

First, the Freedom of Information Law is expansive in its scope, for it pertains to all agency records, such as those of a community college. Specifically, §86(4) defines the term "record" to include:

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

From my perspective, insofar as the College maintains the newspaper articles of your interest, the articles constitute "records" that fall within the coverage 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. In my view, in consideration of the nature of newspaper articles, none of the grounds for denial of access could be asserted.

Third, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Based on a decision rendered by the Court of Appeals, the state's highest court, 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 opinion, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

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

I note that although the attorney for the College wrote that there is no "file" or "list" of newspaper articles concerning the scandal involving Mr. Van Winkle, you did not seek a file or list; rather, you requested newspaper articles and made no mention of the manner in which they may be kept.

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

Lastly, and I am not suggesting that the provisions to be cited are applicable or pertinent, §89(8) and §240.35 of the Penal Law concern the "unlawful prevention of public access to records. The latter states that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James Campion
J. Theodore Hilscher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 19, 2004

E-MAIL

TO: Don Christensen [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. Christensen:

I have received your letter in which you raised a variety of concerns and questions relating to access to records of the City of Hudson.

Your initial area of inquiry involves whether it is "legal for an office to destroy the 'paper trail' of documents during a so-called process of 'revision.'" In this regard, the Freedom of Information Law does not include or provide direction or requirements concerning the preservation or destruction of records. Pertinent is Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible;

> to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

As such, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. To ascertain the length of time that the records of your interest must be retained, it is suggested that you might contact the State Archives, the unit of the Education Department that devises the retention schedules, at 474-6928.

Second, you wrote that the City of Hudson's Code Enforcement Officer"demanded a $25 'administration fee' in advance of any compliance with [your] request....even if the question ended up without any resulting documents." You added that it is your understanding that a fee of that nature cannot be charged "unless there was a local statute prescribing such a fee..." Based on the legislative history of the Freedom of Information Law, the City cannot assess such a fee, even if a local law or "local statute" prescribes the assessment of the fee.

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 "administration", 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)].

Your remaining questions deal with minutes of meetings, and you wrote that you "found several errors" in the minutes of a meetings of the Zoning Board of Appeals. Although you pointed out the errors to the Chairman, he informed you that you have no right to "question the minutes" and that only board members may do so. You added that the mayor "impounded" the minutes of local boards, commissions and committees" and asked whether it is "common practice to have copies of such minutes and requests for copies of these minutes filtered through the Mayor's office."

Section 106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

The provisions quoted above offer guidance in relation to several of the issues that you raised. It is clear, for example, that minutes need not consist of a verbatim of account of all that is stated a meeting. It is also clear that minutes must be prepared and made available to the public "within two weeks of the date of such meeting." I note, too, that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can

generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

I do not believe that it is "common practice" for a mayor to control access to minutes of meetings, and there is nothing in the Open Meetings Law that provides guidance concerning who should have custody of minutes or where they must be kept. There may, however, be provisions in the City code or charter that offer direction. Notwithstanding the absence of any such provision, in my experience, minutes are among the most public and readily accessible records maintained by local governments. In many instances, they are routinely and informally made available without any written or formal request. While there is no requirement that minutes be placed on a municipality's website, either in their "official" or summary form, local governments often do so, again, because minutes are unquestionably public.

Lastly, inherent in the law is that the minutes must be accurate and reflect the reality of what occurred or was expressed. In my view, a member of the public has no right to insist upon the amendment or correction of minutes; I believe that only a public body, by means of a majority vote of its total membership, may amend or correct minutes. However, certainly you or anyone else may seek to bring perceived inaccuracies to the attention of government officials.

As you inferred, meetings are frequently recorded, and it was held more than twenty-five years ago that a tape recording of an open meeting constitutes a record that must be made available to the public under the Freedom of Information Law (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978). Moreover, it has been held that a member of the public may audio or video record an open meeting of a public body, so long as the use of the recording device is neither disruptive nor obtrusive [see e.g., Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83 (2003)]. Through a review of a recording, whether it was prepared by a government agency or the public, there should be an opportunity to ascertain whether the contents of minutes are indeed accurate.

I hope that I have been of assistance.

RJF:tt

cc: City Council
Mayor, City of Hudson
Code Enforcement Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 19, 2004

E-MAIL

TO: Hon. Carol Wingert <tustentownclerk@hvc.rr.com>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Wingert:

I have received your letter in which you raised a variety of issues concerning your ability to perform your duties as Town Clerk of the Town of Tusten. In brief, you wrote that the Town's bookkeeper "will not allow [you] access to any of her files, stating that they are personnel files...and that by law...she is the only one who can have access to them." You added that she "shreds documents regularly" and that her actions preclude you from carrying out your duties as records access officer and records management officer.

From my perspective, the bookkeeper's contentions are inaccurate. In this regard, I offer the following comments.

First, as you are aware, subdivision (1) of the Town Law states that "The town clerk of each town...Shall have the custody of all the records, books and papers of the town." Therefore, while the bookkeeper may have physical custody of the files at issue, I believe that those files are within your legal custody as Clerk.

Second, Article 57-A of the Arts and Cultural Affairs Law deals with the management, custody, retention and disposal of records by local governments. I note that §57.19 specifies that "in towns, the town clerk shall be the records management officer." For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include

> library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

As such, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached.

Third, in my view, irrespective of where records may be kept, they would fall within the scope of the Freedom of Information Law. It is emphasized that that statute pertains to all agency records, and that §86(4) of the Law defines the term "record" expansively to mean:

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

Next, the failure to share the records or to inform you of the existence of the records in question or perhaps their destruction may effectively preclude you from carrying out your duties as

records management officer, or, as records access officer, for purposes of responding to requests under the Freedom of Information Law. Based on the regulations promulgated by the Committee on Open Government (21 NYCRR §1401.2), as records access officer, it is your responsibility to coordinate the Town's response to requests for records. That is not the function of the bookkeeper. In short, if you, as the records access officer, do not know the existence of or location of Town records, you would not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law.

Lastly, there is no provision of law that indicates that the records at issue are confidential. 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.

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 are 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 may be withheld pursuant to §87(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" 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. In sum, it is reiterated that some elements of personnel files may properly be withheld, but that others would be accessible to the public.

I hope that I have been of assistance.

RJF:tt

cc: Victoria Skabowski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14168?

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

May 24, 2004

Mr. Robert V.H. Weinberg
President
Bath Petroleum Storage Inc.
20 Crossways Park North
Woodbury, NY 11797

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

Dear Mr. Weinberg:

I have received your letter and the materials relating to it. In short, in your capacity as President of Bath Petroleum Storage Inc. ("BPSI"), you wrote that the Department of Environmental Conservation ("DEC") denied your request to "keep confidential certain critical business information."

Having reviewed the materials, the issue, in my view, involves the strength of BPSI's contentions and meeting the burden of defending secrecy. Since I know little about BPSI's business or the extent to which there may be competition, I cannot provide an opinion concerning the conclusion reached by DEC. However, in considering the issues pertinent to the matter, I offer the following general comments.

First, as you are likely aware, §89(5) of the Freedom of Information Law has for years included provisions that authorize a commercial enterprise required to submit records to a state agency to seek confidentiality by identifying those portions of the records believed to fall within the scope of §87(2)(d). That exception to rights of access authorizes 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..."

Under §89(5), if a request is made for records believed to fall within the trade secret exception, the agency must inform the commercial enterprise of the request and provide an opportunity to indicate why it continues to contend that disclosure would cause substantial injury to its competitive position. If the agency agrees, it will deny access, and the person requesting the record, as in all other instances, has the right to appeal to the head or governing body of the agency. If the appeal sustains the initial denial of access, the person seeking the record may bring a judicial proceeding in which the agency has the burden of proving that disclosure would result in the harm described in the exception. If the agency disagrees with the commercial enterprise and contends that the record sought should be made public, the commercial enterprise has the right to appeal. If the agency's decision to disclose is upheld on appeal, the commercial enterprise has fifteen days to go to court to attempt to block disclosure.

Second, new provisions in the Freedom of Information Law pertain to "critical infrastructure", and that phrase is defined in §86(5) to mean "systems, assets, places or things, whether physical or virtual, so vital to the state" that their "disruption, incapacitation or destruction could jeopardize the health, safety, welfare or security" of the state or its residents. The procedure prescribed in §89(5) applies with respect to critical infrastructure information. In short, a person or "entity" has the opportunity to inform a state agency that records or portions of records it submits to the state agency include information regarding critical infrastructure as that phrase is defined in §86(5). The agency would except those records from disclosure until the procedure described above is complete.

It is emphasized that critical infrastructure information is not automatically exempt from disclosure; it is subject to the same exceptions applicable in all other circumstances in which records are requested. The designation of material as critical infrastructure information is essentially a signal, a warning, that government officials need to pay special attention when a request is made for records containing information so designated.

As indicated above, your and your company have the ability to attempt to prevent a state agency from disclosing records that you believe fall within the coverage of §87(2)(d) or which contain critical infrastructure information that can be withheld pursuant to that provision or any other exception to rights of access appearing in §87(2) of the Freedom of Information Law. However, it is reiterated that an agency denying access, or a commercial enterprise seeking to prohibit disclosure, has the burden of defending secrecy.

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).

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.).

Based on the correspondence attached to your letter, it appears that officials of DEC do not agree that the records at issue can justifiably be withheld. While I am not encouraging you initiate litigation, you may choose to do so to attempt to prohibit disclosure. In consideration of the commentary within the correspondence, it appears unlikely, in my view, that you would prevail.

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: P. Nicholas Garlick
Ruth Earl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1616 88

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May 24, 2004

Mr. Patrick T. Creighton
[redacted]

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

Dear Mr. Creighton:

I have received your letter and the correspondence attached it to it. In brief, you referred to your unsuccessful efforts to obtain information from the Town of Tonawanda concerning the Director of Community Development, including his gross wages, benefits and residency. Additionally, you have requested copies of the "building code pertaining to plumbing", an appraiser's report, and a building inspector's report.

In this regard, I offer the following comments.

First, it is emphasized at the outset that the Freedom of Information Law pertains to existing records, and that an agency, such as a town, is not required to create a record in response to a request or supply information in response to questions. For instance, rather than asking whether the Town supplies a car to the Director, you might seek records indicating his use of a vehicle at Town expense.

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

Although tangential to your inquiry, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

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

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

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

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

Based on the foregoing, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

It has been contended that W-2 forms are specifically exempted from disclosure by statute on the basis of 26 USC 6103 (the Internal Revenue Code) and §697(e) of the Tax Law. In my opinion, those statutes are not applicable in this instance. In an effort to obtain expert advice on the matter, I contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue. I was informed that the statutes requiring confidentiality pertain to records received and maintained by the Internal Revenue Service; those statutes do not pertain to records kept by an individual taxpayer [see e.g., Stokwitz v. Naval Investigation Service, 831 F.2d 893 (1987)], nor are they applicable to records maintained by an employer, such as a school district. In short, the attorney for the Internal Revenue Service said that the statutes in question require confidentiality only with respect to records that it receives from the taxpayer.

In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. Further, in a recent decision, the same conclusion was reached, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

In a related area, I note that §89(7) of the Freedom of Information Law specifies that the home address of a present or former public employee need not be disclosed. Consequently, in situations in which there a may be local residency law, for example, it has been advised that a street

address need not be disclosed, but that the zip code of residence of a public employee should be made available.

Third, provisions of a building code concerning plumbing requirements would in my opinion be accessible, for none of the grounds for denial would apply. Rather than seeking copies, which may involve hundreds of pages of documentation, it is suggested that you ask to inspect those provisions in an effort to focus on those of particular interest.

Next, you referred to an appraisal and a building inspector's report. It appears that both would fall within the coverage of §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.

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

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

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

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Cal Champlin, Town Clerk

From: Robert Freeman
To: Debbie Walsh
Date: 5/24/2004 3:01:16 PM
Subject: Re: foil requests

Dear Ms. Walsh:

I have received your note and, as I understand your remarks, I am in general agreement with your contention.

In brief, first, if a municipal official is seeking legal advice and the municipality's attorney renders legal advice in response, the communications between them would fall within the attorney-client privilege and, therefore, would be exempted from disclosure by statute [see Freedom of Information Law, §87(2)(a) and §4503 of the Civil Practice Law and Rules, the latter of which codifies the attorney-privilege].

Second and in the alternative, §87(2)(g) pertains to "inter-agency and intra-agency materials", i.e., communications between or among government officials. That provision has also been found by the courts to pertain to communications between consultants and government agencies that retain them. Insofar as those kinds of communications consist of questions, advice, opinions, recommendations and the like, they may be withheld under §87(2)(g).

Third, while an individual might want you to write a letter to the town attorney asking the attorney to explain his or her opinion, there is no obligation to do so. The Freedom of Information Law pertains to existing records, and there is no requirement that you prepare a new record in order to accommodate the applicant.

I hope that I have been of assistance. Should any further questions arise please feel free to contact me.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14690

41 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 24, 2004

Mr. George O'Donnell
[redacted]

Dear Mr. O'Donnell:

I have received your letters concerning your efforts to obtain a police blotter entry from the New York City Police Department.

By way of background, you filed a criminal complaint with the Department on January 11, 2001 and enclosed a copy of the complaint report made available by the Department. Although the complaint dealt with what you contend was "the assault and murder" of your father, a review of previous correspondence indicates that the Richmond County District Attorney determined that your father's death was not a homicide (see my letter to you of April 22, 2003). Consequently, there was no criminal case file prepared or created.

While I would agree that a police blotter entry relating to your complaint is subject to rights of access conferred by the Freedom of Information Law, I would conjecture that there may be no such record. I note in this regard that the Freedom of Information Law pertains to existing records. Therefore, if no blotter entry exists, and I would conjecture that there may be no such entry, that statute would not apply.

I point that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I hope that the foregoing may clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jonathan David
Lt. Michael Pascucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 24, 2004

Mr. Michael Clemons
00-A-7183
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. Clemons:

Your letter addressed to the Department of State has been forwarded to the Committee on Open Government. You characterized your communication as an appeal of a denial of access to records that you sought from the City of Yonkers.

In this regard, neither the Department of State nor the Committee on Open Government is empowered to determine appeals made under the Freedom of Information Law. The Committee on Open Government is, however, authorized to provide advice and opinions concerning that statute.

That being so, I point out that §89(4)(a) of the Freedom of Information Law pertains to the right to appeal. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I hope that the foregoing serves to clarify your understanding of the 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-14692

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 24, 2004

Ms. Carol Thompson
The Valley News
117 Oneida Street
Fulton, NY 13069

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Ms. Thompson:

As you are aware, I have received your letter concerning requests for records made to the Town of Schroeppel. In short, even though it is your belief that certain records exist and are maintained by the Town, you were informed that the records sought were not maintained by certain offices with the Town. Since the Town Clerk is the custodian of Town records and serves as both the records management officer for purposes of the Local Government Records Law and records access officer relative to the Freedom of Information Law, it appears to be your view that you are "entitled to a denial" in writing from the Clerk, rather than from a person who is not the records management or records access officer.

In this regard, 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, neither the Freedom of Information Law nor the Committee's regulations specifies who should prepare the certification envisioned in §89(3) of the Freedom of Information Law. 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)]. It is also noted that the Court of Appeals, the state's highest court, has held that a certification made under §89(3) need not be prepared specifically by either the person who made the search or by an agency's records access officer [see Rattley v. New York City Police Department, 96 NY2d 873 (2001)].

Section 89(3) requires that an "entity", such as a town, shall, upon request for a record that cannot be found, "certify that it does not have possession of such record or that such record cannot be found after diligent search." I point out that the Town sent a copy of a response to you that

includes a certification by the Clerk indicating that various units within the town were not able to supply the records that you requested. If they are the only units within Town government that would maintain the records of your interest, the certification would appear to be proper. However, if there is a possibility or likelihood that the records may be maintained elsewhere, the certification in my view may be inadequate.

Lastly, since you referred to them, §89(8) of the Freedom of Information Law and §240.35 of the Penal Law concern the "unlawful prevention of public access to records. The latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record that must be maintained.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Margaret A. Cole
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14693

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

May 25, 2004

Mr. Sean Varone
94-A-3541
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Varone:

I have received your letter in which you complained that you had not received a response to your Freedom of Information Law request directed to the Department of Correctional Services Inspector General's Office. You asked what recourse you might have.

In this regard, having searched our files concerning appeals and determinations, it appears that Mr. Anthony Annucci, Counsel to the Department, responded to your appeal and informed you that your initial request was directed to the wrong person and that a review of the documents was being conducted and that you would receive a reply by May 5, 2004. As such, it is assumed that you have received a response to your request.

With respect to your question concerning what recourse you have when requests are ignored, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM: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

May 25, 2004

Mr. Donnell Jefferson
92-B-2833
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jefferson:

I have received your letter in which you raised a variety of questions concerning the implementation of the Freedom of Information Law.

In this regard, I will attempt to respond to your questions by offering the following general comments.

First, the Committee on Open Government is authorized to provide advice and opinions to any person having questions concerning the Freedom of Information Law. As such, a person can seek an advisory opinion whenever he or she has a question concerning that statute.

Second, if there is a specific advisory opinion that you are interested in receiving, you may request it from this office.

Third, §87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying, and the regulations promulgated by the Committee on Open Government state in part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3). In my view, neither the Law nor the regulations requires that records be transferred from their usual locations to accommodate an applicant at a site convenient to the applicant. In short, while inmates may be indigent or unable to travel, I do not believe that an agency is required to make records available at other than its designated or customary locations.

It is also noted that records that are available for inspection are also available for copying by paying the requisite fees. Section 87(1)(b)(iii) of the Freedom of Information Law states that an

agency may charge "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." I point out 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)].

Fourth, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information responsive to a request, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request.

Next, the Freedom of Information Law does not require that you request "particular records." By way of background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant seek "identifiable" records. That standard often resulted in the kind of problems that you have raised, that you are unaware of the particular records that you want and therefore cannot identify them. Nonetheless, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Additionally, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state that an agency's designated records access officer has the duty of assuring that agency personnel "assist the requester in identifying requested records, if necessary" [21 NYCRR 1401.2(b)(2)]. Therefore, when making a request, it is suggested that you confer with the records access officer in an effort to enable you to seek the records of your interest.

Lastly, you asked if the Prisoner's Litigation Reform Act would apply if you petition a court concerning an issue under the Freedom of Information Law. I am unfamiliar with that Act. However, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)]. As such, the Prisoner's Litigation Reform Act would not apply with respect to a court proceeding concerning the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14695

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May 26, 2004

Mr. Ben Smalls
00-A-3608
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Smalls:

I have received your letter in which you complained that you have not received a response to your appeal made under the Freedom of Information Law directed to the Westchester County District Attorney's office. You requested a grand jury log book entry for a certain indictment number as well as other records that you did not identify.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Since you referred to various grand jury related records, it is my view that those records could be withheld if requested under the Freedom of Information Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the CPL, states in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

Further, "subdivision three" of §190.25 includes specific reference to the district attorney. As such, grand jury records would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Richard E. Weill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 26, 2004

E-Mail

TO: Joseph Mangano [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. Mangano:

I have received your letter and apologize for the delay in response. You wrote that the Bureau of Radiation Protection at the State Department of Health "routinely collects data on environmental levels of radioactive chemicals only produced by nuclear reactors and weapons." Although the Department provided reports containing the data from 1982 to 1994, "since then, they have not released any data, giving a variety of excuses." You added that you "need the data for research on several grants." You have sought guidance concerning "what [you] should do."

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and a request should ordinarily be made to him or her. The records access officer for the Department of Health is Robert LoCicero.

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, sufficient detail should be included to enable agency staff to locate and identify the records of interest.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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. While I am not familiar with the data of your interest, it appears that one of the grounds for denial of access, §87(2)(f), may be pertinent in determining rights of access. That provision authorizes an agency to deny access to records to the extent that disclosure "could endanger the life or safety of any person." The proper assertion of that exception is dependent on factual circumstances, the contents of records and the effects of their disclosure.

Lastly, since you wrote that you "need the data for...research on several grants", I note that your interest in or "need" for the records is irrelevant. In short, I believe that you would have the same rights of access as any other member of the public, irrespective of your need, interest or use of the data.

I hope that I have been of assistance.

RJF:jm

cc: Robert LoCicero

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 26, 2004

Mr. David L. Perkins
03-A-2287
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. Perkins:

I have received your letter in which you complained that you have not received any response or copies of records that you requested from Ms. Suzanne Gurran, the Appeals Officer for Rensselaer County. You indicated that you sent a copy of your request to this office in January. Having researched our files, we did not receive a copy of your request. However, we did receive a copy of the appeal determination from Ms. Gurran in which you request was denied.

In an attempt to clarify the matter, I offer the following comments.

First, from my perspective, the Freedom of Information Law does not apply, and §50-b of the Civil Rights Law would prohibit disclosure of records which identify a victim of a sex offense even though you were the person charged.

Subdivision (1) of §50-b states that:

> "The identity of any victim of a sex offense, as defined in article one hundred thirty or §255.25 of the penal law, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."

The initial ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 50-b of the Civil Rights Law exempts records identifiable to a victim of a sex offense from disclosure. Consequently, the Freedom of Information Law in my view provides no rights of access to those records. Any authority to disclose or obtain the records in question would be based on the direction provided by the ensuing provisions of §50-b.

In this regard, the introductory language of subdivision (2) provides that "[t]he provisions of subdivision one of this section shall not be construed to prohibit disclosure of information to: a. Any person charged with the commission of a sex offense..." While an agency is not forbidden from disclosing records subject to §50-b to a person charged, I do not believe that §50-b creates a right of access on behalf of such person. Further, subdivision (3) states in relevant part that "The court having jurisdiction over the alleged sex offense may order any restrictions upon disclosure authorized in subdivision two of this section..."

The state's highest court has held that the exception in §50-b authorizing disclosure to persons "charged" with a sex offense did not apply to those seeking post-conviction relief. Consequently, agencies and courts were prohibited from disclosing records that had been sought by a convicted sex offender insofar as the records identified victims of sex offenses [Fappiano v. New York City Police Department, 724 NYS2d, 685, 95 NY2d 738 (2001)].

In consideration of the foregoing, in my opinion, §50-b would prohibit the county clerk from providing you with records that identify the victim of a sex offense.

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 office of the district attorney.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 26, 2004

Mr. R. Scott
00-B-1406
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. Scott:

I have received your letter in which you asked for assistance with respect to your unanswered Freedom of Information Law request and appeal directed to the Great Meadow Correctional Facility.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

Lastly, in the correspondence attached to your letter, you indicated that you lack funds to pay for the records requested. In this regard, I point out that there is nothing in the Freedom of Information Law that 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)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14699

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May 26, 2004

E-MAIL

TO: Phyllis Ann <Plinker@ins.state.ny.us>

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, unless otherwise indicated.

Dear Phyllis Ann:

I have received your note in which you indicated that the State Comptroller is performing an audit of the Liquidation Bureau. Because the Department of Audit and Control is subject to FOIL, you expressed concern with respect to "the status of any information that the Comptroller's auditors may take with them to their agency", and you asked about "the FOIL status of Liquidation Bureau information....once the information falls into the possession of the Comptroller's auditors."

In this regard, first, as you are aware, it has been held that the Liquidation Bureau "functions independently, administratively and financially independent of the state" and, therefore, is not an "agency" that falls within the coverage of FOIL [Consolidated Edison Co. v. Insurance Department, 523 NYS2d 186, 189 (1988)].

Second, however, when records from any source come into the possession of an agency, such as the Department of Audit and Control, they are subject to FOIL. 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 a decision involving records prepared by corporate boards furnished voluntarily to the Insurance Department, 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, 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 an agency, I believe that they constitute "records" of the agency subject to rights conferred by FOIL.

Lastly, with respect to rights of access, FOIL is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In consideration of our conversation, I point out that an assertion or claim of confidentiality, unless it is based upon a statute, is likely 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 FOIL, 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, (id., see also; Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my view serve to enable an agency to withhold a record.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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May 26, 2004

E-MAIL

TO: Edwina Davies [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. Davies:

As you are aware, I have received your letter in which you sought an advisory opinion concerning the right to obtain records associated with requests for proposals (RFP's).

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.

Potentially relevant is §87(2)(c), which enables agencies to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." From my perspective, the key word in the quoted provision is "impair", and the question under that provision involves how disclosure would impair the process of awarding contracts.

Section 87(2)(c) often applies in situations in which agencies seek bids or RFP's. While I am not an expert on the subject, I believe that bids and the processes relating to bids and RFP's are different. As I understand the matter, prior to the purchase of goods or services, an agency might solicit bids. So long as the bids meet the requisite specifications, an agency must accept the low bid and enter into a contract with the submitter of the low bid. When an agency seeks proposals by means of RFP's, there is no obligation to accept the proposal reflective of the lowest cost; rather, the agency may engage in negotiations with the submitters regarding cost as well as the nature or design of goods or services, or the nature of the project in accordance with the goal sought to be accomplished. As such, the process of evaluating RFP's is generally more flexible and discretionary than the process of awarding a contract following the submission of bids.

When an agency solicits number of bids, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage *vis a vis* those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, when the deadline for submission of bids has been reached, all of the submitters are on an equal footing and, as suggested earlier, an agency is generally obliged to accept the lowest appropriate bid. In that situation, the bids would, in my opinion, be available.

In the case of RFP's, even though the deadline for submission of proposals might have passed, an agency may engage in negotiations or evaluations with the submitters resulting in alterations in proposals or costs. Whether disclosure at that juncture would "impair" the process of awarding a contract is, in my view, a question of fact. In some instances, disclosure might impair the process; in others, disclosure may have no harmful effect or might encourage firms to be more competitive, thereby resulting in benefit to the agency and the public generally. If a contract has been awarded, I do not believe that §87(2)(c) would serve as a basis for withholding.

Also of potential significance is §87(2)(d), which enables an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information 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 firms responding to RFP's. If, for example, the records could be used to ascertain a unique business process or include significant and detailed financial information, it might be contended that certain aspects of the records might, if disclosed, cause substantial injury to its competitive position.

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.).

In my view, the nature of the records and the area of commerce in which a profit-making entity is involved would be the factors used to determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of the 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.

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

cc: Mary Krause

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3803
FOIL-AO-14701

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May 27, 2004

E-MAIL

TO: "Supervisor Susan Cockburn" <tomsupervisor@frontiernet.net>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Supervisor Cockburn:

As you are aware, I have received your letter in which you raised questions relating to the Open Meetings and Freedom of Information Laws.

You wrote that members of the Town Board and others "have repeatedly met in a local village bar...and have discussed town matters amongst themselves in full view of the public", often after Town Board meetings.

In this regard, by way of background, in a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a majority of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, 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, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

In my opinion, inherent in the definition of "meeting" is the notion of intent. If a majority of a public body gathers in order to conduct public business collectively, as a body, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law. In the decision cited above, the Court affirmed a decision rendered by the Appellate Division,that dealt specifically with so-called "work sessions" and similar informal gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an offici@l document. Every step of the decision-making process, including the

> decision itself, is a necessary preliminary to form action. Formal acts have always been matters of public records 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).

With respect to social gatherings or chance meetings, it was found that:

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to point just short of ceremonial acceptance'" (id. at 416).

In view of the foregoing, if members of a public body meet by chance or at a social gathering, for example, I do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body. However, if, by design, a majority of the members of a public body gather to discuss public business, formally or otherwise, I believe that a gathering of a majority would trigger the application of the Open Meetings Law, for such gatherings would, according to judicial interpretations, constitute "meetings" subject to the Law.

Although the Open Meetings Law does not specify where meetings must be held, I point out that §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. While a bar or restaurant is open to the public, I believe that it would be inappropriate and inconsistent with the Open Meetings Law to hold a meeting in a location where those who attend must be members or are expected to make a purchase. Any member of the public has the right to attend meetings of public bodies. In my view, a meeting held at a bar would represent an impediment to free access by the public.

Next, you referred to a situation in which a town employee quit without notice and claimed payment for more than a thousand hours of compensatory, vacation and sick time. When you asked for the records from the Town Clerk indicating those accruals, you were told that they do not exist. However, a Town Board member said that he has the records at his home. You indicated that you would like to see them prior to any payment.

As you are likely aware, the Freedom of Information Law pertains to existing records. However, due to the scope of that statute, I believe that the records of your interest must be made available insofar as they exist, irrespective of their physical location. The Freedom of Information Law includes all agency records within its coverage, and §86(4) defines the term "record" expansively to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents need not be in the physical possession of the Town Clerk or located in Town offices 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 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 the context of the matter as you presented it, if the materials at issue are kept by a Town Board member or other person at his or her home or private office, I believe that they would constitute Town records subject to rights conferred by the Freedom of Information Law. I note, too, that §30 of the Town Law states in part that a town clerk is the legal custodian of all town records. That being so, if the records sought are kept outside of Town offices, I believe that the Town Clerk would have the responsibility to obtain them or direct their disclosure in response to a request for their review by yourself or a member of the public.

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.

Section 87(2)(b) 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. 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 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.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14702

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May 28, 2004

Ms. Aimee J. 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 Ms. Fitzgerald:

As you are aware, I have received your letter, and I appreciate your kind words.

You requested from the Town of Woodbury "Any correspondence to & from any sources regarding the issuance of a Certificate of Occupancy to Conroy for their porch." You were informed in response that "the correspondence we have on file is of a confidential nature, attorney/client and we can not, at this time release any of these letters."

I am unaware of the specific nature of the correspondence falling within the coverage of your request. However, in an effort to provide perspective and background, I offer the following comments.

First, the Freedom of Information Law is expansive in its scope, 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, hooks, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the language quoted above, any written materials maintained by or for the Town that fall within the ambit of your request would, in my view, constitute records subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records

or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Insofar as the records sought include communications between Town employees and the town attorney, it appears that the attorney-client privilege would be relevant in determining 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)].

The other ground for denial of potential significance, §87(2)(g), deals with communications between or among government agency officers or employees and permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> I. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. 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).

Insofar as the correspondence that you requested did not emanate from a town attorney or a government officer or employee, I believe that it would be accessible. In short, I do not believe that any of the grounds for denial of access would apply in that instance.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: GaryThomasberger
Marian Tipaldo
Desiree Herb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 28, 2004

Mr. Anthony Puckett
97-A-3749
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929-2001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Puckett:

I have received your letter in which you asked for assistance with respect to your Freedom of Information Law request to the New York City Department of Corrections for copies of pages from a log book. In response to your request, the records access officer indicated that the requested material could not be found. You asked how long the Department has to keep these materials and what "Code, Rule, or regulation" requires the Department to maintain these log books.

In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

With respect to your questions concerning the retention of log books, it is suggested that you contact the New York City Department of Records and Information Services, Municipal Records Management Division, 31 Chambers Street, New York, NY 10007. That agency is responsible for developing retention and disposition schedules for all records maintained by New York City government.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 28, 2004

Ms. Patricia Freeman
Mendon Town Councilperson
[redacted]

The staff of the Committee on 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. Freeman:

I have received your letter, and I appreciate your kind words. You asked that I confirm the response given during a presentation during which I spoke at the annual meeting of the Association of Towns.

You wrote that the prior Town Supervisor provided copies of "all correspondences" during her tenure of office to the Town Clerk, the Town Board and other "involved parties." Further, at the end of her term, "she downloaded several discs of information, templates and lists for the incoming Supervisor...[and] provided the clerk with hard copies of all these files." She then "cleared the electronic files from her computer and her secretary's computer." You asked during my presentation whether "there [is] a problem with this scenario", and I suggested that there was no problem, for if the Town Clerk, as "the keeper of the record", has hard copies, no records would have been destroyed.

In this regard, although I responded as I did in an effort to provide a service and information for those present, the matter does not directly relate to the Freedom of Information Law. That statute deals generally with the extent to which government records must be disclosed or may be withheld. It does not pertain to the custody, maintenance or preservation of records. Nevertheless, it is reiterated that the Town Clerk, pursuant to §30(1) of the Town Law, is the legal custodian of all Town records, irrespective of the physical custody or location of the records.

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and

> identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

As such, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached.

Lastly, §57.29 of the Education Law states that:

> "Any local officer may reproduce any record in his custody by microphotography or other means that accurately and completely reproduces all the information in the record. Such official may then dispose of the original record even though it has not met the prescribed minimum legal retention period, provided that the process for reproduction and the provisions made for preserving and examining the copy meet requirements established by the commissioner of education. Such copy shall be deemed to be an original record for all purposes, including introduction as evidence in proceedings before all courts and administrative agencies."

If you have questions relating to records management or the retention and disposal of records, it suggested that you contact the State Archives, the unit within the State Education Department that has special expertise in those areas.

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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FOIL-AO-14205

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June 1, 2004

E-MAIL

TO: Gary Fredericks [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. Fredericks:

As you are aware, I have received your letter in which you questioned the legality of certain activities of the City Council in Beacon.

According to your letter, the Council voted unanimously to promote two police officers and place their promotions on the agenda for final approval at the Council's next meeting. An executive session was held later during that meeting, and a few days later, the Mayor indicated that the promotions would not be made and that the decision to reject the promotions was made by the Council during an executive session. You have asked whether such action could validly have occurred during an executive session.

In this regard, when a public body, such as the City Council, has properly entered into executive session, it may vote during the executive session, unless the vote is to appropriate public money.

Specifically, the introductory language of §105(1) of the Open Meetings Law 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Following the provision quoted above, there are eight grounds for entry into executive session. Pertinent in the context of the situation that you described is §105(1)(f), which authorizes a public body to conduct an executive session to discuss:

> "....the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

It appears that the discussion during the executive session likely involved the employment histories of the two officers. If that is so, I believe that the Council could properly have entered into executive session.

Additionally, §106 of the Open Meetings Law pertains to minutes of meetings and includes provisions concerning the preparation of minutes when action is taken during an executive session. Subdivisions (2) and (3) state that:

> "2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, minutes reflective of its action would not have include

reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy [see Freedom of Information Law, §87(2)(b)].

In this instance, since the matter involved police officers, I do not believe that details concerning the matter would have been required to have been disclosed or included in minutes. As you may be aware, §50-a of the Civil Rights Law prohibits the disclosure of personnel records pertaining to police officers that are used to evaluate performance toward continued employment or promotion.

Notwithstanding the foregoing, I point out that since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although that statute generally pertains to existing records and ordinarily does not require that a record be created or prepared [see Freedom of Information Law, §89(3)], an exception to that rule involves voting by agency members. Specifically, §87(3) of the Freedom of Information Law has long required that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Stated differently, when a final vote is taken by members of an agency, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Further, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "[t]he use of a secret ballot for voting purposes was improper", and that the Freedom of Information Law requires "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987), aff'd 72 NY 2d 1034 (1988)].

To comply with the Freedom of Information Law, I believe that a record must be prepared and maintained indicating how each member cast his or her vote. From my perspective, disclosure of the record of votes of members of public bodies, such as the City Council in this instance, represents a means by which the public can know how their representatives asserted their authority. Ordinarily, a record of votes of the members appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 2, 2004

Ms. Amy McKnight
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. McKnight:

As you are aware, I received your letter and the materials attached to it. If my interpretation of the matter is accurate, you requested records pertaining to the Big Tree Volunteer Fire Company ("Big Tree") through the Town of Hamburg. Although the request was "approved" by the town attorney, Big Tree has apparently not cooperated or made the records available.

In this regard, I offer the following comments.

First, from my perspective, the Town and Big Tree are separate legal entities. While Big Tree and the Town may have a contractual relationship, I do not believe that the Town has legal custody or control of Big Tree's records.

Second, 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 applies to entities of state and local government. Nevertheless, the Court of Appeals, the state's highest court, held more than twenty years ago that volunteer fire companies constitute agencies required to comply with that law, despite their corporate status.

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, even though many are created as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

Another decision confirmed in an expansive manner that volunteer fire companies are required to 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, I believe that Big Tree has an independent responsibility to give effect to and comply with the Freedom of Information Law.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies, such as Big Tree, must respond to requests for records. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance understanding of and compliance with the Freedom of Information Law, a copy of this response will be sent to Chief Stoberl.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Stoberl
Hon. Catherine A. Rybczynski

FOIL-AO-14707

From: Robert Freeman
To: Village of Schuylerville
Date: 6/2/2004 11:51:19 AM
Subject: Re: foil and the fire department

A volunteer fire department typically is a not-for-profit corporation that carries out its duties based on a contractual relationship with one or more municipalities. Although not-for-profit corporations ordinarily are not subject to the Freedom of Information Law, the Court of Appeals, the state's highest court, held in 1980 that volunteer fire companies are "agencies" required to comply with that law.

If my assumptions in this instance are accurate and the volunteer fire company is a corporate entity separate and distinct from the Village, you, as Village Clerk, would not have custody or control over the company's records. And if that is so, you would not bear the responsibility of dealing with a request for company records; a request for company records should be made to the company.

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-14708

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June 2, 2004

Mr. David Donaldson
02-B-1351
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. Donaldson:

I have received your letter and the correspondence attached to it in which you requested an advisory opinion concerning your requests made to the Chemung County Jail. You requested records concerning your transportation from the jail to court and records and/or logbooks of all your attorney visits from December 1, 2001 through June 1, 2002. Mr. Daniel Pesesky of the Chemung County Jail in a letter date April 20 informed you that the jail does not keep records for individual inmate transports. He also stated that you would have to supply the name of your lawyer and that it would take approximately thirty days to research the visitors logs. You appealed the denial of access concerning the transportation records.

In this regard, I offer the following comments.

First, with respect to your request and the response by Mr. Pesesky concerning transportation records, 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 new record in response to a request. However, 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, when a response indicates that no records exist, I do not believe that that response could be characterized as a denial of access. You were not denied access to a record, because no such record exists. Therefore, the County would not have withheld records and, in my view, there would be no right to appeal.

Third, with regard to the response by Mr. Pesesky that you would have to supply the name of your attorney and that it would take thirty days to research the visitors logs, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 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. As such, the response from Mr. Pesesky appears to be consistent with law.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Daniel Pesesky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1909

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June 2, 2004

Mr. Sam Pratt
Executive Director
Friend of Hudson
P.O. Box 326
Hudson, NY 12534

Ms. Ellen Thurston
Treasurer
Friends of Hudson
P.O. Box 326
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. Pratt and Ms. Thurston:

I have received your letter prepared in your capacities as officers of Friends of Hudson, a citizen group based in the City of Hudson.

Having met with difficulty in your recent efforts to gain access to records in possession of the City of Hudson, and in attempt to avoid those kinds of problems in the future, you raised the following questions:

> "1) Are public notices and application materials submitted by an agency (such as DEC) to municipalities for public review subject to FOIL?
>
> 2) Is it proper for a municipality (or agency of that municipality) to deny copies of records in its possession, on the basis that the same records are also in the possession of another agency, thus requiring a citizen to obtain those records elsewhere?"

In this regard, first, the Freedom of Information Law pertains to all records maintained by an agency, such as the City of Hudson, irrespective of their function or origin. That statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of the foregoing, as soon as documentation comes into the possession of an agency or is kept for an agency, it constitutes an agency record that falls within the framework of the Freedom of Information Law. By means of example, in the context of the situation that you described, when documents were received by the City of Hudson from the Department of Environmental Conservation, they constituted City records for purposes of the Freedom of Information Law. Either the City and the Department would be required to honor a request for those records, regardless of which agency created or initially obtained the records.

Second, when records are maintained by an agency, again, irrespective of their origin, they are, according to §87(2) of the Freedom of Information Law, presumptively accessible and available for inspection and copying. Section 89(3) requires agencies to provide copies of accessible records upon payment or offer to pay the appropriate fee, and §87(1)(b)(iii) states that agencies may charge up to twenty-five cents per photocopy, or the actual cost of reproducing other records (i.e., those larger in size, computer tapes or disks, etc.). I note, too, that an agency cannot charge a fee for the inspection of records accessible to the public.

In an effort to enhance understanding of and compliance with the Freedom of Information Law, copies of this opinion will be forwarded to City officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: City Council
Hon. Bonnie Colwell, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14710

41 State Street, Albany, New York 12231
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June 2, 2004

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 requested assistance with respect to your Freedom of Information Law request directed to the New York City Department of Correction for commitment information required to be maintained under §500-f of the Corrections Law. Mr. Thomas Antenen acknowledged receipt of your request on September 24, 2003 and indicated that you should anticipate a response within two months. As of the date of your letter to this office, you had not yet received a response. You asked to whom you should direct an appeal.

In this regard, I offer the following comments.

First, I believe that §500-f of the Correction Law applies only to county jails and that it does not apply to correctional facilities maintained by the New York City Department of Correction. This is not to suggest that the records of your interest are not maintained by the Department, but rather that §500-f of the Correction Law does not apply to the Department.

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..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The person designated by the Department of Correction to determine appeals is Captain Lugo.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Thomas Antenent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 3, 2004

Mr. Larry Williams
99-A-2285
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Williams:

I have received your letter in which you complained that you have requested a variety of records from the New York City Police Department and the Office of the District Attorney, but that as of the date of your letter to this office, you had not received any responses. You also requested records from the Brooklyn Supreme Court and were told that the records could not be located.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

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.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, 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,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-14712

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June 3, 2004

Mr. Robert Hawley
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hawley:

As you are aware, I have received your correspondence concerning your efforts in obtaining records from the Village of Penn Yan.

It is noted at the outset that you requested "rulings" from this office. In this regard, the Committee on Open Government and its staff are authorized to render advisory opinions relating o the Freedom of Information and Open Meetings Laws. Therefore, the following commentary should be considered advisory and not binding upon a government agency or a member of the public.

The matter focuses on enforcement of the Village's snowmobile law at a meeting held in January. Having listened to a tape of the meeting, you contend that the matter was not discussed in public and allege that the Board conducted an executive to consider the issue, citing "pending litigation" as the reason. Approximately two months later, you requested that the Board "make known the discussion on the snowmobile matter during its executive session", but the Mayor denied your request. In connection with the foregoing, you asked:

> "1. Whether the Village can discuss enforcement of its snowmobile law in executive session, given that there is no pending or ongoing litigation on the matter.
>
> 2. Whether the Mayor can take it upon himself to rule on behalf of the Board of Trustees in denying FOIL access to notes or other documents on enforcing the snowmobile law.
>
> 3. Whether the Mayor and Board of Trustees can be compelled to disclose a discussion of the snowmobile law in executive session. By way of further explanation, at issue is the Village's earlier removal of signs prohibiting snowmobile use in certain parts of the Village,

> and the failure to restore the signs as a necessary part of effective enforcement of the law."

By way of background, first, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, the Law requires that meetings of public bodies be conducted in public, except to the extent that a closed or executive session may properly be held. Paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may be considered in 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. 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.

If indeed the issue concerning the snowmobile law involved the removal or restoration of signs as you suggested, it seems unlikely that there would have been a basis for consideration of the matter during an executive session. In short, based on a review of paragraphs (a) through (h) of §105(1), none of the grounds for entry into executive session appear to have been pertinent.

Second, when a public body enters into executive session and merely discusses an issue or issues but takes no action, there is no requirement that minutes or any other record of the executive session be prepared. In the context of your inquiry, if no action was taken and no record of the executive session exists, the Freedom of Information Law would not apply, for that statute pertains to existing records. Further, §89(3) provides in part that an agency, such as a village, is not required to create or prepare a record in response to a request. In a similar vein, there is nothing in either the

Freedom of Information or Open Meetings Laws, assuming that no record exists, that would require the Mayor and the Board of Trustees to disclose the nature of its discussion in executive session. It is possible that the executive session was improperly held; nevertheless, I know of no provision that would require that they honor your request to disclose the details of their discussion.

Third, when an initial request for records is denied, the person denied access may appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

The applicable provision of the Village Code, a copy of which you attached, states that "The Board of Trustees of the Village of Penn Yan shall hear appeals for denial of access to records under the Freedom of Information Law." That being so, I believe that the Board, not the Mayor, would have the duty of determining an appeal.

You also questioned the propriety of the deletion of telephone numbers appearing on the bills relating to the cell phone assigned to the Mayor.

In this regard, in a manner analogous to the Open Meetings Law, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. In my opinion, the phrase quoted in the preceding sentence indicates that a single record may be both accessible or deniable in whole or in part. I believe that the quoted phrase also imposes an obligation on agency officials to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

Perhaps most relevant is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear that those persons 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 them, 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].

When a public officer or employee uses a telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to an officer or employee of the Village or other government agency.

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended by some that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call.

There is but one decision of which I am aware that deals with the issue. In Wilson v. Town of Islip, one of the categories of the records sought involved bills involving the use of cellular telephones. In that decision, it was found that:

> "The petitioner requested that the respondents provide copies of the Town of Islip's cellular telephone bills for 1987, 1988 and 1989. The court correctly determined that the respondents complied with this request by producing the summary pages of the bills showing costs incurred on each of the cellular phones for the subject period. The petitioner never specifically requested any further or more detailed information with respect to the telephone bills. In view of the information disclosed in the summary pages, which indicated that the amounts were not excessive, it was fair and reasonable for the respondents to conclude that they were fully complying with the petitioner's request" [578 NYS 2d 642, 643, 179 AD 2d 763 (1992)].

The foregoing represents the entirety of the Court's decision regarding the matter; there is no additional analysis of the issue. I believe, however, that a more detailed analysis is required to deal adequately with the matter.

When phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call, and in many cases an indication of the phone number would disclose nothing regarding the nature of a conversation. Further, even though the numbers may be disclosed, nothing in the Freedom of Information Law would require

an individual to indicate the nature of a conversation. In short, I believe that the holding in Wilson is conclusory in nature and lacks a substantial analysis of the issue.

This is not to suggest, however, that the numbers appearing on a phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to contact recipients of public assistance or persons seeking certain health services. It has been advised in the past that if a government employee contacts those classes of persons as part of the employee's ongoing and routine duties, there may be grounds for withholding phone numbers listed on a bill. For instance, disclosure of numbers called by a caseworker who phones applicants for or recipients of public assistance might identify those who were contacted. In my view, the numbers could likely be deleted in that circumstance to protect against an unwarranted invasion of personal privacy due to the status of those contacted, i.e., as recipients of public assistance or persons having particular health problems or issues.

Similarly, in the case of phone bills reflective of calls made by law enforcement officials, depending upon an official's function and how an official uses a phone, there may be grounds for withholding the numbers on a bill. If a phone is frequently or routinely used in connection with criminal investigations, disclosure of numbers called could permit an applicant for the bills to ascertain the course of an investigation, identify witnesses or even confidential informants. When that is so, I believe that appropriate deletions (i.e., the numbers called) could be made on the ground that disclosure would constitute an unwarranted invasion of personal privacy and/or endanger the lives or safety of law enforcement personnel and perhaps others who might be identified by means of a phone number appearing on a bill. In that latter situation involving the possibility of endangerment, §87(2)(f) of the Freedom of Information Law would serve as a basis for denial.

Lastly, many 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 "could endanger the life or safety of any person."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1613

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 3, 2004

Mr. Shawn Woodward
00-A-6563
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. Woodward:

I have received your letter in which it appears that you are asking whether inmates can request "documents, directives, manuals for guidelines, procedures, rule, regulations, etc. that govern the Superintendent's ability to authorize any variances of the standard handbook" relating to Special Housing Unit inmates under the Freedom of Information Law.

In this regard, I offer the following comments.

First, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records is, in my opinion, irrelevant.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, of potential relevance is §87(2)(g). 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 could 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 mater contained in the records at issue could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

The other provision of possible significance as a basis for denial is §87(2)(f). Again, that provision permits an agency to withhold records insofar as disclosure "could endanger the life or safety of any person." As suggested with respect to the other exceptions, I believe that agency staff would be required to review the records sought to determine which portions fall within this or other exceptions.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-1471L

From: Robert Freeman
To: richfield-clerk@stny.rr.com
Date: 6/3/2004 8:20:20 AM
Subject: Dear Ms. Harris:

Dear Ms. Harris:

I have received your inquiry concerning a situation in which a person seeks a copy of a tape recording of a Town Board meeting, but the Town does not have the equipment to copy the tape.

In my view, the easiest solution would involve placement of the applicant's tape recorder next to the Town's tape recorder and playing the Town's tape aloud so that the sound can be captured by the other tape recorder. No fee could be assessed in that instance.

As an alternative, if the applicant has a dual cassette recorder, he or she, in your presence, could use the Town's tape to produce a duplicate on his or her own cassette.

Finally, the Town could bring or send the tape to an outside source, a commercial establishment, to have a copy made. In that instance, the Town could charge a fee based on the actual cost of reproduction.

I hope that I have been of assistance.
Bob Freeman

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14715

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 3, 2004

Mr. Michael A. Polakoff
Ms. Judith E. Freilicher-Polakoff
[redacted]

The staff of the Committee 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. Polakoff and Ms. Freilicher-Polakoff:

I have received your letter, as well as a variety of related materials, concerning your efforts in obtaining records used in the development of the assessment of your real property. You sought assistance in obtaining those materials, particularly a "manual model" used by the Assessor of the Town of Cuyler, Ms. Juliene K. Ray.

I have discussed the "manual model" with representatives of the NYS Office of Real Property Services. It is my understanding that the manual model is a computer application, that it is software that serves as a delivery system. There is no document or record that can be characterized as a manual model.

Through the use of the manual model, comparables are not listed as they had been in past years. Rather, it is my understanding that figures are derived based on a computer analysis of typical unit values regarding recent sales. It is also my understanding that the Assessor printed spreadsheets that include information pertaining to recent sales used in the assessment process. Those spreadsheets relate to various categories of homes and involve what was characterized as a component method of valuation by Ms. Ray. She also informed me that she has made each of those spreadsheets available to you.

In snm, in consideration of the foregoing, I believe that the Assessor has acted in a manner consistent with law and provided information to you regarding the assessment of your property to the extent possible.

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: Juliene Ray

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1417/16

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 14, 2004

E-MAIL

TO: Alec Pandaleon [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. Pandaleon:

As you are aware, I have received your letter in which you raised questions in relation to a failure on the part of a volunteer rescue squad to respond to your requests for records made pursuant to the Freedom of Information Law.

In this regard, first, it is questionable whether the rescue squad is subject to the Freedom of Information Law. If it is part of or analogous to a volunteer fire company, I believe that it would be required to comply with that statute.

The Freedom of Information Law applies to agency records, and §83(3) defines the term " agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Although volunteer fire companies most often are not-for-profit organizations rather than governmental entities, it was held more than twenty years ago by the Court of Appeals, the state's highest court, that they are agencies subject to the Freedom of Information Law, for they perform what historically is an essentially governmental function.

Second, assuming that the volunteer rescue squad is required to comply with the Freedom of Information Law, you inquired with respect to the penalty that may be imposed in relation to

§89(8). That provision and §240.65 of the Penal Law include essentially the same language. Specifically, the latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record that must be maintained.

That statute indicates that unlawful prevention of public access to records is a violation. The term "violation" is defined in §10.00(3) of the Penal Law to mean "an offense, other than a 'traffic infraction', for which a sentence to a term in excess of fifteen days cannot be imposed." 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, when applicable, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal

> fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1717

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June 14, 2004

Hon. Bonnie Colwell
City Clerk
City of Hudson
City Hall, 520 Warren Street
Hudson, NY 12534

Dear Ms. Colwell:

I have received your letter of June 3 in which you communicated with respect to an advisory opinion that I prepared in response to a letter sent to this office by Friends of Hudson.

While I believe that you acted in good faith and sought to comply with the Freedom of Information Law, I would like to offer the following clarification.

In short, first it is reiterated that any document, regardless of its origin or use, constitutes a record of the City of Hudson for purposes of the Freedom of Information Law as soon as it comes into the possession of the City of a City official.

Second, although the facts of the matter are not entirely clear, it appears that you may have been informed by a representative of the Department of Environmental Conservation that certain records sent to the City should be made available for inspection, but not for copying. If that is so, I believe that the direction given would have been inconsistent with law. As suggested in my response to the Friends of Hudson, when records are available for inspection under the Freedom of Information Law, an applicant has the right to make or obtain copies as well.

When requests for copies are made for oversized documents, it has been recommended that the applicant may photograph the documents. Doing so obviates any need to send or deliver the documents to a facility that can produce copies and also enables the public to gain access to such records quickly and in a meaningful manner.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14718

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 14, 2004

Mr. Peter and Ms. Mary Pirnie
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. and Ms. Pirnie:

I have received your letter and the materials attached to it. As I understand the matter, you requested a draft of an audit pertaining to the Town of Spafford that was prepared by the Codes Division of the Department of State. The request was denied on the ground that the record consists of "inter-agency or intra-agency materials."

From my perspective, when the audit becomes final, it will be accessible in its entirety. Even in draft or preliminary form, however, it is likely that significant portions must be disclosed. In this regard, I offer the following comments.

First, the Freedom of Information Law applies to all records maintained by or for an agency, such as a town. Section 86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when documentation prepared by an agency, such as the Codes Division, or comes into the possession of the Town, irrespective of its status as a draft or preliminary, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records

or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While the record in question falls within the coverage of §87(2)(g), the exception pertaining to inter-agency and intra-agency materials, in consideration of the structure of that provision, it is likely that portions of the record at issue must be disclosed.

Specifically, §87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a decision rendered by the Court of Appeals, the state's highest court, although the issue involved records different from the record of your interest, so-called "complaint follow-up reports" prepared by New York City police officers, it is pertinent to your request. One of the contentions offered by New York City was that the 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, 89 NY2d 267, 276 (1996)].

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" (id., 276-277).

In short, insofar as the record sought constitutes statistical or factual information, I believe that the Town is obliged to disclose.

Further, as indicated previously, when the audit becomes final, it will be accessible in its entirety pursuant to subparagraph (iv) of §87(2)(g), for it will be an "external audit" available pursuant to that provision.

In an effort to enhance their understanding of and compliance with the Freedom of Information Law, copies of this opinion will be forwarded to agency officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Lisa M. Valletta
Roy Scott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1719

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June 14, 2004

Hon. Tony Avella
Council Member, 19th District
The Council of The City of New York
38-50 Bell Boulevard, Suite C
Bayside, NY 11361

The staff of the Committee on 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 Avella:

As you are aware, I have received your correspondence concerning your requests made pursuant to the Freedom of Information Law to the New York City Economic Development Corporation (hereafter "EDC"). The records sought involve responses to requests for proposals ("RFP's") solicited for the development of the Flushing Airport site in the College Point Corporate Park Industrial Urban Renewal Area in College Point, Queens.

In response to the requests, it was contended that, although the EDC is a local development corporation created pursuant to the Not-for-Profit Corporation Law, it gives effect to and complies with the Freedom of Information Law. Notwithstanding that statement and the issuance of a news release on February 3 by Mayor Bloomberg announcing the designation of College Point Wholesale Distribution Development LLC as the awardee of the contract, with the exception of a fact sheet describing the project, the remainder of the request was denied in its entirety. Judy E. Fensterman, EDC's FOIL Appeals Officer, wrote that because the material terms of the contract had not been finalized, it is "conceivable that disclosure of all the responses could unduly impair and compromise NYCEDC's ability to negotiate and potentially award a contract...in the best interests of the citizens of New York City."

You have requested an advisory opinion concerning the propriety of the denial of access. In this regard, I offer the following comments.

First, despite its creation as a local development corporation, I believe that the EDC is an "agency" required to comply with the Freedom of Information Law. Section 86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" [§86(3)].

Specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations. The cited provision describes the purpose of those corporations and states in part that:

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

Due to its status as a not-for-profit corporation, it is not clear in every instance that a local development corporation is a governmental entity; however, it is clear that such a corporation performs a governmental function.

Relevant to your inquiry is a decision rendered by the Court of Appeals in which it was held that a particular not-for-profit corporation, also a local development corporation, is an "agency" required to comply with the Freedom of Information Law [Buffalo News v. Buffalo Enterprise Development Corporation, 84 NY 2d 488 (1994)]. In so holding, the Court found that:

> "The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's counterpart, the Freedom of Information Act (5 U.S.C. §552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus the BEDC is a 'governmental entity' performing a governmental function of the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict

> the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

As I understand its functions, powers and duties, the EDC is an extension of and an integral component of the government of New York City. It was formed through the consolidation of agencies of New York City government, and the Mayor appoints the President and Chairman of its board of directors. In consideration of the "substantial governmental control" by the City of New York over EDC, in my view, the EDC clearly constitutes an agency that falls within the scope of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The Court of Appeals expressed and confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from that cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d,

> at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

The provision upon which the EDC relied to deny access, §87(2)(c), permits an agency to deny access to records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in that provision in my opinion is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers.

As I understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure of those bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor a bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied.

However, in a decision rendered more than twenty years ago, it was held that after the deadline for submission of bids or proposals has been reached and a contract has been awarded, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Conversely, the Court of Appeals sustained the assertion of §87(2)(c) in Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], in which the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

As indicated earlier, in a press release issued in February, the Mayor announced that a developer had been selected, and the fact sheet prepared later that month states that the EDC "received" more than 10 proposals" and that :

> "The project will be developed by College Point Wholesale Distribution Development, LLC. The LLC was formed by a group of New York-based wholesale business owners specifically to respond to the Request for Proposals.

> "The Developer has assembled a highly qualified and experienced team to assist in the project. The development manager is Jonathan Rose Companies, the architect is Hellmuth Obata and Kassabaum, and the construction manager is Turner Construction. The Developer's advisors are the law firm Pryor, Cashman, Sherman and Flynn, and K. Backus & Associates, Real Estate Consultants."

It is clear that a contract has been awarded. Moreover, in a decision dealing specifically with records sought in relation to the RFP process, it was held by the Appellate Division that "once the contract was awarded...the terms of [the] RFP response could no longer be competitively sensitive" [Cross-Sound Ferry v. Department of Transportation, 219 AD2d 346, 634 NYS2d 575,577 (1995)].

In consideration of the foregoing, I believe that EDC's denial of access is inconsistent with the Freedom of Information Law and its judicial interpretation. In an effort to encourage the EDC to reconsider its determination and to avoid litigation, a copy of this opinion will be forwarded to Ms. Fensterman.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Judy E. Fensterman
Rebecca A. Sheehan

STATE OF NEW YORK
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June 14, 2004

E-MAIL

TO: Brian Colella [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. Colella:

As you are aware, this office has received your correspondence concerning your efforts in obtaining information from the New York City Fire Department.

Two of the primary issues, those involving access to records indicating overtime payments made to public employees and time limits within which agencies must respond to requests and appeals made under the Freedom of Information Law, were considered in an advisory opinion addressed to you approximately a year ago. That being so, I do not believe that it is necessary to reiterate those remarks. I offer the following comments, however, concerning other issues that you raised.

First, the authority of the Committee on Open Government is advisory. Neither the Committee nor its staff is empowered to intervene in the legal sense or to "demand" that records be disclosed on behalf of an applicant.

Second, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create a record in response to a request. Similarly, while agency staff may choose to supply information by responding to questions, they are not obliged to do so by the Freedom of Information Law. By means of an example, in one of your attachments, you asked the Department how it determines who receives an offer of overtime. In the future, rather than seeking answers to questions, it is suggested that you request records, i.e., records indicating the means, procedure or policy under which overtime is offered.

Third, you wrote that you need the information for an arbitration. Here I point out that the status and need for records are irrelevant when records are sought under the Freedom of Information

must be made equally available to any person, without regard to one's status or interest [see Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75 (1984); Burke v. Yudelson, 51 AD 2d 673 (1976); Duncan v. Bradford Central School District, 394 NY 2d 362 (1976)]. As stated by the State's highest court, the Court of Appeals in Farbman, which involved 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)]. Consequently, one's status as a litigant or as a party in an administrative proceeding is irrelevant to that person's rights as a member of the public who seeks records under the Freedom of Information Law.

Lastly, insofar as records exist that indicate the department's "methodology" policy or procedure concerning the distribution of overtime, I believe that they must be disclosed.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Although, one of the grounds for denial of access, §87(2)(g), is pertinent, due to its structure, that provision often requires disclosure. 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 believe that the kinds of records at issue would consist either of instructions to staff that affect the public available under §87(2)(g)(ii) or final agency policies available under §87(2)(g)(iii). Further,

in a letter addressed to me on June 21, 1977 by former Assemblyman Mark Siegel, the lead sponsor of the revised Freedom of Information Law in 1977 and the author of the provision, he wrote that "...it is the intent that any so-called 'secret law' of an agency be made available. Stated differently, records or portions thereof containing any statistical or factual information, policy, or determinations upon which an agency relies is accessible."

I hope that I have been of assistance.

RJF:tt

cc: Aurora Perez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 14, 2004

Mr. Steven Fland
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fland:

I have received your letter in which you "expressed concern for the unreasonable withholding of information dealing with public money at Moravia Central School."

You initially requested a copy of "the proposed/work sheet of the 2004/2005 budget," including "code numbers." In response, the School disclosed " a generalized budget summary without any codes and descriptions of those coded items." Due to the minimal nature of those materials, you submitted a second request in which you asked for " a written explanation as to how the different categories, with their allotted money, have been totaled or calculated when no breakdown by codes or descriptions are available." In response to that request, you were informed that "no such public record exists." You were also informed that no public record characterized as a "line item budget with codes" exists.

In this regard, first, the Freedom of Information Law pertains to existing records, and §89(3) states in part that, an agency, such as a public school or school district, is not required to create a record in response to a request. Therefore, if no "explanation" of the means by which public moneys have been calculated or allotted exists, the School would not be required to prepare a new record with an explanation on your behalf.

Second, however, I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) of the Law defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when information is maintained by an agency in some physical form (i.e., drafts, worksheets, computer disks, etc.), I believe that it would constitute a "record" subject to rights of access. Further, all such records are "public" records subject to rights conferred by the Freedom of Information Law, irrespective of their status as preliminary or draft, and regardless of means by which they are stored or maintained.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my opinion, two of the grounds for denial would be relevant to an analysis of rights of access to the records sought.

Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> I. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a case involving "budget worksheets", it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law,

§88(1)(d)]. Currently, §87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

> "[I]t is readily apparent that the language statistical or factual tabulation was meant to be something other than an expression of opinion or naked argument for or against a certain position. The present record contains the form used for work sheets and it apparently was designed to accomplish a statistical or factual presentation of data primarily in tabulation form. In view of the broad policy of public access expressed in §85 the work sheets have been shown by the appellants as being not a record made available in §88" (54 Ad 2d 446, 448)."

The Court was also aware of the fact that the records were used in the deliberative process, stating that:

> "The mere fact that the document is a part of the deliberative process is irrelevant in New York State because §88 clearly makes the back-up factual or statistical information to a final decision available to the public. This necessarily means that the deliberative process is to be a subject of examination although limited to tabulations. In particular, there is no statutory requirement that such data be limited to 'objective' information and there no apparent necessity for such a limitation" (id. at 449).

Based upon the language of the determination quoted above, which was affirmed by the state's highest court, it is my view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible, unless a provision other than §87(2)(g) could be asserted as a basis for denial.

Further, another decision highlighted that the contents of materials falling within the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective 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)].

I note that Ingram was cited with favor and as precedent by the Court of Appeals in Gould v. New York City Police Department, [89 NY2d 267, 27 (1996)].

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted. Having reviewed the materials, I believe that they consist entirely of statistical or factual information that should have been disclosed pursuant to §87(2)(g)(i).

The remaining provision of possible significance, §87(2)(c), states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." If a proposed expenditure refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, those portions of budget-related records could be withheld.

Lastly, §84 of the Freedom of Information Law contains that statute's statement of intent. That provision states in part that:

> "As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.
>
> "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 School officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
William Tammaro

STATE OF NEW YORK
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June 14, 2004

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 April 9 in which you sought an advisory opinion in relation to a partial denial of access by Ms. Mary Saviola, the Records Access Officer in region 5 of the Department of Transportation.

Although the record sought is not described in the correspondence, Ms. Saviola redacted "personal identifying information relating to private citizens." You contend that "an unwarranted invasion of personal privacy is when the person involved has no choices in the matter - The person or persons here put themselves in play and made themselves part of the official record..."

I disagree with your contention. Whether a person, in your words, "puts himself or herself in play" is not necessarily relevant in considering whether the extent to which an agency may determine that disclosure would constitute an unwarranted invasion of personal privacy in accordance with §87(2)(b).

For example, it has been advised that identifying details pertaining to a person who submits a complaint to an agency may be withheld to protect that person's privacy, even though the action of that person precipitated the creation of a record. Although the deletion of a person's name may in some circumstances adequately serve to protect his or her privacy, often, due to factual circumstances, so minimal a deletion, may not be sufficient to guarantee that his or her identity cannot be ascertained. In those circumstances, it has been advised that other aspects of a record, or perhaps the record in its entirety, may be withheld, so as to ensure that the person's identity cannot be ascertained.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mary Saviola
John Dearstyne

STATE OF NEW YORK
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June 14, 2004

E-MAIL

TO: Bob and Jenny Petrucci [redacted]

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. and Ms. Petrucci:

As you are aware, I have received your correspondence of July 14. Although I believe that the issue that you raised has been addressed in previous communications with you, I offer the following comments.

Specifically, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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."

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 fully disagree with your suggestion that the Freedom of Information is "a joke." That statute has been used by thousands of individuals on thousands of occasions successfully and without impediment. Those disclosures have in many instances enabled the recipients to improve their lives and ensure the accountability of government. While that may not be your experience, I

believe that positive results are common and prevalent when many seek records under the Freedom of Information Law.

RJF:tt

cc: Robert Del Torto
Charlene M. Indelicato

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June 14, 2004

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 information presented in your correspondence.

Dear Mr. Kaminski:

I have received your letter in which you complained that the Department of Correctional Services has informed you that the records you requested were not available. You requested records that identify names, titles and office addresses for all employees responsible for "handling and responding to all inmate mail."

In this regard, I offer the following comments.

First, with certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

If no records exist that specifically identify those employees who handle or respond to mail from inmates, there would be no obligation imposed by the Freedom of Information Law to prepare a record containing that information on your behalf.

Second, if such records exist, I believe that they would be available. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Most pertinent in my view would be §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 109 AD 2d 292 (1985) aff'd 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In my opinion, insofar as records identify public employees in relation to their functions and duties, they would be accessible.

Lastly, I believe that a possible issue may involve whether the request concerning employees who perform a specific duty "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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.

In this instance, based upon the terms of your request, I would conjecture that many employees of the Department of Correctional Services and other agencies handle inmate mail and that there may be no separate record that identifies just those employees. If indeed that is so, it appears that the request might not have reasonably described the records, and that the Department's response was consistent with law.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14725

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 15, 2004

Mr. Paco Restifo
98-R-8253
Lakeview Shock Incarceration
Correctional Facility
P.O. Box T
Brocton, NY 14716

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Restifo

I have received your letter in which you asked if you could obtain a report prepared by the Inspector General's office at the Department of Correctional Services with respect to an investigation of your allegations that you were assaulted. You also asked which agency should receive such a request.

In this regard, I offer the following comments.

First, it is suggested that you submit a request to the Department of Correctional Services' records access officer. According to the Department's regulations, the records access officer is the Deputy Commissioner for Administration, whose office is located at Building 2, State Campus, Albany, NY 12236.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Several grounds for denial may be pertinent with respect to 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 a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. In addition, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Notwithstanding the foregoing, when certain personnel records relate to correction officers, they are confidential. Section 50-a of the Civil Rights Law provides that correction officers' personnel records that are "used to evaluate performance toward continued employment or promotion" cannot be disclosed, unless an officer consents or a court orders disclosure.

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.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14726

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June 15, 2004

Mr. Baxter Thomas
03-A-0954
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Thomas:

I have received your letter in which you complained that you have made numerous attempts to acquire records from the Division of Parole at your correctional facility and have not received them. You indicated that you wrote to Mr. Anthony J. Annucci at the Department of Correctional Services about the matter and that he indicated that the Division of Parole is a separate agency from the Department.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 Mr. Annucci suggested to you, the Division of Parole is an agency separate and distinct from the Department of Correctional Services. As such, Mr. Annucci would have not jurisdiction over records of the Division of Parole, even though the records may be physically located in a correctional facility. The person designated to determine appeals by the Division of Parole is Terrence X. Tracy, Counsel. He address is 97 Central Avenue, Albany, NY 12206.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 15, 2004

Mr. Noah Joseph
02-A-5084
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. Joseph:

I have received your letter in which you asked for assistance in gaining access to police officers' notes dealing with your arrest from the New York City Police Department. You indicated that you requested this information from the arresting officers and have only received a partial report from one officer. You also asked if you could request a copy of the dispatch transcripts concerning your arrest.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests. In the case of the New York City Police Department, there is one records access officer, Lt. Michael Pascucci, whose office is located at Room 110C, One Police Plaza, New York, NY 10038. While I believe that the persons in receipt of your request should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you resubmit your request to the records access officer.

Second, for future reference, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow-up reports and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> I. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical

> descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NYS2d 54, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, the Police Department 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 "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.

Further, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, with respect to the dispatch transcripts concerning your arrest, in my opinion, insofar as the recordings in question were broadcast and could have been heard by anyone with a scanner or public band radio, there would be no basis for denial, for the information contained on the tapes would have been effectively disclosed when it was transmitted.

Even if there are aspects of the tapes that were not transmitted via the public airwaves, while one or more of the grounds for denial may be relevant to an analysis of rights of access, a blanket denial of access would in my opinion be inconsistent with the requirements of the Freedom of Information Law as indicated previously. The same provisions cited earlier would also be applicable with respect to the dispatch transcripts.

However, for example, if a transcript consists of factual information or perhaps instructions to staff that affect the pubic, it would be available, unless a different ground for denial could properly be asserted. As you may be aware, despite an attempt to rely upon §87(2)(g) to deny access, it was held by the Appellate Division, Fourth Department, that "tape recordings of certain communications broadcast over public radio" must be disclosed [Buffalo Broadcasting Co., Inc. v. City of Buffalo, 126 AD 2d 983 (1987)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Janet M. Mercer

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14728

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June 15, 2004

Mr. Stacy Sanchez
90-A-6416
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sanchez:

I have received your letter and the materials attached to it in which you asked for assistance in obtaining medical records concerning your accuser.

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, with respect to medical records, 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, with respect to your requested directed to the New York City Police Department and its response that a decision will be made within 120 days, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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

Janet M. Mercer

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-14729

From: Robert Freeman
To: supervisor@clarksonny.org
Date: 6/15/2004 4:17:02 PM
Subject: http://www.dos.state.ny.us/coog/ftext/f8908.txt

http://www.dos.state.ny.us/coog/ftext/f8908.txt

Dear Supervisor Ey:

Attached is a lengthy opinion in which it was advised, in brief, that the public has the right to know which employees or former employees have health insurance paid for by the Town, but that there is no obligation to disclose the nature of the coverage, i.e., individual, family, catastrophic care, etc., selected by an employee or former employee. It has been suggested that a disclosure of the cost of each kind of coverage with the number of employees opting for each be made.

The other items, such as contributions to the Retirement System, the amount of a former employee's pension, or the value of benefits, would, in my opinion, be accessible to the public.

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
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14730

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June 15, 2004

Mr. Jason Jones
01-A-4390
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Jones:

I have received your letter in which you asked for assistance concerning your Freedom of Information Law request and appeal directed to the Psychiatric Satellite Unit at your correctional facility for your mental health records.

In this regard, I offer the following comments.

Although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If the Sing Sing Correctional Facility maintains the records as a facility, I believe that it would be required to disclose the records to you to the extent required by §33.16 of the Mental Hygiene Law. 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

Janet M Mercer (77)

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 15, 2004

Mr. Ronald Herbert
96-A-5921
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990-0900

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Herbert:

I have received your letter in which you complained that your attempts to obtain your ASAT file have been unsuccessful.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Janet M. Mercer

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14732

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 15, 2004

Mr. Richard Lenihan
83-B-2557
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lenihan:

I have received your letter in which you asked for help in obtaining "minutes of [your] in chambers plea negotiation." You were denied access on the ground that the minutes have been sealed.

In this regard, it is noted that the Freedom of Information Law pertains to agency records and that §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. Other provisions of law, however, often grand broad rights of access to court records (see e.g., Judiciary Law, §255), and it is suggested that any request for those records be made to the clerk of the court, citing an applicable statute as the basis for the request.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14733

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 15, 2004

Mr. Joseph Mastropietro
88-B-0811
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. Mastropietro:

I have received your letter in which you asked for help in obtaining documents from Wende Correctional Facility and the NYS Department of Correctional Services. You wrote that your requests were neither acknowledged or answered and that you appealed to Mr. Anthony Annucci, who indicated that your requests were under review and that he would take no action on your appeal. You also asked that this office take disciplinary action against the Department.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute, to compel an agency to grant or deny access to records or to impose disciplinary action against a person or agency. 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. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 of the Freedom of Information Law, copies of this opinion will be sent to Ms. Wanda Stachowski and Mr. Anthony J. Annucci.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Janet M. Mercer

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Wanda Stachowski
Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1473 4

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 15, 2004

Mr. David S. Ladenheim
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ladenheim:

I have received your letter and the correspondence attached to it. You wrote in order to "lodge a formal complaint" against the New York City Taxi and Limousine Commission due to its failure to provide "answers to [your] requests" made under the Freedom of Information Law.

In this regard, having reviewed your request, 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.

In most instances, you requested "numbers" or totals. For instance, one aspect of the request involved "the total number of complaints against taxi drivers, the total number of complainants that failed to appear for hearing, total number of findings of not guilty, and total amount of revenue generated by the actual fines imposed for year ending 2003."

Insofar as records exist that indicate the kinds of totals that your seeking, I believe that those records or portions of records must be disclosed. In short, none of the grounds for denial of access appearing in §87(2)(a) of the Freedom of Information Law would be applicable. However, if no totals exist in the form of a record or records, the Commission in my view would not be required to prepare totals on your behalf or to review its records and tabulate its findings in order to create a new record for you.

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, I believe that the Commission is required to respond in a manner consistent with the Freedom of Information Law. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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:tt

cc: John Balis, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIC-AO-14735

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June 15, 2004

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 facts presented in your correspondence.

Dear Mr. Reiter:

I have received your letter and the correspondence attached to it.

In short, you requested a copy of the contract between the Enlarged School District of the City of Watervliet and its attorney. Because there was no response to the request, you contacted the District in other correspondence to remind the District of its responsibilities. Nevertheless, as of the date of your letter to this office, you had "yet to receive the common courtesy of a reply, let alone the requested contract."

In this regard, assuming that a contract between the District and its attorney or law firm exists, I believe that it must be made available to comply 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. From my perspective, none of the grounds for denial could properly be asserted to deny access to such a contract.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance their understanding of and compliance with 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:tt

cc: Board of Education
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3817
FOIL-AO-14736

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June 15, 2004

E-MAIL

TO: Klaus Gaebel [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. Gaebel:

As you are aware, I have received your correspondence.

You have raised a series of questions all of which relate to the process by which the then eight members of the Saugerties Board of Education, upon which you serve, voted to elect a ninth member in order to fill a vacancy.

In short, it is my view, based on the language of the Freedom of Information Law, that the only instance in which a record was required to have been prepared involved the final vote in which a candidate received five votes. It is also clear, however, that there is no "privacy" accorded to Board members when a final action is taken.

Specifically, §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, such as a board of education, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. 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)]. I note, too, that it has been specifically held that the final vote involving the election of officers of a public body cannot be accomplished by secret ballot [Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000].

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 15, 2004

E-MAIL

TO: John Bosco <Bosco@siaccident.com>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bosco:

As you are aware, I have received your letter. You have requested an advisory opinion concerning the following matter;

> "Assume that a plaintiff in a personal injury action brought a case against the City of New York for damages on account of negligence in the ownership of a road in the City of New York. The case settled. A settlement agreement is entered into by the plaintiff and the Defendant, the City of New York. The attorney for the City of New York want [sic] to insert a confidentiality clause in the settlement agreement barring disclosure of the terms of the settlement agreement. Assume further that the funding of the settlement will come from an insurance policy of a contractor who was actually doing the road work."

You have asked whether the City must "disclose the settlement agreement pursuant to a FOIL request despite the existence of a confidentiality clause in the agreement."

From my perspective, based on the language of the Freedom of Information Law and its judicial construction, a "confidentiality clause" is irrelevant in considering rights of access. In this regard, I offer the following comments.

It is noted at the outset 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 twenty five years ago that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

Second, I believe that the agreement must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Unless records may justifiably be withheld in accordance with one or more of the grounds for denial, a claim, a promise or an agreement to maintain confidentiality would, based on judicial decisions, be meaningless.

In Geneva Printing Co. v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefitted by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure.

> Without one, the agreement is invalid insofar as restricting the right of the public to access."

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law [see FOIL, §87(2)(g)(iii)]. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

In another decision, the matter involved the subject of a settlement agreement with a town that included a confidentiality clause who brought suit against the town for disclosing the agreement under the Freedom of Information Law. In considering the matter, the court stated that:

> "Plaintiff argues that provisions of FOIL did not mandate disclosure in this instance. However, it is clear that any attempt to conceal the financial terms of this expenditure would violate the Legislative declaration of §84 of the Public Officer's Law, as it would conceal access to information regarding expenditure of public monies.
>
> "Although exceptions to disclosure are provided in §§87 and 89, plaintiff has not met his burden of demonstrating that the financial provisions of this agreement fit within one of these statutory exceptions (see Matter of Washington Post v New York State Ins. Dept. 61 NY2d 557, 566). While partially recognized in Matter of LaRocca v Bd. of Education, 220 AD2d 424, those narrowly defined exceptions are not relevant to defendants' disclosure of the terms of a financial settlement (see Matter of Western Suffolk BOCES v Bay Shore Union Free School 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 the agreement must be disclosed in response to a request made under the Freedom of Information Law, notwithstanding the language regarding confidentiality in the agreement.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14738

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June 16, 2004

Mr. Eugene F. Meenagh
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Meenagh:

As you are aware, I have received your letter and a variety of materials relating to it.

The correspondence concerns your attempts to gain access to records indicating certain kinds of training on the part of police officials in the Town of Copake. You also requested all "computer records maintained by or for the police department...for the calendar year 2003..." Although several of the requests were granted in great measure, it was determined by the Town Board that the denials of access by its records access officer must be sustained "on the basis that there appeared to be no legitimate public purpose behind [your] ongoing FOIL requests."

You have asked whether a denial of access on that basis is consistent with law and whether the number of requests can be limited. In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law that sets a restriction on the number of requests that may be made. I note, however, that it has been held that an agency is not ordinarily required to produce or make copies of records available on a second occasion to an applicant who has previously gained access to those same records [see e.g., Moore v. Santucci, 151 AD2d 677 (1989)].

Second, the purpose of a request and the intended use of records are irrelevant when requests are made under the Freedom of Information Law. As stated by the Court of Appeals:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on 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 [Farbman v. New York City, 62 NY2d 75, 80 (1984)].

In short, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a litigant, and the nature of the records or their materiality to a proceeding.

Third, it appears that some of the records that you requested may be withheld.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used "to evaluate performance toward continued employment or promotion" are confidential. 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.

Lastly, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. In contrast, a request for computerized records does not describe the subject matter or content of the records; it merely refers to the means by which records are stored or maintained. If a request is made for all records of any agency kept on paper, I do not believe that such a request would reasonably describe the records. Similarly, I do not believe that a request for all "computer records" would satisfy that standard, and therefore, could be rejected on the ground that it does not reasonably describe 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:tt
cc: Town Board
Vana S. Hotaling

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-14739

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June 16, 2004

E-MAIL

TO: Margaret A. Feml [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. Feml:

As you are aware, I have received your letter in which you questioned the propriety of certain activities of the Board of Fire Commissioners of the Cairo Fire District.

In brief, at a Board meeting held on March 21 "Commissioner X handed in his official notice of resignation." At a meeting held on April 5, three Commissioners and Commissioner X were present, and the Chairman indicated that X "was rescinding his resignation and the Board was accepting it." The public questioned "how this could have been done without a vote taken", an agreement ensued, and "Commissioner Y" resigned and walked out. You wrote that "At this point there was the Chairman, a remaining Board member and Commissioner X", and you asked whether that could have been "a legal meeting."

After more debate, the Chairman announced that an executive session would be held. Forty-five minutes later, those who attended the executive session returned and the Chairman, according to your letter, said that there had not been a meeting, but rather "a discussion" during which "all four had come to an agreement...that the Chairman would step down and another Commissioner would take over the chair position." Both X and Y agreed to "stay" on the Board.

In this regard, it is emphasized that the Committee on Open Government and its staff are authorized to provide advice concerning the Open Meetings Law. We cannot advise as to the validity of a resignation or the status of a member of a public body who purportedly resigned. Consequently, the following comments will focus on the application of the Open Meetings Law.

First, based on relatively recent legislation, I believe that voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a

meeting held by videoconference. It is noted that the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Since a board of fire commissioners is the governing body of a public corporation, I believe that it clearly constitutes a public body.

As amended, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the Board of Fire Commissioners, 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."

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, 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 a "meeting" 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.

Third, it is emphasized that the definition of "meeting" [Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions,

> but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, when a majority of the Board gathers to discuss District business, collectively as a body and in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Assuming that a quorum was present, I believe that the gathering begun as an executive session but later characterized as "a discussion" was a meeting. Further, I believe that the meeting should have been conducted in public, for none of the grounds for entry into executive session delineated in paragraphs (a) through (h) of §105 (1) of the Open Meetings Law would apparently have applied.

Lastly, when action is taken by a public body, it must be memorialized in minutes, for §106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes must include reference to action taken by a public body.

Further, if a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes

pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

Therefore, if the Board reached a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. I note, too, that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot.

In an effort to enhance compliance with and understanding of the open government laws, copies of this opinion will be sent to the Board.

I hope that I have been of assistance.

RJF:tt

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1740

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June 16, 2004

E-MAIL

TO: Michael A. 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 facts presented in your correspondence.

Dear Mr. Miller:

As you are aware, I have received your letter. You have questioned the propriety of a fee of $200 that is being charged by the Nassau County Board of Elections for a "CD-diskette copy of Nassau County voter registration data." Since you are familiar with the case law and advisory opinions rendered by this office pertinent to the matter, you asked what action you might take to encourage compliance.

In this regard, by way of background and as you know, §87(1)(b)(iii) of the Freedom of Information Law authorizes agencies to charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing other records (i.e., those that cannot be photocopied, such as computer tapes or disks, tape recordings, etc.), unless a different fee is prescribed by statute.

The amount of the fee permitted to be charged for a computerized voter registration list was considered at length in Schultz v. New York State Board of Elections (Supreme Court, Albany County, September 7, 1995). The court determined the issue by viewing both the Freedom of Information Law and sections of the Election Law, stating that:

> 'The language of the Freedom of Information Law (Public Officers Law, sct. 87 (1)(b)(iii), which limits charges for requested public records to 'the actual cost of reproducing' [emphasis added], is elucidating. 'Actual cost' would reasonably seem to mean more finite, direct and less inclusive than'[indirect] cost', which is a concept as infinite and expandable as the mind of man. 'Reproducing' a record certainly does not include 'producing' a record in the first place -i.e., compiling the information from which the record is produces. The purpose and intention of the Freedom of

> Information Law is to further the concept of open government. For this reason charges for public records must be kept to a minimum. In a sense the information compiled by counties under election Law 5-602 and 5-604 is a part of that concept and charges for that information must be kept to a minimum so as to maximize access thereto."

Further, using the standard of "actual cost of reproduction", it was stated that:

> "Where the record is a computerized record the charge shall be limited to the cost of a diskette or other computerized tape and a reasonable amount for the salary of the employee downloading said diskette or tape during the time such diskette or tape is being downloaded."

When reproduction of a voter list involves a simple transfer of data from one storage medium to another, i.e., from a computer to one or more tapes or disks, I believe that the time and effort to do so would be minimal. If that is so, the "actual cost" would involve computer time, the cost of a tape or disk, plus according to Schultz the minimal cost of personnel time of an employee.

In my view, rather than initiating litigation, it is suggested that you contact the County Attorney in an attempt to resolve the matter. In an effort to encourage a positive outcome, a copy of this response will be sent to the County Attorney.

I hope that I have been of assistance.

RJF:tt

cc: Nassau County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3821
FOIL-AO- 14741

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June 16, 2004

E-MAIL

TO: Katy Cashen [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. Cashen:

As you are aware, I have received your letter concerning the propriety of certain actions purportedly taken by the Town of Claverack.

The matter involves the creation of a water district and the site of a water tower. As indicated during a phone conversation, the jurisdiction of the Committee on Open Government involves the ability to offer advice and opinions relating to the Open Meetings and Freedom of Information Laws. Consequently, the following remarks will relate to issues concerning those statutes.

You wrote that during a recent meeting of the Town Board, "it was revealed that a decision had been made as to the location of the Tower." Although the decision was apparently made based on an engineer's recommendation, you indicated that "no formal vote" was taken "by the full board." You added that Town officials informed residents that no report containing the engineer's recommendations exists.

In this regard, I offer the following comments.

First, by way of background, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of that statute defines the term "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section

> sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

The Town Board is clearly a public body required to comply with the Open Meetings Law.

Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assembly syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of the Board, or a convening by means of videoconferencing. An affirmative vote of a majority would be needed for the Board to take action or to carry out its duties.

I note that 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, 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.

In sum, I do not believe that the Town Board could validly have taken action, except at a meeting during which a quorum convened and in which a majority of the Board's total membership voted in favor of the proposed action.

Second, while I am unaware of whether any report or similar document relates to the siting of the water tower, I note that the Freedom of Information Law is expansive in the scope, for it pertains to all records kept by or prepared for an agency, such as a town. Section 86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, any documentation maintained by or for the Town, irrespective of its origin or physical location, would constitute a "record" subject to rights conferred by the Freedom of Information law.

I note, too, that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 16, 2004

Hon. Connie Lightner, CMC
Town Clerk
Town of Vestal
605 Vestal Parkway West
Vestal, NY 13850

The staff of the Committee on 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. Lightner:

I have received your letter and apologize for the delay in response. You have raised questions and requested an advisory opinion concerning "the availability of a final draft of the Town Comprehensive Plan."

According to your letter:

> "The Town of Vestal contracted with Saratoga Associates for a Comprehensive Plan and a committee consisting of the Planning Board, Town Engineer, ZBA Chairman, Conservation Advisory Commission Representative, two Town Board members and two citizen representatives was appointed.
>
> "The meetings of this committee were open to the public and the process has taken in excess of two years. The last committee meeting was devoted to going over the draft that had been sent to the committee and corrections were to be made, ie typo errors, spelling etc.
>
> "In December a final draft was sent to our Supervisor. Due to the Election of 2003, we now have two new Town Board members and also a new Planning Board member. These new people have asked for a copy of the Dec. Draft and have been advised by the Supervisor that she has not had an opportunity to check to see if all the changes and corrections were made. She has been in touch with Saratoga Associates and they have advised here that protocol states they send

> a copy of the draft to the Supervisor, she in turn makes the corrections desired, returns the draft to Saratoga (who in turn makes the changes) and forwards copies to the Supervisor. Once the committee has seen the draft, it is then presented to the Town Board."

In consideration of the foregoing, you have asked whether the draft should be available to the Town Board and committee members "before the Supervisor makes sure it is correct", whether the draft should be filed in your office in your capacity as Town Clerk, and whether the draft, as well as "minutes, tapes, [other] drafts and related materials" can be made available to the public.

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.

Since the meetings of the committee which you referred were open to the public, any portions of the records at issue that were effectively disclosed during those open meetings, must, in my view, be made available to any person. In short, insofar as there have been public disclosures of the contents of the draft or any other records, I believe that those disclosures constitute and serve as a waiver of any authority to deny access. I note too, that it was held more than twenty-five years ago that tape recordings of open meetings are accessible under the Freedom of Information Law [see Zaleskiv. Hicksville Union Free School District, Board of Education of Hiscksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978].

Second, notwithstanding the "protocol" in which it was advised that a copy of the draft be sent to and reviewed by Supervisor prior to review by either the committee or the Town Board, I find no reference to any such protocol or similar direction in any provision of law. Section 272-a of the Town Law entitled "Town Comprehensive Plan" describes the procedure for the preparation and eventual adoption of a comprehensive plan.

It appears that the committee may be a "special board", which is defined in subdivision (2)(c) of §272-a to mean:

> "...a board consisting of one or more members of the planning board and such other members as are appointed by the town board to prepare a proposed comprehensive plan and/or an amendment thereto."

It is my understanding that a "special board" may be designated by the Town Board, but that there is no requirement that a special board be created. If the development of the comprehensive plan is a function that is carried out by a special board, it appears that such board has the primary responsibility to develop a draft; if there is not such a board, the Town Board would have that responsibility.

Irrespective of which entity bore the responsibility of preparing the draft, there is nothing in §272-a that gives a town supervisor unilateral authority to review, modify or correct a draft comprehensive plan. That being so, I do not believe that the Supervisor has any greater right of access or control of the draft than any other member of the Town Board. Rather, it would appear all Town Board members should have equal authority to carry out or be involved in that function. For those reasons, it is my view that each member of the Town Board, logically and legally, should have the same access to the draft.

If the committee is a special board, it would appear, based on §272-a of the Town Law, that the members of that board should enjoy the authority to review the draft. Moreover, it is clear that they were involved in the creation of the draft and are most likely fully familiar with its content.

With respect to public access, if my assumption described earlier is accurate, that the substance of the draft, as well, perhaps, as the details now under review, have been disclosed or available to the public in the form of records distributed or disseminated, or by means of a series of open meetings, I believe that that ability to deny access would effectively have been waived. Further, since you asked whether the draft "can" be made available to the public, my response must be in the affirmative. Even in the instances in which records or portions of records *may* be withheld in accordance with the grounds for denial of access appearing in §87(2) of the Freedom of Information Law, the state's highest court has held that there is no obligation to do so. On the contrary, in Capital Newspapers v. Burns, the Court of Appeals determined that the Freedom of Information Law is permissive; although an agency may have the authority to withhold records or portions of records, it is not required to do so and may choose to disclose [67 NY2d 562, 567 (1986)].

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

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June 16, 2004

E-MAIL

TO: Linda A. Mangano [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. Mangano:

As you are aware, we have received your correspondence addressed to Janet, and we appreciate your kind words.

You referred initially to a provision in the Uniform Justice Court Act, §2019-a, and asked "what and is not releasable to the public" under that provision. From my perspective, §2019-a indicates that records maintained by a justice court are public, except when a different statute specifies that certain records are exempt from disclosure. For example, if a person is charged with a criminal offense, and the charge is dismissed in his or her favor, the records relating to the event are typically sealed pursuant to §§160.50 or 160.55 of the Criminal Procedure Law. Similarly, records pertaining to "apparently eligible" youths or persons adjudicated as youth offenders may be sealed under Article 720 of the Criminal Procedure Act. Those are the primary instances in my view in which records maintained by a justice court may not be accessible to the public.

I note that there is no single provision of law pertaining to court records. While §255 of the Judiciary Law generally requires that records in the custody of a court clerk are accessible, other provisions of law may deal with particular records or courts. For instance, §235 of the Domestic Relations Law provides that records pertaining to matrimonial proceedings are generally beyond public rights of access; §166 of the Family court Act states that records of those courts shall "not be open to indiscriminate public inspection", §2501 of the Surrogate's Court Procedure Act pertains to Surrogate's Court records.

Lastly, with respect to search warrants, I believe they may generally be withheld before they are executed based on §87(2)(e)(i) of the Freedom of Information Law, which deals with records compiled for law enforcement purposes. That provision and authorizes agencies to deny access

when disclosure would interfere with an investigation or judicial proceeding. After a search warrant has been executed, there may be no basis for denying access.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 16, 2004

Hon. Liz Berghorn
Town Clerk
Town of Rutland
28411 NYS Route 126
Black River, NY 13612

The staff of the Committee on 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. Berghorn:

I have received your letter in which you raised a variety of questions relating to request made under the Freedom of Information Law.

The initial area of inquiry involves your obligation to review or search through records prepared over the course of as much as fifty years in order to locate entries dealing with a particular road.

From my perspective, the issue involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a)

> (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the Town, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. If, for instance, the records are not kept on the basis of location, or if there is no index to the subject matter of minutes of meetings, and if a review of fifty years of minutes, page by page, a period of years would serve as the only means of retrieving the records of interest, the request would not reasonably describe the records. In that circumstance, you would not be required to engage in a page by page search.

If that is the case, it is suggested that applicant could on his or her own, review the minutes in an effort to locate and identify those of interest.

Second, in general, employee "time logs" are available. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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 "time logs" and similar records at issue must be disclosed under the Freedom of Information Law.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may

be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

I hope that I have been of assistance

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14745

41 State Street, Albany, New York 12231
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June 16, 2004

Mr. Michael DeMasi
The Gazette Newspapers
2345 Maxon Road Extension
Schenectady, NY 12301

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DeMasi:

I have received your letter and the correspondence attached to it. You have sought an advisory opinion concerning a denial of access to certain records that you requested from the Metroplex Development Authority in Schenectady.

By way of background, the records at issue pertains to the Parker Inn, "a hotel in downtown Schenectady whose renovation was financed, in part, with public subsidies from the Metroplex Authority." You requested "financial projections for the Parker Inn as outlined in their business plan, including, but not limited to, occupancy rates, and "all reports, letters, memorandums, and any other documentation indicating the occupancy rates at the Parker Inn in 2003." The request was denied in its entirety on the basis of §87(2)(d) of the Freedom of Information Law.

In this regard, first, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Department contended that DD5's could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink 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, because the records sought have been withheld in their entirety, the determination would, in my view, likely be inconsistent with the language of the law and judicial interpretations. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the Authority for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*... as long as the requisite particularized showing is made" (id., 277; emphasis added).

Third, the basis for denial cited by Metroplex, §87(2)(d), permits an agency to withhold records that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause a substantial injury to the competitive position of the subject enterprise."

The question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity. The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Also relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" in Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale [87 NY2d 410(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise...obtain the requested information, the inquiry ends here (id., 419).

From my perspective, it is possible that some of the records in question may have *some* value to competitors, but whether every aspect of every record that has been withheld would, if disclosed, cause *substantial injury* to the competitive position of the Parker Inn is questionable, and that is the standard that must be met to justify a denial of access.

In consideration of the burden of defending secrecy coupled with the language of the law and its judicial construction, it is doubtful, in my view, that occupancy rates for 2003 could justifiably be withheld. It is difficult to envision how occupancy rates relating to 2003 or any previous period could today, half way through 2004, cause injury, let alone substantial injury, to Parker Inn's competitive position.

With respect to the other records that you requested, the ability to justify a denial of access would, in my opinion, be dependent on the degree of detail contained within the records, their specificity, the extent to which there is real competition, and the ability to demonstrate that disclosure would indeed "cause substantial injury "to Parker Inn's competitive position." While it is possible that *some* aspects of those records might have been properly withheld, it is unlikely in my opinion that they may be withheld *in toto*.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jayme Lahut
Michael G. Sterthous

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-1474G

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June 18, 2004

Mr. A. Dolberry
03-A-3611
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

Dear Mr. Dolberry:

I have received your recent letter. As I understand its content, you requested various records from the Wyoming Correctional Facility in 2000, and you are seeking those records from this office now.

In this regard, the primary function of the Committee on Open Government involves offering advice and opinions relating to the Freedom of Information Law. The Committee cannot compel an agency to disclose its records, and it does not have general custody or control of records. In short, I cannot make the records of your interest available, because we do not possess those records.

As a general matter, a request for records should be directed to the agency that maintains them. I note, too, that the regulations promulgated by the Department of Correctional Services indicate that a request for records kept at a correctional facility may be made to the facility superintendent or his designee. It is my understanding that records pertaining to inmates are sent with the inmate when he or she is transferred to a different facility.

I hope that the foregoing will be of assistance to you.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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June 18, 2004

Mr. Thomas Simeti
Principal Assistant County Attorney
County of Rockland
Department of Law
11 New Hempstead Road
New City, NY 10956

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Simeti:

I have received your letter and appreciate your interest in complying with the Freedom of Information Law. You have asked that I review Rockland County's current procedures relating to the implementation of the Freedom of Information Law.

Based upon my review, I could offer extensive and detailed commentary concerning the propriety of various aspects of the procedures. Rather than engaging in that exercise, I will offer brief remarks concerning certain aspects of the procedures, which appear to consist of some elements derived from the Freedom of Information Law as originally enacted in 1974 and others based on that statute as revised in 1977 and effective in 1978. In addition, enclosed are copies of the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) and model regulations designed to facilitate the adoption of proper procedures by state and municipal agencies. As you are aware, §87(1) of the Freedom of Information Law requires that the governing body of a public corporation is required to promulgate procedural rules and regulations applicable to all agencies within that public corporation. Further, those rules and regulations must be consistent with the regulations promulgated by the Committee on Open Government and the Freedom of Information Law.

In an effort to update the County's procedures in a manner consistent with law, it is suggested that consideration be given particularly to the following points.

- While an agency may prepare a form for use in seeking records, it cannot require that a person use or complete the form. Any request made in writing that reasonably describes the records should suffice. Also, the form itself, especially as it relates to reasons for denial of access, is out of date and inconsistent with law.

- In a related vein, although an agency may require that a request be made in writing, it may choose to accept an oral request.

- Section 2. A. 2. refers to a payroll record. A similar provision appeared in original Freedom of Information Law, but there has been no reference to the payroll record in the law since 1978. That provision and Section 6 should be deleted.

- Section 2. A. 3. concerning "public records" should also be deleted in view of the definition of "record" in §86(4) of the Freedom of Information Law.

- Section 3 refers to a request for "identifiable" records, but §89(3) of the Freedom of Information Law merely requires that records be "reasonably described."

- Section 7 refers to the "subject matter list" required to be maintained pursuant to §87(3)(c). To ease the burden of compliance, it has been suggested that agencies adopt the records retention schedule developed by the State Education Department pursuant to Article 57-A of the Cultural Affairs Law as their subject matter lists.

- Section 13 is obsolete and should be deleted. Since the regulations are procedural in nature, it has been advised that an agencies' procedures should not refer to grounds for denial of access. I note, too, that the exceptions listed in the County Executive's 1994 memorandum are out of date.

- Section 14. F. refers to seven business days to determine an appeal; §89(4)(a) states that an agency has ten business days to do so.

- Section 15. A. - It has been held that an agency must permit the public to inspect records during regular business hours, and that a limitation of one hour is inconsistent with law [see Murtha v. Leonard, 620 NYS2d 101 (1994), 210 AD2d 411].

- Section 16 - Only a statute, an act of the State Legislature, can enable an agency to charge a fee of more than twenty-five cents per photocopy or the actual cost of reproducing records that cannot be photocopied [see §87(1)(b)(iii); Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS2d 214, 226 AD2d 339 (1996)].

Again, it is suggested that you review the Committee's official and model regulations.

If you would like to discuss the matter, please feel free to contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14748

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June 18, 2004

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 and appreciate your kind words.

Although you "know that FOIL is a Federal Law", you asked that I consider the propriety of an agreement between yourself and the Town Clerk of the Town of Southeast concerning access to Town records.

In this regard, first, the governing law in consideration of the matter is the New York Freedom of Information Law. That statute applies to entities of state and local government in New York and is separate and distinct from the federal FOI Act (5 USC §552). The latter pertains to federal agencies only.

Second, although you may request "an entire file", the content of the file is the key determinant in considering the extent to which it 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. It is emphasized that the introductory language is §87(2) refers to an agency's authority to withhold "records or portions thereof" that fall within the grounds for denial of access that follow. The phrase quoted in the preceeding sentence is based on the recognition that a file or even a single record might include portions that must be disclosed, as well as portions that might justifiably be withheld. That phrase also imposes an obligation on agency personnel to review records sought to determine which portions, if any, may properly be withheld.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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.

Enclosed, as you requested, is a copy of the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Ruth Mazzei

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14749

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June 18, 2004

Trustee M. Jody Edmondson
Hempstead Village
99 Nichols Court
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 Trustee Edmondson:

I have received your letter concerning a request by a fellow trustee for copes of "legal Invoices (Attorney fees) and related information" from the Village's risk manager. In response, the risk manager expressed the understanding "that Village Law requires all action by the Board of Trustees to be inacted (sic) by a resolution" and that claims and invoice documents could be made available following the receipt of such a resolution by the Village's "third party auditor" or upon payment of a fee. You added that you were told that:

> "...the Claims Administrator (hired by the Risk Manager) reviews the claims and submits a bill to our comptroller who pays (reimburses) the Claims Administrator. According to my understanding of what they (our Village Attorney, who is one of the attorneys used by the Risk Manager) are saying, our Board has no right to access these records. Somehow, this does not seem consistent with our fiduciary responsibility to provide over site [sic] on all monies flowing from the public coffers."

You have sought advice concerning the foregoing.

In this regard, if I understand the situation accurately, the risk manager and the claims administrator maintain the documentation of your interest for the Village. If that is so, I believe that it falls within the coverage of the Freedom of Information Law and that it would be accessible at least in part and perhaps in its entirety to any member of the public or a Village Trustee.

The Freedom of Information Law is applicable to records of an agency, such as a Village, and §86(4) defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form

> whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, records prepared or maintained for the Village, irrespective of their physical location or custody, would constitute Village records subject to rights of access conferred by the Freedom of Information Law. I note that in a decision rendered by the Court of Appeals, the state's highest court, it was confirmed that records need not be in the physical possession of an agency to be within the coverage of the Freedom of Information Law [see Encore College Bookstores, Inc. v. Auxillary Services Corporation of the State University, 87 NY2d 410 (1995)]. In that case, an entity carried out certain functions pursuant to a contract for a branch of the State University, and it was held that the records involving that function were State University records, even though they were in possession of the other entity.

According to the regulations promulgated by the Committee on Open Government, the records access officer has the duty of coordinating an agency's response to requests (21NYCRR §1401.2). When records are maintained for an agency, I believe that a request may be made to the agency's records access officer. In such a circumstance, I believe that the records access officer would have responsibility to direct the custodian of the records to make the records available in accordance with the Freedom of Information Law or acquire the records so that he or she can determine the extent to which they must be disclosed to comply with law.

With respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, books of account, invoices, bills and similar records must be made available, for none of the grounds for denial of access would apply. In the case of attorney's bills or invoices, it has been held that those portions that offer a description of services rendered, the time spent and the amount of the fee charged or paid must ordinarily be made available [see Orange County Publications v. County of Orange, 637 NYS2d 596 (1995)]. However, portions of such records that would be subject to the attorney-client privilege, i.e., those that detail litigation strategy or the opinions of an attorney, may be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: William Hester

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3822
FOIL-AO-14750

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June 18, 2004

Hon. Al Cardamone
Supervisor, Town of Greenville
P.O. Box 38
Greenville, NY 12083

Mr. J. Theodore Hilscher
Hilscher & Hilscher
327 Main Street
Catskill, NY 12414

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Supervisor Cardamone and Town Attorney Hilscher:

I have received correspondence from both of you concerning public access to a certain tape recording. The Supervisor has asked whether he is prohibited from disclosing the recording to the public; the Town Attorney asked whether the tape is subject to the Freedom of Information Law and whether it should be released to the public.

It is noted that several individuals have contacted me to discuss the matter, and based on those conversations and the written materials sent to me, the facts as I understand them, are as follows.

By way of background, the Supervisor wrote that "we", presumably the Town Board, began to record meetings several weeks ago with the intention of enabling those who cannot attend meetings of Town bodies to see and hear events occurring at those meetings. In this instance, the meeting of the Zoning Board of Appeals was taped. Although a motion to adjourn was adopted, signifying the end of the meeting, Board members remained and discussed the merits of a person being considered for appointment to the Board. It was apparently unknown to the members or others that the recording continued and captured the discussion on tape.

A variety of issues may be pertinent in relation to the foregoing, and I offer the ensuing brief comments.

First, there is nothing in the Open Meetings Law or any other statute concerning the recording of meetings of a public body, such as a town board, a planning board or a zoning board of appeals. Nevertheless, judicial decisions indicate that any person may audio record or video record an open meeting of a public body, so long as the use of the recording equipment is neither disruptive nor obtrusive [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Csorny v. Shoreham-Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003)]. Therefore, I believe that the Town Board, a member thereof, or any member of the public may record a meeting, so long as that entity or person does so without disruption.

Second, I believe that the discussion that occurred after the adjournment of the meeting of the Zoning Board was subject to and should have been held in accordance with the Open Meetings Law. That statute is applicable to meetings of public bodies and the term "meeting" [see Open Meetings Law §102(1)] has been construed expansively by the courts. In a case decided more than twenty-five years ago, it was held that any gathering of a majority of a public body for the purpose of conducting public business constitutes a "meeting", even if there is no intent to take action, and regardless of its characterization as "informal" or as a "workshop" or "work session" [see Orange County Publications v. Council of the City of Newburgh 60 AD 2d 409, affm'd, 45 NY2d 947 (1978)]. In short, I believe that the discussion that occurred following the approval of the motion to adjourn constituted a "meeting."

Third, if the Open Meetings Law had been given effect, it appears that some or perhaps the entirety of the discussion could have occurred during an executive session.

I note for purposes of ensuring understanding 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. That being so, an executive session is not separate from an open meeting, but rather is a part of an open meeting. Further, the Open Meetings Law requires that a procedure be accomplished during an open meeting before an executive session can be held. 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..."

Thereafter, paragraphs (a) through (h) specify and limit the subjects that may properly be considered in executive session.

Of likely relevance in this circumstance would have been §105(1)(f), which permits a public body to enter into executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment,

> employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."

Insofar as the discussion involved a matter leading to the appointment of a particular person, it appears that the Board could validly have conducted an executive session if it had complied with the Open Meetings Law.

In consideration of the foregoing and assuming its factual accuracy, a tape recording was made of a discussion which, perhaps in part, could have been held during an executive session.

With respect to the tape, I believe that it falls within the coverage of the Freedom of Information Law. That statute 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."

Since the tape was prepared for the Town, apparently by the Town Board or the Supervisor, in my opinion, it constitutes a "record" subject to rights of access.

Although the Supervisor wrote that a copy of the tape was given to me, I have neither heard the tape nor do I have a copy. Moreover, because I am not a judge and the Committee on Open Government is not a court, neither myself nor the Committee would have the right to determine rights of access to the tape.

In consideration of the nature of the discussion, it appears that portions of the tape 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.

It is possible that some remarks might have involved personal or intimate information pertaining to an individual under consideration for appointment. To that extent, those portions of the tape might be withheld on the ground that disclosure would constitute "an unwarranted invasion o f personal privacy" [see Freedom of Information Law, §87(2)(b)].

Additionally, since the recording involves exchanges among Board members, it would consists of intra-agency material subject to §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.

Again, if my assumptions are accurate, portions of the tape could be withheld under the Freedom of Information Law.

Lastly, and notwithstanding the foregoing, there is nothing in the Freedom of Information Law, in my view, that would prohibit the Supervisor from disclosing the tape. Section 87(2) provides that an agency *may* withhold records or portions of records based on the exceptions to rights of access. However, the state's highest court has held that the exceptions are permissive. While an agency may choose to deny access in proper circumstances, it is not required to do so [see Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562, 567 (1986)]. Therefore, in response to the Supervisor's question, I know of no provision of law that would prohibit him or any other person from disclosing the tape.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

14751

From: Robert Freeman
To: Tierney, Michael
Date: 6/18/2004 4:27:45 PM
Subject: Re: Opinion Requested

Dear Mr. Tierney:

I have received your letter in which you sought an opinion relating to the Schuylerville-Victory Water Board.

In this regard, I note that the duties of the Committee on Open Government relate to the Freedom of Information and Open Meetings Laws. The first area of inquiry in your letter pertains to a possible conflict of interest, and that kind of issue, therefore, is beyond the jurisdiction or expertise of this office.

The second pertains to a meeting during which the Board approved a raise for one of its employees but did not publicly disclose how the members voted. Here I direct your attention to the Freedom of Information Law, which includes what some have characterized as an "open vote" requirement. Specifically, §87(3)(a) requires that an agency, such as the Board, "shall maintain....a record of the final vote in every agency proceeding in which the member votes..." Therefore, a record must be prepared indicating the manner in which each Board member cast his or her vote. Ordinarily a record of votes will appear in minutes of a meeting.

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-1412.52

41 State Street, Albany, New York 12231
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June 22, 2004

Mr. George R. Hubbard
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hubbard:

I have received your letter and the materials attached to it.

You serve as a member of the Greece Central School District Board of Education, and you have requested an advisory opinion concerning the following questions:

> "A) By what authority can a school board take action to censure another board member, and do so in executive session without due process?
>
> B) By what authority can a Board President instruct a District clerk to intercept and withhold duly constituted business correspondence between one board member and other board members?
>
> C) By what authority can one board member be denied access to records and documents of actions taken by a school board?"

In this regard, it is emphasized that the statutory advisory jurisdiction of the Committee on Open Government pertains to matters involving the Freedom of Information and Open Meetings Laws. Since the first two questions involve the powers and duties of a board of education and its president, I have neither the authority nor the expertise to address them. With respect to the remaining question and other elements of your commentary, I offer the following comments.

First, the Freedom of Information Law does not deal directly with the right of a member of a board of education to gain access to school district records. I an unaware of any statute that deals specifically with requests by or disclosures to member of board of education or any unique authority

that board members enjoy, individually, concerning their capacity to obtain copies of district records. I note, however, that district records are the property of the district rather that any particular board member, including the president of a board.

Second, the Freedom of Information Law is applicable to all agency records, such as a school district. Section 86(4) of that statutes 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."

Third, the Freedom of Information Law governs rights of access 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. Agency officials, based on the direction provided in the Freedom of Information Law and by the courts, cannot "seal" records or remove them from rights of access [see e.g., Capital Newspapers v. Whalen, 69 NY2d 246 (1987); Washington Post v. Insurance Department, 61 NY2d 557 (1984)]. Again, the law, specifically §87(2), serves as the standard for determining the extent to which records must be disclosed or, conversely, may be withheld.

Lastly, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a board rule or policy to the contrary, I believe that a 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 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-14753

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 22, 2004

E-MAIL

TO: Hon. Susan Kramarsky [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. Kramarsky:

I have received your letter in which you indicated that you were informed by a resident "that if certain records are not included in [your] response, that [you are] obliged to specify by name what is being excluded."

In my view, when any portion of a request is denied, the applicant must be informed in writing. In that circumstance, the denial must indicate the reason and inform the applicant of the right to appeal in accordance with §89(4)(a) of the Freedom of Information Law. However, there is nothing in that statute nor is there any judicial decision construing the Freedom of Information Law that would require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each document. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index.

Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers

> Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14254

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 22, 2004

Ms. Julie Penny
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Penny:

I have received your correspondence concerning your efforts in obtaining records pursuant to the Freedom of Information Law from the Town of Southampton. Based on a review of the materials, I offer the following general comments.

First, as you may be aware, §87(1) of the Freedom of Information Law requires that the governing body of a municipality, i.e., a town board, is required to adopt procedural rules and regulations consistent with the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401). One aspect of those regulations involves a requirement that one or more persons be designated as "records access officer." The primary function of the records access officer is to "coordinate" the agency's response to requests for records.

Second, if any aspect of a request is denied, both the Freedom of Information Law [§89(3)] and the regulations [§1401.2(b)] require the applicant to be informed that records or portions thereof have been withheld. The regulations in §1401.7 also require that a person denied access to records be informed of the right to appeal. If, for example, nine records are requested, and in response, two are made available, an agency must in my opinion indicate that a request has been denied in part or that records sought do not exist or are not maintained by the agency, or both, if appropriate.

I note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Lastly, for future reference, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

I point out that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

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: Diane Carpenter

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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June 22, 2004

Ms. Mary Callahan
Assistant Superintendent for Business
Port Washington Union Free School District
100 Campus Drive
Port Washington, NY 11050

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Callahan:

I have received your letter and the correspondence attached to it.

By way of background, you requested on behalf of the Port Washington Union Free School District from the Nassau County Department of Assessment "records or portions thereof pertaining to outstanding tax certioraris for individual properties in Port Washington which are related to school taxes of $50,000 or greater." In response to the request, you were advised that:

> "...this information is not in hard copy form nor can it be printed out based on our existing computer program. Our agency would have to write a specialized computer program to reply to this request. Under the New York Freedom of Information law, if the agency does not maintain the records in the format requested, the law does not require - - nor is the agency obligated - - to develop new programs or reprogram its computer data to produce the information sought."

You asked whether I "agree with this answer." From my perspective, based on the direction provided in a relatively recent judicial decision, the issue involves the County's ability to generate or extract the data of your interest with reasonable effort.

By way of background, the Freedom of Information Law pertains to agency records, such as those of a county, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than twenty years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

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 in many instances 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, I believe that an agency must do so.

Most pertinent in my opinion 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. In short, if the County has the ability to generate or extract the data of your interest with reasonable effort, based on NYPIRG, I believe that it is obliged to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Loren Schindler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 23, 2004

E-Mail

TO: Joyce Moultrie [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. Moultrie:

I have received your letter and apologize for the delay in response. You have sought assistance in locating your great uncle who resided in Erie County at the time of his death in 1979. While I do not believe that a death certificate must be disclosed, it is possible that a burial permit would be available if you can ascertain the location of the burial.

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 that statute provides broad rights of access, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute."

On such statute, §4174(1)(a) of the Public Health Law, pertains to access to certified copies of certified transcripts of death records, states that such records are available:

> "(1) when a documented medical need has been demonstrated, (2) when a documented need to establish a legal right or claim has been demonstrated, (3) when needed for medical or scientific research approved by the commissioner, (4) when needed for statistical or epidemiological purposes approved by the commissioner, (5) upon specific request by municipal, state or federal agencies for statistical

> or official purposes, (6) upon specific request of the spouse, children, or parents of the deceased or the lawful representative of such persons, or (7) pursuant to the order of a court of competent jurisdiction on a showing of necessity; except no certified copy or certified transcript of a death record shall be subject to disclosure under article six of the public officers law..."

Article six of the Public Officers Law is the Freedom of Information Law. As such, based upon the provision quoted above, death records are available only under the circumstances prescribed in the Public Health Law. Unless you are the lawful representative of the deceased, I do not believe that you would have the right to obtain a death certificate.

Second, however, 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 uncle'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 in this instance would pertain to a person deceased for 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. It is my understanding that the registrar is the town clerk in towns and the city clerk in cities. In an effort to assist you, under a separate email, I will send you a document found on the internet which lists cemeteries located in Erie County.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14752

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June 23, 2004

Mr. Robert J. Zafonte
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Zafonte:

I have received your letter and the materials attached to it. You have sought assistance in relation to a request for "the past six years of evaluations" of the Superintendent of the East Meadow School District, as well as the "past six employment contracts" between the Superintendent and the District.

In this regard, an analysis of rights of access to the evaluations was provided in an opinion addressed to you in March, and there is no need to reiterate the comments offered then. A contract between a superintendent and a school district is, in my view, like other contracts into which a unit of government enters, clearly public. I note, too, that a school board's annual proposed budget must contain "a detailed statement of the total compensation to be paid to the superintendent of schools....including a delineation of the salary, annualized cost of benefits and any in-kind or other form of remuneration" [see Education Law, §1716(5)]. You might ask to review that document, which should be readily available.

With respect to a delay in disclosure or an absence of response, 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. 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Leon J. Campo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14758

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June 23, 2004

Elmer Robert Keach, III, Esq.
One Steuben Place
Albany, NY 12207

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Keach:

I have received your letter in which you sought an advisory opinion relating to the Freedom of Information Law. Specifically, you have asked "whether time and billing records from an attorney for services rendered on behalf of a government body are subject to FOIL when those records are in possession of the attorney, as compared to the municipality in question."

Based on the language of the Freedom of Information Law and judicial decisions, I believe that the records at issue fall within the coverage of that statute.

Critical in my view is the scope of the term "record", which is defined in §86(4) of the Freedom of Information Law to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

In a situation that may be analogous to that which you described, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the

Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Perhaps most significant is a decision rendered by the Court of Appeals in which it was found that materials 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)].

In short, insofar as records maintained by an attorney or firm are "kept, held, filed, produced or reproduced...*for* an agency", such as a municipality, I believe that they would constitute agency records subject to rights of access conferred by the Freedom of Information Law.

Lastly, as you acknowledged, there may be portions of the records that might properly be withheld. To review an analysis of rights of access to the records at issue, I believe that the most expansive consideration of the matter may be found in Orange County Publications v. County of Orange, 637 NYS2d 596 (1995).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James Kierzinski
Karen Crouse

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14759

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June 23, 2004

Mr. Claude Mays
02-A-0493
Franklin Correctional Facility
P.O. Box 10
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mays:

I have received your correspondence in which you indicated that you requested records from the Rensselaer County Attorney's Office and were informed that you would receive a response within thirty days. As of the date of your letter to this office, you had not received a response.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14760

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June 23, 2004

Mr. Jack Kinzie, Chairman
The Fulton County Taxpayers Association
P.O. Box 468
Gloversville, NY 12078

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kinzie:

I have received your letter and thank you for your kind words. You complained with respect to the delay in disclosure of records that you requested from the Gloversville Enlarged School District.

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, 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: Board of Education
D. Paul Blowers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14761

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June 23, 2004

Mr. Charles Watson
03-A-2302
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. Watson:

I have received your letter in which you questioned the sufficiency of a subject matter list maintained by the Commission of Correction. You also indicated that you requested records relative to the status of medical services delivery, medical complaints and quarterly classification reports. The Commission informed you that "you have not 'reasonably described' the records sought.

In this regard, I offer the following comments.

First, 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. 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.

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.

Second, of significance involves the extent to which your request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals 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 Commission, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. If an office maintains all of its records regarding medical services delivery in a single file or perhaps in a series of files that can be readily located, it may be a simple task to retrieve the records. If, however, records are not maintained in that manner, locating the records might involve

a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1496

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June 23, 2004

E-MAIL

TO: Thomas Koehler [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. Koehler:

As you are aware, I have received your letter in which you complained with respect to delays in the disclosure of records that you requested from the Fairport Central School District.

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, 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:tt

cc: William C. Cala
Janet Stulpin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14763

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June 23, 2004

Mr. Rod Kovel
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kovel:

I have received your letter in which you asked whether a failure on the part of State University at Stony Brook to effectively respond to your request made pursuant to the Freedom of Information Law constituted a "constructive denial" of your request.

In brief, you wrote that you made a request on March 20 and that you were advised soon after by the records access officer in which she indicated, in your words, that a "search was under way, but not stating what, if any, progress had been made, and failing to make any definite promises as to when [you] would have an answer about what was available or when." As of the date of your letter to this office, you had received no further response.

From my perspective, your request has been constructively denied. In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement

is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

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)].

For your information, the person designated to determine appeals within the State University system is Ms. Stacey Hengersterman, whose office is located at the University's central offices in Albany.

Second, in consideration of the description of your request, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. If, for example, there are no "breakdowns" containing the information of your interest, the University, in my view, would not be required to prepare new records containing that information. However, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Karol Kain Gray
Stacey Hengsterman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1476

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June 28, 2004

Mr. Richard L. Johnson, Sr.
03-B-1809
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Johnson:

I have received your letter in which you asked if you could obtain information concerning a county sheriff lieutenant's history of using unsigned statements confessing guilt as evidence in court.

In this regard, I offer the following comments.

First, 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 for "information." In short, if records do not exist containing the information in question, the Freedom of Information Law would not apply.

Second, the same provision requires that an applicant must "reasonably describe" the records sought. When an agency can locate requested records with reasonable effort, I believe that a request would meet that standard. However, if, due to the nature of an agency's filing or recordkeeping system, records requested cannot be found except by reviewing hundreds or even thousands of records individually, the request would not "reasonably describe" them [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Of possible significance, assuming that records of your interest exist and can be found with reasonable effort, 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 §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. It has been found that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY 2d 652, 568 (1986)].

In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals upheld a denial of access and found that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

When seeking a court order to require disclousre, §50-a provides in part 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 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 records found to be relevant and material available to the persons so requesting."

I hope that the foregoing serves to clarify the matter and that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14765

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June 28, 2004

Mr. Anthony Dixon
86-A-4087
Eastern Correctional Facility
P.O. Box 338
Napanoch, NY 12458-0338

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Dixon:

I have received your letter and the materials attached to it in which you requested an advisory opinion concerning the availability of a variety of records relating to your arrest from the Nassau County Police Department.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of all of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records falling within the scope of your request, relevant is a decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or

deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 654 NY2d 54, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available. However, in the same decision, it was also found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The

> respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

The Court in Moore also specified that an agency "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-14766

From: Robert Freeman
To: [redacted]
Date: 6/29/2004 8:27:37 AM
Subject: Dear Mr./Ms. Abelman:

Dear Mr./Ms. Abelman:

I have received your inquiry in which you asked whether it is "necessary for the requester [of records pursuant to FOIL] to be a resident of that municipality or have some relationship/nexus with the municipality..."

In this regard, the Freedom of Information Law does not distinguish among applicants for records. The residence of a person seeking records is irrelevant, and it was held early as 1976 that when records are accessible under that statute, they must be made "equally available to any person, without regard to status or interest" [Burke v. Yudelson, 51 AD2d 673]. In short, any person may use the Freedom of Information Law to seek and obtain records; he or she need not be a resident of the entity from which the records are sought, and there need not be a "nexus" of any sort to assert rights 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
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO- 14767

From: Robert Freeman
To: [redacted]
Date: 6/29/2004 8:38:33 AM
Subject: Dear Ms. Doran:

Dear Ms. Doran:

I have received your inquiry concerning the ability to appeal an initial denial of access to records by an agency.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records.

The provision dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states that a person denied access may appeal to the head or governing body of the agency, or the person designated to determine appeals by the head or governing body. That provision also requires that an agency send copies of appeals and determinations thereon to the Committee. It is noted, too, that the regulations promulgated by the Committee require that when a request is denied in whole or in part, the agency denying access must inform the applicant of the reason and the right to appeal [22 NYCRR §1401.7].

Since you referred to the City of Albany, although I believe that Mr. Harold Greenstein has been designated to determine appeals, it is suggested that you contact the Office of the City Clerk to be certain of the identity of the person so designated.

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: Janon Fisher
Date: 6/29/2004 2:56:11 PM
Subject: Re: FOIL Appeal process

Dear Mr. Fisher:

I have received your inquiry in which asked what step might be taken when an agency fails to respond to an appeal.

In this regard, when an agency fails to respond to an appeal within the statutory time, ten business days, the applicant may consider the appeal to have been denied. In that circumstance, he or she would have exhausted administrative remedies and may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

In consideration of the nature of the request, it is suggested that you might contact the Department of Records and Information Services and seek the same records from that agency.

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-14769

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

June 30, 2004

Mr. Clyde Purnell
03-R-1438
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

Dear Mr. Purnell:

I have received your letter of June 11, which reached this office on June 24. You requested certain records from the Committee on Open Government.

In this regard, first, please note that the Committee is authorized to provide advice and opinions concerning the Freedom of Information Law. This office does not maintain records generally, nor is it 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 agency does not possess them.

Second, requests for records should be directed to the "records access officer" at the agency that maintains the records sought. The records access officer hast he duty of coordinating an agency's response to requests.

Lastly, you included a request for a 'Vaughn Index." That kind of document identifies each record withheld and includes a description of the reasons for withholding each. 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)]. A Vaughn 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

FOIL-AO-14770

From: Robert Freeman
To: sburke@irondequoit.org
Date: 7/1/2004 8:04:43 AM
Subject: Good morning - -

Good morning - -

I have received your inquiry concerning a request for records relating to an employee who was out of work due to a work related injury prior to his retirement. Specifically, the request involves the amount paid to the employee during the period that he was on disability leave, and the amount that the employee paid to the town "for disability payments he received for insurance that might have covered him during his disability."

In this regard, I agree with your comment that care should be taken in considering disclosure relating to a workers' compensation claim. As you may be aware, one of the examples of an unwarranted invasion of personal privacy appearing in §89(2)(b) of the Freedom of Information Law pertains to "information of a personal nature contained in a workers' compensation record."

As I understand the nature of the records sought, they are not "workers' compensation" records. Rather it appears that they include information reflective of moneys paid to a Town employee and amounts that repaid to the Town based on insurance proceeds that he received. If that is so, I believe that the records would be accessible. It is emphasized, however, that any aspect of the records indicating the nature of an injury or which includes medical or similar information could, in my view, be withheld or deleted on the ground that disclosure would constitute an unwarranted invasion of privacy.

If I have misinterpreted the facts, please let me know.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-14771

From: Robert Freeman
To: Susan Wick
Date: 7/6/2004 8:19:37 AM
Subject: Re: Copy prices

Dear Ms. Wick:

I have received your inquiry. In this regard, under the Freedom of Information Law, an agency can charge up to twenty-five cents per photocopy, unless a different fee is prescribed by statute. In this instance, since the matter involves a county clerk, I point out that a series of statutes found in the Civil Practice Law and Rules (CPLR) pertain specifically to county clerks and authorize the assessment of fees that supersede those appearing in the Freedom of Information Law.

In the context of your comments, §8019 of the CPLR specifies the fee of 65 cents per photocopy. That figure recently went into effect; prior to the amendment of that provision, the fee had been fifty cents per photocopy.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14772

41 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 6, 2004

Mr. Oscar Rhodes
00-A-7092
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. Rhodes:

I have received your letter in which you complained that you have requested your medical records under the Freedom of Information from the Mt. Sinai Hospital and that as of the date of your letter to this office, you had not yet received a response.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14723

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July 6, 2004

Mr. Yianni Pantis
Law Office of Yianni Pantis
2308 Garfield Avenue, Suite A
Carmichael, CA 95608-5120

The staff of the Committee 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. Pantis:

I have received your correspondence and related materials concerning your request for records maintained by the Office of the Suffolk County Clerk. The request involves all mortgages, deeds, map abstracts and a variety of other records filed with the Clerk since January 1, 1983, as well as additional categories of records, such as judgments, federal tax liens and uniform commercial code filings since January 1, 1993. You asked that the records be made available "in the electronic format regularly maintained by the County, or, if electronic images are not maintained by the County, then in microfilm format."

In consideration of your comments and those of Colleen M. Fondulis, Assistant County Attorney, who responded to you, I offer the following remarks.

First, although there is nothing in the Freedom of Information Law that limits the number or scope of records that may be requested, your request clearly involves voluminous material comprising thousands of documents. In considering a request that may have been similar, the court upheld the agency's denial, stating that:

> "Petitioner's actual demand transcends a normal or routine request by a taxpayer. It violates individual privacy interests of thousands of persons...and would bring in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already heavily burdened bureaucracy" (Fisher & Fisher v. Davison, Supreme Court, New York Cty., Oct. 6, 1988).

In view of the nature of your request, the holding in Fisher & Fisher might be pertinent.

Second, because you have requested records in "electronic format", you have contended that the fee for copying should be based on §87(1)(b)(iii) of the Freedom of Information Law, rather than provisions found in §§8019 and 8021 of the Civil Practice Law and Rules (CPLR). Those provisions authorize county clerks to assess fees on a per page basis. Since you are not requesting copies of "pages", but rather the contents of pages in electronic format, it your view that the Freedom of Information Law should govern with respect to the assessment of fees.

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. The question in this instance 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 CPLR. I know of no judicial determination that has considered the issue.

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...".

By means of example, 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", it is unclear whether that would transfer the basis for charging a fee to the Freedom of Information Law, or whether §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. It would seem that the provisions concerning fees were intended, perhaps in part, to

generate revenue. If that is so, the duplication of records in electronic form would involve a minimal actual cost, thereby defeating the intent of those statutes. Since I am unfamiliar with the intent of the State Legislature concerning the provisions of the CPLR at issue, it is unclear which statute would be found to apply by a court.

Third, assuming that the request is completely appropriate and that there is no issue involving fees, it is questionable in my view whether the commentary offered by Ms. Fondulis concerning the absence of an obligation to create records is fully consistent with the judicial interpretation of the Freedom of Information Law. As I understand the County's retrieval system, records in many instances can be extracted individually, but not in the array. Ms. Fondulis wrote that the County Clerk's records that are maintained electronically are stored in a mainframe computer, and that to honor your request, staff:

> "...would have to extract the data from the mainframe, and, since the relational software is contained on the mainframe, the Clerk's office would then need to create a 'relational' software program and, thereafter, a 'front end' user interface program would need to be written in order for the data to be accessible on a CD-ROM. Thus, the Clerk's office would need to create a record, in a format and with programming, that is not pre-existing and the New York Freedom of Information Law (FOIL) does not require the Suffolk County Clerk's office to create a record in order to comply with this FOIL request."

In this regard, a relatively recent decision focused on the creation of records and the extraction or generation of records electronically, and it may be pertinent to the matter. The case involved a request for records, data and reports maintained by the New York City Department of Health concerning "childhood blood-level screening levels" [New York Public Interest Research Group v. Cohen and the New York City Department of Health, 729 NYS 2d 379 (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 request.

In NYPIRG, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'

> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the

> redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

Unlike NYPIRG, your request does not involve a situation in which portions of an existing records must be segregated. However, if the County has the ability to honor the request *with reasonable effort*, as in NYPIRG, that decision suggests that the County would be required to do so. Whether the County has the ability to do so with reasonable effort is unknown to me.

Next, there are instances in which records may be available individually, but in which a request for a group of those records maintained within a list or its equivalent may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §§87(2)(b) and 89(2)(b)]. As you know, §89(2)(b)(iii) indicates that an unwarranted invasion of personal privacy includes the sale or release of a list of names and addresses when the list would be used for commercial or fund-raising purposes. In my view, that provision is intended to pertain to names of natural persons and their residences. Some of the materials at issue would appear to involve, perhaps in part, names and addresses in a business or commercial context. In those cases, I do not believe that there would be anything "personal" about the information or that §89(2)(b)(iii) would apply. That provision, however, may involve additional considerations.

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 §89(2)(b)(iii), which represents what might be viewed as an internal conflict in the law. Although the status of an applicant and the purposes for which a request is made are irrelevant to rights of access and an agency cannot ordinarily inquire as to the intended use of records, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which Suffolk County 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.).

A similar conclusion was reached in a more recent decision, [Siegel, Fenchel & Peddy, P.C. v. Central Pine Barrens Joint Planning & Policy Commission, 251 AD2d 670, 676 NYS 191, 193 (1998)].

While your request may not involve a list *per se*, it has been held, in essence, that a request for records that would be used to develop a list of names and addresses to be used for a commercial purpose may be denied [see Scott, Sardano & Pomeranz, supra, 65 NY 2d 294 (1985)]. That decision dealt with a request by a law firm for copies of motor vehicle accident reports to be used for the purpose of direct mail solicitation of accident victims. Although the Court of Appeals found that accident reports are available, in view of the intended use of the reports, i.e., to create a mailing list for a commercial purpose, it was determined that names and addresses of accident victims could be withheld based on considerations of privacy.

Again, it does not appear that all of the categories of the records sought would necessarily implicate §89(2)(b)(iii). However, where that provision is applicable, it appears that the County could deny access.

Lastly, Ms. Fondulis wrote that "[t]he courts have consistently held that court records are not subject to disclosure under FOIL, even if those court records are possessed by other agencies." The Court of Appeals in 2002 unanimously rejected that contention, holding that court records that come into the possession of an agency are agency records subject to rights conferred by the Freedom of Information Law [Newsday v. Empire State Development Corporation, 98 NY2d 746].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Colleen M. Fondulis

STATE OF NEW YORK
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July 6, 2004

Mr. William J. Molloy
[redacted]

The staff of the Committee 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 Molloy:

As you are aware, I have received your correspondence concerning a request for records of the City of Cohoes Industrial Development Agency ("the IDA"). Most recently, I also received a copy of a response by John P. Scavo, Chairman of the IDA.

You requested thirty-one "active" loan files maintained by the IDA, and Mr. Scavo wrote that "[t]he FOIL exempts from disclosure those records which would constitute an unwarranted invasion of personal privacy....to include, but not be limited to, 'disclosure of employment...credit histories or personal references..." That being so, he indicated that he "will need to redact private information from each file prior to your inspection...."

While it is likely that some elements of the files might justifiably be redacted, the authority to do so is, in my view, limited. In consideration of the matter, I offer the following comments.

First, 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. One of tbe exceptions, §87(2)(b), authorizes an agency to withhold records or portions of records which if disclosed would constitute an unwarranted invasion of personal privacy." Additionally, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy.

My understanding is that loans are conferred by an IDA to business enterprises or persons acting in a business capacity. In this regard, several judicial decisions, both New York State and federal, pertain to records about individuals in their business or professional capacities and indicate that the records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of

Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare

> payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of the identities of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such as unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

In short, in my opinion and as suggested in the decisions cited above, the exception concerning privacy does not apply to a record identifying entities or individuals acting in their business or professional capacities.

This is not to suggest that some aspects of the records might not properly be withheld. For instance, in the case of a small business, the federal tax identification number may be the same as an individual's social security number. In that instance, I believe that the social security number could be deleted to protect the individual's privacy. I note, too, that the provision to which Mr. Scavo referred concerning "personal references" involves references relating to applicants for employment. Again, if a reference relates to commercial enterprise or a person acting in a business capacity, the courts have suggested that those items are not "personal.'

Lastly, it is likely that your request involves situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with a ground for denial appearing in §87(2). In that event, I do not believe that you 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 IDA would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John P. Scavo
Darrin B. Derosia

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July 6, 2004

Mr. Benedict C. DiVenti Jr.
Certified Public Accountant
67 Grand Avenue
Massapequa, NY 11758

Dear Mr. DiVenti:

I have received your letter in which you requested certain records from this office.

In this regard, I note that 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 over records generally. In short, I cannot provide access to the records to which you referred because this office does not possess them.

When seeking records under the Freedom of Information Law, a request should be made to the agency that maintains the records. Further, pursuant to regulations promulgated by the Committee (21 NYCRR Part 1401), each agency must designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and a request should ordinarily be directed to that person.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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July 6, 2004

Ms. Tanya Foster
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Ms. Foster:

As you are aware, I have received your letter and materials relating to it. Your questions relate to requests made under the Freedom of Information Law to the Town of Irondequoit concerning real property assessment and particularly in relation to your property.

The first pertains to a situation in which "a report contained public information that was available in other records but not sorted or formatted like the report denied", and you asked whether the information is "unavailable to public through FOIL requests."

In this regard, first, the Freedom of Information Law includes existing records within its coverage, and §89(3) provides in part that an agency need not create a record in response to a request. If, for example, certain items of information are located within a variety of records, an agency would not be required to retrieve those items individually for the purpose of creating a new record or report. Second, I believe that an issue of likely relevance is another aspect of the same provision that requires that an applicant must "reasonably describe" the records sought. Under that standard, a key element involves the ability of an agency to locate, identify and retrieve the items of one's interest with reasonable effort.

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 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, insofar as a request would involve a search of hundreds perhaps thousands of records or entries maintained electronically, and locating the items of one's interest would involve, in essence, the search for the needles in the haystack, I do not believe that it would meet the standard of reasonably describing the records. Similarly, if retrieval of the information would involve an entirely new enterprise and the development of a new computer program in order to locate items of interest, I believe that such steps would exceed the Town's legal responsibilities.

Your second question relates to the ability to obtain a certain report "after litigation ends." Reference is made in the correspondence to a denial of access to a report that "was prepared for the town attorney for pending litigation."

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 §3101(d) of the Civil Practice Law and Rules (CPLR), which exempts material prepared for litigation from disclosure. In my opinion, records falling within the coverage of that statute remain confidential only so long as they are not disclosed to an adversary or a filed with a court, for example.

Section 3101 pertains disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable." The other provision at issue pertains to material prepared for litigation, and §3101(d)(2) states in relevant part that:

> "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary. If the report was prepared for litigation and has not been disclosed to a person other than a client or clients (i.e, Town officials), it appears that the assertion of §3101(d) would be proper.

It is also noted that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

Lastly, having discussed the matter some time ago with the Town Assessor, I was informed that the process of assessment utilizes new software, and that the means of reaching an assessed value is simply different than it had been until recently. Further, it is my understanding that the nature of information stored electronically by an assessor is constantly changing as properties are bought and sold. That being so, I believe that the data stored or used by an assessor may change on a daily basis.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Noeleen Griffin, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
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July 7, 2004

Mr. Keith Bush
76-B-0980
Wyoming Prison
P.O. Box 501
Attica, NY 14011-0501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bush:

I have received your letter in which you indicated that you have sent requests to the Office of Counsel at the Department of Correctional Services, but that as of the date of your letter to this office, you had not received any response.

In this regard, I offer the following comments.

First, according to the Department of Correctional Services' regulations, the records access officer, concerning requests for records maintained at the Department's central office is the Deputy Commissioner for Administration. 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 head of an executive agency 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...
>
> (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. 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.

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

Janet M. Mercer

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
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July 7, 2004

Mr. Tim Adler
97-A-5600
Butler Correctional Facility
P.O. Box 388
Red Creek, NY 13143

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Adler:

I have received your letter in which you complained that you are encountering difficulties in obtaining access to records prepared by the Inspector General of the Department of Correctional Services concerning an investigation relating to yourself.

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.

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.

In view of the duties of the Inspector General, 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.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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July 7, 2004

Mr. David Garcia
98-A-6674
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. Garcia:

I have received your letter in which asked if you could obtain copies of documents from the Attorney General's Office without having to pay for them.

In this regard, I point out that there is nothing in the Freedom of Information Law that 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)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Janet M. Mercer

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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July 7, 2004

Mr. David Brooks
89-A-4087
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. Brooks:

I have received your letter in which you complained that you have requested records from the New York County District Attorney's Office, but that as of the date of your letter to this office, you had not yet received a response. You enclosed a certified return receipt in which you claim that the date is "bogus", for it is unsigned and the receipt numbers have been blotted out.

In this regard, it is noted that the Committee on Open Government is authorized to provide advice and guidance concerning the Freedom of Information Law. This office is not empowered to comment on the accuracy of the certified return receipt. However, with respect to issues relating to the Freedom of Information Law, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

With respect to your request for a waiver of fees, I point out that there is nothing in the Freedom of Information Law that 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)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 7, 2004

Mr. Claudio Ribaudo
01-A-1819
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13404

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ribaudo:

I have received your letter in which you asked if you would be able to request educational background information concerning Parole Board members under the Freedom of Information Law.

Int his regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Relevant to the matter is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating

to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981 Seelig v. Sielaff, 200 AD 2d 298 (1994)].

Additionally, in Kwasnik v. City of New York [Supreme Court, New York County, September 26, 1997, affirmed, 262 AD2d 171 (1999)], the court quoted from and relied upon an opinion rendered by this office and held that portions of resumes must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

> "Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

I note that it has also been held that disclosure of a public employee's general 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)]. Further, subdivision (2) of §259-b of the Executive Law pertaining to the State Board of Parole provides that:

> "Each member of the board shall have been awarded a degree from an accredited four-year college or university or a graduate degree from such college or university or accredited graduate school and shall have had at least five years experience in one or more of the fields of criminology, administration of criminal justice, law enforcement, sociology, law, social work, corrections, psychology, psychiatry or medicine."

In short, I believe that a Parole Board member's general educational background, as well as other items pertinent to that person's employment, must be disclosed.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Terrence X. Tracy

14782

From: Robert Freeman
To: klamphere@mari-inc.com
Date: 7/7/2004 5:11:39 PM
Subject: Dear Ms. Lamphere:

Dear Ms. Lamphere:

I have received your inquiry in which you questioned the propriety of a fee of fifty cents per photocopy assessed by the Department of State.

In this regard, as you are aware, the Freedom of Information Law authorizes agencies to charge up to twenty-five cents per photocopy, unless a different fee is prescribed by statute. In this instance, a statute, §96(3) of the Executive Law, has long stated that the Department of State "shall" charge "[f]or a copy of any paper or record not required to be certified or otherwise authenticated, fifty cents per page."

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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July 8, 2004

Mr. Harry M. Alberts
Attorney at Law
175 Fulton Avenue, Suite 308
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 Mr. Alberts:

I have received your letter in which you complained that the New York City Transit Authority has failed to respond to your requests for records in a timely manner.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Gail Rogers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-14784

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July 8, 2004

Mr. Daniel J. Harmony
[redacted]

The staff of the Committee 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. Harmony:

I have received your letter and apologize for the delay in responding to you.

You have sought an opinion concerning a disclosure by Francis Hoefer, a member of the Board of Education of the City School District of Oswego, of "a document from an employee disciplinary hearing and publishing it on a commercial website that he owns." You wrote that you met with the Board in executive session in January, at which time you read a prepared statement "detailing some specific issues in [your] life." Just over a month later, Mr. Hoefer published the text of your statement on his website. You expressed the view that the Board could properly have met with you in executive session pursuant to §105(1)(f) of the Open Meetings Law and that "publication of the text of [your] remarks constitute a violation of §87(2)(b) of the Public Officers Law in that his action, taken by him as a member of the board, constituted 'an unwarranted invasion of personal privacy' by him and the board." You asked for a "determination" concerning a "violation" of §87(2)(b).

In this regard, it is noted at the outset that neither the Committee on Open Government nor myself has the authority to render a "determination" that is binding. Rather the Committee and its staff are authorized to prepare advisory opinions, and it is suggested that the following remarks be considered as advisory in nature.

From my perspective, although I agree with your contention that the Board clearly had a basis for conducting an executive session and for withholding a record containing intimate personal and medical information, I do not believe that the Freedom of Information Law, the Open Meetings Law, or any other statute would have prohibited the Board or one of its members from disclosing the prepared statement or divulging what transpired during the executive session. This is not to suggest that such disclosures would be fair, ethical or appropriate. That is not the question; the question is whether disclosure would constitute a violation of law.

By way of background, as you may be aware, both the Open Meetings Law and the Freedom of Information Law are based on a presumption of openness. In brief, the former requires that meetings of public bodies, such as boards of education, be conducted open to the public, except when an executive session may properly be held under §105(1) or when a matter is exempt from its coverage; the latter requires that agency records be made available to the public, except to the extent that one or more grounds for denial access appearing in §87(2) may properly be asserted. The first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

Both the state's highest court, the Court of Appeals, and federal courts in construing access statutes, have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims a 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, with or without identifying details, if it so chooses" (Capital Newspapers v. Burns, supra, 567).

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose. Stated differently, there is nothing inherently confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).

The same analysis is applicable in the context of the Open Meetings Law. While that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has the right to do so. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

Since a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not "confidential." To be confidential, again, a statute must prohibit disclosure and leave no discretion to an agency or official regarding the ability to disclose.

By means of example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality. Again, the Freedom of Information Law states that an agency *may* withhold records in certain circumstances; it has discretion to grant or deny access. The only instances in which records may be characterized as "confidential" would, based on judicial interpretations, involve those situations in which a statute prohibits disclosure and leaves no discretion to a person or body.

In short, 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

cc: Board of Education
Francis Hoefer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 8, 2004

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 facts presented in your correspondence.

Dear Mr. Crane:

As you are aware, I have received your letter in which you raised questions concerning obligations imposed by the Freedom of Information Law on your firm, Software Consulting Associates ("SCA").

You wrote that SCA "provides current and delinquent tax software products to municipalities, which you have characterized as "customers." Some of your customers have, according to your letter, received requests for "computer data files" and the "layouts for those files." It is your belief that applicants intend to "derive tax status information from these files on their own, or with some assistance" from you. However, you characterized your software as "proprietary" and indicated that the "data file relationships for all our tax software applications are very complex" and that "it would take a significant amount of time for us to document to [a requester] those relationships such that they could derive useful tax information from those files, and would also reveal to them what we consider SCA-proprietary information on how our software works." You expressed a preference that would involve requests for "text-file extract information", and that you "would then program for installation" at municipal offices and charge requesters "development and service fees for this program."

In relation to the foregoing, two sets of questions were raised. In the first, you indicated that you would "prefer not to provide the software files and layouts of [y]our applications...in order to protect [y]our firm's proprietary technology embedded in those files", and you asked whether that concern "override[s] the FOIL request for the actual data files and layouts..." You also inquired as to "the degree of assistance" that must be given to a person seeking records, which, in some instances, would be complex and laborious. In the second, since the "data relationships among those files is quite complex", you asked whether you are obligated to "explain in detail to the requestor

the proprietary (and copyrighted) data relationships embedded in [y]our software products." In consideration of your work schedule, you also asked whether a delay of four to seven months would be proper before you can "support requests made to [y]our customers."

In this regard, I am not an expert with respect to computer technology. However, based on my understanding of your remarks, I offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to agency records, and §86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, information that exists in some physical form by or for an agency, whether it is maintained within the agency's premises or elsewhere, would in my view constitute a "record" that falls within the framework of the Freedom of Information Law. However, insofar as a request involves informational material in SCA's premises that is neither kept nor was produced for an agency, I do not believe that that statute would apply.

You referred to software applications, and it is questionable in my opinion whether an "application" is a record. As I understand its function, an application is essentially a tool that enables people or entities to use data; it is not data itself and, therefore, it might not be characterized as a "record" as that term is defined in §86(4) of the Freedom of Information Law. If an application can be likened to calculators or computers that provide individuals with the means to create or use data, but which are not themselves "records", I do not believe that it would constitute a record for purposes of that statute.

Second, I believe that responsibilities associated with the Freedom of Information Law are borne by agencies, and not directly by SCA. 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 municipality, to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to

> records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In short, I believe that the records access officer has the duty of coordinating responses to requests.

Section 1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

Based on the foregoing, again, the records access officer must "coordinate" an agency's response to requests. From my perspective, if a request is made to SCA under the Freedom of Information Law for agency records, the request should be forwarded to the agency's records access officer. That person, as the agency's designated representative, in my opinion would have the responsibility of dealing with a request; the actions of SCA would be taken in response to the direction given by the records access officer.

Third, with respect to materials prepared by SCA that you characterized as "proprietary", insofar they constitute agency records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Pertinent in this context is §87(2)(d), which permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Therefore, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

From my perspective, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Relevant to the analysis is a decision rendered by the Court of Appeals, which considered the phrase "substantial competitive injury" in Encore College Bookstores, Inc. v. Auxiliary Service

Corporation of the State University of New York at Farmingdale, [87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

In short, it is reiterated that when an agency maintains records prepared by or derived from records created by a commercial entity, the issue under §87(2)(d) involves the extent to which it can be demonstrated that disclosure would cause substantial harm to that entity's competitive position.

Next, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency is not required to create a record in response to a request. Further, agency staff, or perhaps SCA as the agent of a municipality, is not required, in my opinion, to interpret or explain the contents or use of records. Although the principle that an agency need not create records was relatively clear in the era in which records were kept on paper, it is evolving in the era of electronic information systems. As I view the trend in judicial interpretations, when agencies have the ability to extract or generate information with reasonable effort, they may not be involved in creating new records.

A relatively recent decision focused on the creation of records and the extraction or generation of records electronically. The case involved a request for records, data and reports maintained by the New York City Department of Health concerning "childhood blood-level screening levels" [New York Public Interest Research Group v. Cohen and the New York City Department of Health, 729 NYS 2d 379 (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 inquiry.

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."

Again, when an agency has the ability to honor a request *with reasonable effort*, as in NYPIRG, that decision suggests that the agency would be required to do so. The agency, in the context, of that comment, would be your "customer." I note that the standard for charging fees for copies of records other than by photocopying is the actual cost of reproduction [see §87(1)(b)(iii)]. Therefore, whatever it might cost an agency to generate records sought would serve as the basis for determining the fee.

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.

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."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14786

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July 8, 2004

Ms. Deborah Lee King
[redacted]

The staff of the Committee on 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. King:

I have received your letter and apologize for the delay in response. You have raised a series of questions relating to your efforts in obtaining records from the Town of Cochecton. In consideration of those concerns, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies, such as towns, must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. Several acknowledgements of the receipt of your requests did not make reference to such a date or "timeline."

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and

that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if an agency acknowledges the receipt of a request but fails to include an approximate date for granting or denying access, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, the Freedom of Information Law does not include provisions dealing with the length of time records must be kept. However, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

As such, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. I am unaware of the minimum retention period applicable to a notice of a public hearing. To learn of the retention period, you might review the retention schedule, a copy of which is maintained by the Town Clerk, or contact the State Archives at (518) 474-6928.

Third, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Town Board
Hon. Hollye Schulman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14787

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July 8, 2004

Mr. Ramzan Ali
97-A-1989
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

Dear Mr. Ali:

I have received your letter in which you requested from this office "a copy of the Subject Matter list index, or any other list called by a different name, pertaining to the list of materials available to the public." You enclosed a list of New York City Police Department records, identifying them by form number, that you have requested, but you were told that the request has not been honored "is because they do not know what [you are] speaking about."

It is likely in my opinion that you misunderstand certain provisions of the Freedom of Information Law, and in this regard, I offer the following comments.

First, your reference to the "subject matter list index" is derived from §87(3)(c) of the Freedom of Information Law, which 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." Based on the foregoing, an agency's subject matter list is not an index identifying each and every record of an agency; rather, it is supposed to be a categorization, by subject matter, of the kinds of records maintained by an agency. Further, that document refers by category to all agency records, whether or not they are accessible. This office does not possess agencies' subject matter lists.

Second, due to the structure and language of the Freedom of Information Law, there can be no complete list of records accessible to the public. 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. Many of the grounds for denial are based on the possibility that some sort of harm could arise by means of disclosure, and rights of access are, therefore, dependent on the specific contents of records and the effects of disclosure. By means of example, "arrest investigation reports" might relate to ongoing investigations, in which case §87(2)(e) would be relevant. That provision authorizes an agency to withhold records compiled for law enforcement purposes when disclosure would interfere with an investigation or identify a confidential source. If such a report relates to a

situation in which a person has been convicted, disclosure following the conviction would not likely have any impact on the investigation, for the investigation has ended. Moreover, some arrest investigation reports include names of confidential sources, while others do not. The point is that there are instances in which records may be withheld today, but, due to the passage of time or the occurrence of events, they may become accessible in the future. Further, because the contents of records of differ (i.e., they may or may not include names of informants or confidential sources), rights of access will also differ. In short, the name of the record or form often does not, of itself, indicate that the record is always public in whole or in part.

Third, while your list of Police Department forms may be accurate, I am unfamiliar with most of them. Nevertheless, I point out that the Freedom of Information Law does not require that a person seeking records identify exactly every record that he or she might want to obtain. Rather, §89(3) requires that an applicant must "reasonably describe" the records sought. Therefore, when seeking records, an applicant should supply sufficient detail (i.e., names, dates, identification or index numbers, etc.) to enable the staff of an agency to locate and identify the records of interest.

Enclosed is a copy of "Your Right to Know", a general guide to the Freedom of Information Law.

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- 14788

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July 9, 2004

Hon. Janet Salisbury
Town Clerk
Town of Schaghticoke
290 Northline Drive
Melrose, NY 12121-9707

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Salisbury:

I have received your letter and apologize for the delay in responding. You requested a written confirmation of advice offered during the April conference of the Association of Town Clerks concerning rights of access to records of a member of the Town Board who is acting on his own behalf, and not for or at the direction of the Board.

In this regard, it clear in my view that the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. 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 member of a board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41; also Town Law, §63). In my opinion, 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.

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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July 9, 2004

Mr. Fitzroy Wright
95-A-4419
Eastern NY Correctional Facility
Box 338
Napanoch, NY 12458

Dear Mr. Wright:

Your letter addressed to the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to offer advice and opinions concerning public access to government information, primarily in relation to the state's Freedom of Information Law.

You referred to §62 of the Civil Service Law, which, in brief, requires state employees to affirm that they will perform their duties "in a manner consistent with the constitution of the United States and the constitution of the state of New York." You have asked for "a ratio of all the Department of Correctional Services employees who have fulfill[ed] this requirement compare[d] to the ones who have not."

In this regard, there is no record that indicates the ratio that you are seeking. I note, too, that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, neither the Department of State nor the Department of Correctional Services would be required to review its affirmations or oaths, prepare a total, compare that figure to the number of persons employed, and calculate a ratio.

If a record had been prepared containing the ratio in which you are interested, I believe that it would clearly be available under the Freedom of Information Law. Nevertheless, again, since no such record has been prepared, the agency would not be required to create a new record containing the information sought on your behalf.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 9, 2004

Mr. Eric Bashford
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bashford:

I have received your letter and the materials attached to it. You described a situation in which you requested records from the Department of Law and encountered what you believe to be an inappropriate delay in disclosure. You have asked that I advise as to the Department's obligations when it receives an appeal.

In this regard, the person with whom you communicated, Ms. Stacy Rowland, is the records access officer for the Department of Law. The records access officer has the duty of coordinating an agency's response to requests for records. Pursuant to §89(4)(a) of the Freedom of Information Law, a person denied access has the right to appeal to the head of the agency or that person's designee. Further, the regulations promulgated by the Committee on Open Government specify that the same person cannot serve as both records access and appeals officer (21 NYCRR §1401.7). In short, I do not believe that an appeal should have been made to Ms. Rowland. Nevertheless, to provide perspective, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stacy Rowland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14791

41 State Street, Albany, New York 12231
(518) 474-2518
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July 9, 2004

Hon. Loretta Raimone
Clarkstown Receiver of Taxes
10 Maple Avenue
New City, NY 10956

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Raimone:

I have received your letter and the materials related to it. You have sought an advisory opinion concerning the Town's obligations in relation to a request made under the Freedom of Information Law by Abstracters' Information Service, a real estate research company. The request is expressed as follows:

> "1- Receiver of tax file with payment amount & dates
>
> The format requested is in the following order of preference:
>
> > i. The electronic/digital format regularly maintained by the County ('electronic format'), to be provided on CD-ROM or other electronic storage medium regularly used by the County
> >
> > ii. If electronic format is not maintained, then microfilm format."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, there are instances in which records may be available individually, but in which a request for a group of those records maintained within a list or its equivalent may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see

Freedom of Information Law, §§87(2)(b) and 89(2)(b)]. Section 89(2)(b)(iii) indicates that an unwarranted invasion of personal privacy includes the sale or release of a list of names and addresses when the list would be used for commercial or fund-raising purposes. In my view, that provision is intended to pertain to names of natural persons and their residences.

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 §89(2)(b)(iii), which represents what might be viewed as an internal conflict in the law. Although the status of an applicant and the purposes for which a request is made are irrelevant to rights of access, and an agency cannot ordinarily inquire as to the intended use of records, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which Suffolk County 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.).

A similar conclusion was reached in a more recent decision, [Siegel, Fenchel & Peddy, P.C. v. Central Pine Barrens Joint Planning & Policy Commission, 251 AD2d 670, 676 NYS 191, 193 (1998)].

While the request may not involve a list *per se*, it has been held, in essence, that a request for records that would be used to develop a list of names and addresses to be used for a commercial purpose may be denied [see Scott, Sardano & Pomeranz, supra, 65 NY 2d 294 (1985)]. That decision dealt with a request by a law firm for copies of motor vehicle accident reports to be used for the purpose of direct mail solicitation of accident victims. Although the Court of Appeals found that accident reports are available, in view of the intended use of the reports, i.e., to create a mailing list for a commercial purpose, it was determined that names and addresses of accident victims could be withheld based on considerations of privacy.

In consideration of the foregoing, assuming that the file that has been requested represents a list of names and addresses or an equivalent, it is suggested the applicant be asked to assert in writing that the file will not be used for a commercial purpose. If the applicant cannot or chooses not to do so, the decisions cited earlier indicate that the request may be denied.

Third, if the request does not involve a list of names or addresses or an equivalent and if the information sought is available under the law, additional considerations may be pertinent. Over the course of time, 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, judicial decisions suggest that an agency must do so.

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 potentially relevant 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. I am unaware whether the LeadQuest system is used by other counties in the state. Nevertheless, the principles enunciated in that decision would likely be applicable with respect to information maintained electronically in the context of your requests.

In NYPIRG, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'

> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the

> redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

Unlike NYPIRG, the request in this instance does not appear to involve a situation in which portions of an existing record must segregated. However, if the Town has the ability to honor the request *with reasonable effort*, as in NYPIRG, that decision suggests that the Town would be required to do so. Whether the Town has the ability to do so with reasonable effort is unknown to me.

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: Joseph Licari

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July 9, 2004

Ms. Helen G. Norjen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Norjen:

I have received your letter and the materials attached to it. You have requested an advisory opinion concerning a denial of access to records by the New York State Department of Transportation ("the Department").

The records sought involve the results of a survey "involving Economic Impact Analysis and Business Planning" for several airports, including Republic Airport, which is near your residence. A consultant was retained by the Department to conduct the survey, and in a letter to "airport employers", they were "assured that all information will be kept in strict confidence...." In response to your request, you were given "a listing of employment numbers at Republic Airport." However, you were informed that the Department "cannot provide a copy of company level information", for "[t]o do so would be to go back on our word to the employers who provided proprietary information and might result in a lack of cooperation in future surveys."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all government agency records, irrespective of their origin. Section 86(4) of that statute defines the term "record" to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of the foregoing, records prepared by a consultant for an agency constitute agency records, irrespective of their physical location.

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.

Third, the state's highest court, 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 short, I believe that the terms of the Freedom of Information Law, rather than any promise of confidentiality, serve as the criteria for determining rights or access or, conversely, the ability of the Department to deny access. From my perspective, two of the grounds for denial are pertinent in considering the extent to which the survey results must be disclosed.

Section 87(2)(g) involves the ability to withhold internal governmental communications, depending on their contents. That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The 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. In this instance, it appears that the information that you have requested is statistical or factual in nature and that, therefore, it must be disclosed, unless a different exception may properly be asserted.

The other exception of significance deals with what might be characterized as "proprietary" information. Specifically, §87(2)(d) authorizes an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Therefore, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken

> by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

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 considered the phrase "substantial competitive injury" in Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, [87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.

> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421).

The issue, in short, therefore, involves whether a denial of access to the names of employers at Republic Airport and the number of persons they employ can be justified on the basis of §87(2)(d). In my opinion, it is questionable whether disclosure of those items, without more, would indeed cause *substantial* injury to an employer's competitive position or significantly hamper the state's efforts in relation to economic development.

In this regard, I note that in a judicial proceeding in which a person denied access seeks review of the denial, the agency has the burden of defending secrecy. The Court of Appeals has expressed its general view of the intent of the Freedom of Information Law on several occasions. In Gould v. New York City Police Department, the Court confirmed that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

The 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.).

Lastly, it is unclear whether you requested the material at issue informally or pursuant to the Freedom of Information Law. If the request was informal, it is suggested that you submit a request to the Department's records access officer. If the request was made pursuant to the Freedom of Information Law, I believe that you should have been informed of the right to appeal the denial pursuant to §89(4) of the Freedom of Information Law and as required by the regulations promulgated by the Committee on Open Government (see 21 NYCRR §1401.7).

In an effort to encourage the Department to review its denial of access, copies of this opinion will be forwarded to Department officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Steven F. Lewis
Seth Edelman
John Dearstyne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 9, 2004

E-MAIL

TO: Stan J. Sussina [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. Sussina:

I have received your letter in which you questioned the propriety of a delay in disclosure of more than three weeks relative to your request for records that you believe to be "readily available."

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, 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:tt

cc: Hon. Linda Thompson
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14794

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July 9, 2004

Mr. Jerry L. Morgan Sr.
[redacted]

Dear Mr. Morgan:

I have received your letter and the materials attached to it. You have sought assistance relative to your efforts in obtaining information from the Auburn Enlarged City School District. In consideration of the materials, I offer the following comments.

First, since several aspects of the responses to your request indicate that there is "no document", I point out that the Freedom of Information Law pertains to existing records. Further, §89(3) states in part that an agency, such as a school district, is not required to create a record in response to a request.

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, since it appears that you have encountered delays, 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.

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: John Plume
J.D. Pabis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 9, 2004

Ms. Jean A. Black, CPA
[redacted]

The staff of the Committee on 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. Black:

As you are aware, I have received your letter in which you asked whether a request for certain records is appropriate. You added that the request was made in March, but that you received no response as of the date of your letter to this office. The request involved "[a] copy of the 2001, 2002 and 2003 form W2 or equivalent record" pertaining to certain named employees of the Rochester City School District.

From my perspective, the request is valid. Section 89(3) states in part that an applicant must "reasonably describe" the records sought. It has been held that a request meets that standard when agency staff has the ability to locate and identify the records sought [Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. I believe that your request clearly reasonably describes the records of your interest.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Although tangential to your inquiry, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379

NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Based on the foregoing, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

It has been contended that W-2 forms are specifically exempted from disclosure by statute on the basis of 26 USC 6103 (the Internal Revenue Code) and §697(e) of the Tax Law. In my opinion, those statutes are not applicable in this instance. In an effort to obtain expert advice on the matter, I contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue. I was informed that the statutes requiring confidentiality pertain to records received and maintained by the Internal Revenue Service; those statutes do not pertain to records kept by an individual taxpayer [see e.g., Stokwitz v. Naval Investigation Service, 831 F.2d 893 (1987)], nor are they applicable to records maintained by an employer, such as a school district. In short, the attorney for the Internal Revenue Service said that the statutes in question require confidentiality only with respect to records that it receives from the taxpayer.

In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms may be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. Further, the same conclusion was reached in a judicial proceeding, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the District's records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Barbara Jarzyniecki

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 12, 2004

Mr. Keith Millspaugh
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Millspaugh:

I have received your letter in which you raised a variety of questions and issues relating to meetings and hearings conducted by the Board of Trustees of the Village of Walden. In an attempt to address those matters, I offer the following comments.

First, as you are likely aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1). Consequently, a public body, such as a village board of trustees, cannot enter into an executive session to discuss the subject of its choice. From my perspective, the grounds for entry into executive session are based on the need to avoid some sort of harm that would arise by means of public discussion, and that is so with respect to the only ground for entry into executive session that appears to be relevant in relation to the matter that you described.

Since much of your commentary relates to the purchase of real property, pertinent is §105(1)(h) of the Open Meetings Law which permits a public body to enter into executive session to discuss:

> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

In my opinion, the language quoted above, like other grounds for entry into executive session, is based on the principle that public business must be discussed in public unless public discussion would in some way be damaging, either to an individual, for example, or to a government in terms of its capacity to perform its functions appropriately and in the best interest of the public. It is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters

that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

A key question, in my view, involves the extent to which information relating to possible real property transactions has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or in some way damage the interests of taxpayers. I note that the language of §105(1)(h) does not refer to negotiations *per se* or the impact of publicity upon negotiations relating to a parcel; rather its proper assertion is limited to situations in which publicity would have a *substantial* effect on the *value* of the property. It has been advised, for example, that when a municipality is seeking to purchase a parcel and the public is unaware of the location or locations under consideration, it is possible if not likely that premature disclosure or publicity would indeed substantially affect the value of the property. In that kind of situation, publicity might result in speculation or offers from others, thereby precluding the municipality from reaching an optimal price on behalf of the taxpayers. However, when details concerning a potential real property transaction, such as the location and potential uses of the property, are known to the public, publicity would have a lesser effect or impact on the value of the parcel. Again, the more that is known to the public, the less likely it is that publicity would affect the value of a parcel.

Second, when action is taken, whether it involves approval of a motion to enter into executive session or perhaps to purchase real property, the action must be memorialized in minutes of a meeting. Section 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.

It is noted, too, that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. If, for example, a public body votes to authorize its representative to offer up to a certain figure to purchase a parcel, I do not believe that minutes would be required to include that figure. One of the grounds for denial of access in the Freedom of Information Law, §87(2)(c), permits an agency, such as a village, to withhold records to the extent that disclosure "would impair present or imminent contract awards...." The state's highest court sustained a denial of access on the basis of that provision in relation to appraisals of property owned by a government agency that were sought prior to the consummation of transactions involving the sale of those parcels [see Murray v. Troy Urban Renewal Agency,56 NY2d 888 (1982)]. In short, if it is known how much an agency is willing to offer to buy a parcel or how low a price it may be willing to accept when selling a parcel, premature disclosure would likely "impair" the government's ability to reach an optimal price on behalf of taxpayers.

In consideration of the foregoing, the proper assertion of both §105(1)(h) of the Open Meetings Law and §87(2)(c) of the Freedom of Information Law is dependent on factual circumstances and the effects of disclosure.

Third, I believe that a subcommittee of a public body consisting solely of the members of a public body is itself a public body required to comply with the Open Meetings Law. 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, a subcommittee or "similar body" consisting of members of the Board of Trustees, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. A quorum of a public body is a majority of its total membership (see General Construction Law, §41). Therefore, in a body consisting of seven, a quorum would be four. If that body designates a committee of three, a quorum of the committee would be two.

With respect to public participation at meetings, while individuals may have the right to express themselves and to speak, I do not believe that they necessarily have the right to do so at meetings of public bodies. It is noted that there is no constitutional right to attend meetings of public bodies. That right is conferred by statute, i.e., by legislative action, in laws enacted in each of the fifty states. In the absence of a statutory grant of authority to attend such meetings, the public would not have the right to attend. Although 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), that statute is silent with respect to the issue of public participation. Consequently, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, it has been advised that it should do so based upon rules that treat members of the public equally.

Lastly, with regard to the enforcement of the Open Meetings Law, §107(1) of the Law states in part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any

action or part thereof taken in violation of this article void in whole or in part."

In addition, subdivision (2) of §107 authorizes a court to award attorney's fees to the successful party.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 12, 2004

Mr. John J. Cahill
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Cahill:

I have received your letters, as well as the materials attached to them. You have raised a variety of issues in relation to the creation of a position by the Penn Yan Central School District and its Board of Education. In consideration of those issues, I offer the following comments.

First, with respect to minutes of executive sessions, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

As 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.

In my view, the issues considered by the Board as you described them would not have been among the few instances in which it could have taken action in executive session. Again, assuming that no action was taken in executive session, there would have been no obligation to prepare minutes.

In a related vein, I note that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no record containing an analysis of or rationale for a proposal or an action, there would be no obligation on the part of the District to prepare such a record on your behalf.

With respect to a delay in determining to grant or deny access to records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests for records. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, while I agree with your contention that there would be no basis for discussing the creation of a position during an executive session, the materials suggest that that issue may have been intertwined with another, which is characterized in a memorandum prepared by a Board member as the "deficiencies in [the] performance" of a principal. In this regard, as you are likely aware, 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.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise, for it 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 presence of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department, the creation or elimination of positions, or matters relating to the budget, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981). On the other hand, insofar as a discussion involves the performance of a particular person, as in the case of consideration of the deficiencies of a particular employee, I believe that an executive session may properly be held. In the situation you described, the issue would have involved the employment history of a particular person or perhaps a matter leading to the discipline or removal of a particular person. In short, it appears that the matter of creating a position may have been overlapped or been intertwined with the performance of the principal. Insofar as consideration of creating a position may have been separate from the performance of the principal, I do not believe that there would have been a basis for entry to executive session. However, insofar as the two issues could not be segregated or discussed separately, I believe that §105(1)(f) would have validly served as a means of entering into executive session.

Next, an element of your correspondence involves a request for records that apparently may be withheld under §87(2)(g) of the Freedom of Information Law. That provision pertains to internal governmental communications, and those portions of such communications consisting of opinions, advice, recommendations and the like need not be disclosed. As I understand one of the memoranda attached to your correspondence, it has been contended that opinions expressed in writing or during executive sessions "must be kept confidential in order to comply with Section 805-a of the General Municipal Law." That statute states in subdivision (1)(b) that "no municipal officer or employee shall...disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests." From my perspective, the term "confidential" has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality. Stated differently, an act of Congress of the State Legislature must forbid disclosure in order to characterize information as confidential.

While a variety of subjects may properly be discussed during executive sessions and numerous records or portions thereof may validly be withheld under the Freedom of Information Law, the ability to exclude the public from a meeting or withhold records does not necessarily represent or signify a requirement of confidentiality. I note that both the Open Meetings Law and the Freedom of Information Law are permissive. Under §105 of the former, a public body may enter into executive session to discuss one or more of the subjects appearing in paragraphs (a) through (h) of subdivision (1); there is no requirement that those subjects be discussed in executive session. Moreover, as you are aware, in order to conduct an executive session, a motion to do so must be made and carried by a majority vote of the total membership of a public body. If such a motion does

not carry, even though a public body might have the authority to discuss an issue in executive session, it would not have the obligation to do so. Similarly, under the Freedom of Information Law, §87(2) provides that an agency may withhold records in accordance with the grounds for denial of access that follow. The State's highest court has found that an agency may choose to disclose records even though it has the ability to deny access [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

In short, as a general rule, even though discussions by a public body may in appropriate circumstances be conducted in private and certain records may justifiably be withheld, the matters considered might not be "confidential", but rather beyond the scope of public rights of access. In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). While §805-a of the General Municipal Law may be useful for providing guidance, for the reasons described above, I do not believe that the use of the term "confidential" is entirely clear.

I am unaware of any statute that would prohibit a Board member from disclosing the kind of information to which you referred, even though information might have been obtained during an executive session properly held or from records marked "confidential" or that need not be disclosed.

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 could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public

body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Gene Spanneut

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 12, 2004

Ms. Caryl-Robin Dresher
[redacted]

The staff of the Committee on 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. Dresher:

As you are aware, I have received your letter in which you sought assistance and raised questions relative to the process of adoption.

Your letter was precipitated by difficulties encountered in relation to the process, and you have asked, for example, whether there are "time lines delineated in the law regarding how long the case workers have to respond", what the criteria may be for "picking a family to visit a child", what the "concept of 'competing with other families' for a caseworker to be picked" is intended to mean, and "[h]ow much transparency is there supposed to be in the system so prospective families have some input in the process."

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning rights of access to government records in New York, primarily in relation to the state's Freedom of Information Law. While I cannot offer answers to your questions, it is my hope that the following remarks may offer guidance.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that a government agency is not required to create a record in response to a request. Therefore, if, for instance, there is no record describing the concept of competing with other families, a government agency, such as the Office of Children and Family Services, would not be required to prepare a new record on your behalf explaining or describing the concept.

In a related vein, however, the Freedom of Information Law is expansive in its coverage, for it pertains to all agency records, and §86(4) defines the term "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements,

examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent in relation to your questions is §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. Specifically, §87(2)(g) 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 records exist indicating the time within which caseworkers must respond, the criteria for selecting families to visit a child, that describe the concept to which you referred or the means by which prospective families participate in the adoption process, I believe that they would be accessible. In essence, those kinds of records would represent the policy of the agency and would be available under subparagraph (iii) of §87(2)(g). They might be found within an agency's regulations, policy book, administrative manual or similar documentation.

When seeking records, a request should be made to the "records access officer" at the agency that maintains the records of interest. The records access officer, according to the regulations promulgated by the Committee on Open Government, has the duty of coordinating the 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. It is suggested that a request in this instance be made to the records access officer at the Office of Children and Family Services, 40 North Pearl Street, Albany, NY 12243.

Lastly, as you are likely aware, personally identifiable information relative to children who might be adopted or persons who might seek to adopt is not generally available. The initial 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. With regard to records maintained by a children's or youth agency, whether public or private, involving children and foster care, §372 of the Social Services Law 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 containing personally identifiable information maintained by entities having duties relating to the classes of children described at the beginning of §372 of the Social Services Law can be disclosed, unless authorization to disclose is conferred by a court, or by the agency that was formerly Department of Social Services and is now the Office of Children and Family Services.

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 13, 2004

Mr. Paul J. Solda
Empire State Building
350 Fifth Avenue, Suite 2418
New York, NY 10118

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Solda:

I have received your letter and the materials attached to it. You wrote that you represent a "tax certiorari company" and have requested an advisory opinion concerning a denial of access to records by the Town of Islip.

You requested "All property inventory records. Specifically, the property square footage, bathroom count and miscellaneous data thereon." The Town's denial was based on a contention that "the release of the information would be an unwarranted invasion of personal privacy." You wrote that the request "is necessitated by evidentiary demands through the course of certiorari litigation", that "[t]he data, accordingly, is not sought for a commercial or fund raising purpose", and that the Town "does in fact disseminate such data pursuant to F.O.I.L. requests by taxpayers (or their agents) - but only upon single-individual requests." Significantly, although I found nothing to this effect in your communications with the Town, you indicated that you "specifically waived the need for the property owners names and addresses."

If indeed your request excludes property owners' names and addresses, I believe that the Town would be obliged to disclose the data sought if it has the ability to do so with reasonable effort. On the other hand, if the request is intended to include names and addresses, it appears that the request could properly have been denied. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

One of the grounds for denial of access, §87(2)(b), authorizes an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy

under the provisions of subdivision two of section eighty-nine of this article..." Section 89(2)(c)(i) indicates that disclosure "shall not be construed to constitute an unwarranted invasion of privacy....when identifying details are deleted." Again, if your request does not involve names and addresses, I do not believe that there would be a basis for a denial of access.

In that event, assuming that the Town maintains the data in electronic media, a potential issue involves its ability to segregate the names and addresses from the remainder of the data. 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, which an agency is not required to do [see FOIL, §89(3)], so narrow a construction could 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, judicial decisions suggest that an agency must do so.

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 relevant 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 request.

In NYPIRG, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'
>
> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

If the Town has the ability to honor the request *with reasonable effort*, as in NYPIRG, that decision suggests that the Town would be required to do so. Whether the Town has the ability to do so with reasonable effort is unknown to me.

Second, if the request involves data that includes names and addresses, the analysis is different.

Long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969). For instance, index cards containing a variety of information concerning specific parcels of real property have long been accessible to the public. As early as 1951, it was held that the contents of a so-called "Kardex" system used by assessors were available. The records determined to be available were described as follows:

> "Each card, approximately nine by seven inches (comprising the Kardex System), contains many printed items for insertion of the name of the owner, selling price of the property, mortgage, if any, frontage, unit price, front foot value, details as to the main building, including type, construction, exterior, floors, heating, foundation, basement, roofing, interior finish, lighting, in all, some eighty subdivisions, date when built or remodeled, as well as details as to any minor buildings" [Sears Roebuck & Co. v. Hoyt, supra, 758; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

There are instances in which records may be available individually, but in which a request for a group of those records maintained within a list or its equivalent may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Section 89(2)(b)(iii) indicates that an unwarranted invasion of personal privacy includes the sale or release of a list of names and addresses when the list would be used for commercial or fund-raising purposes. In my view, that provision is intended to pertain to names of natural persons and their residences.

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)].

The only exception to the principles described above involves §89(2)(b)(iii), which represents what might be viewed as an internal conflict in the law. Although the status of an applicant and the purposes for which a request is made are irrelevant to rights of access, and an agency cannot ordinarily inquire as to the intended use of records, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which Suffolk County 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.).

A similar conclusion was reached in a more recent decision, [Siegel, Fenchel & Peddy, P.C. v. Central Pine Barrens Joint Planning & Policy Commission, 251 AD2d 670, 676 NYS 191, 193 (1998)].

With respect to inventory data, provisions of the Real Property Tax Law offer direction. Section 500 requires assessors to prepare an inventory of the real property located within a city or town, and §501 states that the assessor shall publish and post notice indicating that an inventory is available at certain times. As I understand that provision, the inventory must be made available to any person for any reason when it is sought during the period specified in the notice. At that time, as in the case of the assessment roll being available to the public pursuant to a statute other than the Freedom of Information Law, the inventory would be available pursuant to §501 of the Real Property Tax Law. Before or after that specified time, however, it appears that the inventory would be subject to whatever rights exist under the Freedom of Information Law. If that is so, it appears that the inventory could be withheld if it would be used for a commercial or fund-raising purpose.

That is the conclusion, as I interpret the decision, that was reached in COMPS, Inc. v. Town of Huntington [703 NYS2d 225, 269 AD2d 446 (2000); motion for leave to appeal denied, 95 NY2D 758, (2000)]. The Court concluded that the request was properly denied, for the record consisted of the equivalent of a list of names and addresses that was intended to be used for a commercial purpose. That being so, the record was appropriately withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Further, the Court specified that "[b]ecause the respondents have not utilized the inventory data for the purposes of any assessment or reassessment, they are not under any statutory duty to publish the inventory data *at this time*" (id., 226; emphasis mine). Through the inclusion of the phrase, *at this time*, it appears that the Court distinguished rights of access at the time the inventory is required to be made available during the period specified in the notice required by §501 of the Real Property Tax Law from those rights extant at all other times. Based on the decision, it appears that the inventory is available to any person for any reason during the time specified in the notice, but that it may be withheld at other times if it would be used for a commercial or fund raising purpose.

Lastly, although your request may not involve a list *per se*, it has been held, in essence, that a request for records that would be used to develop a list of names and addresses to be used for a commercial purpose may be denied (see Scott, Sardano & Pomeranz, supra). That decision dealt with a request by a law firm for copies of motor vehicle accident reports to be used for the purpose of direct mail solicitation of accident victims. Although the Court of Appeals found that accident reports are individually available, in view of the intended use of the reports, to create a mailing list for a commercial purpose, i.e., to solicit accident victims, it was determined that names and addresses of accident victims could be withheld based on considerations of privacy. From my perspective, if your intended use of the data, for use in certiorari litigation, is similar to the intended use in Scott, Sardano & Pomeranz, and if the request includes names and addresses, it appears that the request could be denied under §89(2)(b)(iii) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard Hoffman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 15, 2004

Mr. Philip Walter Johnson
[redacted]

The staff of the Committee on Open 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 wrote that you are "fighting a speeding ticket in Croton, and the letter that you attached indicates that you requested from the Village of Croton-on-Hudson a "recent traffic speed survey conducted to determine the average speed traffic is going. Nearest cross street is Jacoby Street."

You added that the request was "ignored because it has to have the police department's permission in order to receive it" and that you were "warned that [you] could lose [your] job if [you] challenge or pursue" the matter. You asked whether you should "follow through with a complaint" and "risk everything."

While I cannot offer guidance concerning the "risk" of following through, it is my view that the survey, if it exists, would be accessible under the Freedom of Information Law. In this regard, I offer the following comments.

First, every unit of government is required to comply with the Freedom of Information Law. As the governing body of the village, I believe that the Village Board of Trustees is responsible for ensuring that Village government, including all Village departments, adhere to 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.

I believe that a traffic survey prepared by or for the Village would fall within §87(2)(g). Although that provision potentially authorizes an agency to deny access to records, due to its structure, it often requires disclosure. Section 87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

From my perspective, a "speed survey" would likely consist of statistical or factual information that must be disclosed pursuant to subparagraph (i) of §87(2)(g).

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to a request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing

> body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

It is suggested that you share a copy of this response with the Village Manager.

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-14801

41 State Street, Albany, New York 12231
(518) 474-2518
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July 15, 2004

Mr. Larriante Sumbry
Indiana State Prison
P.O. Box 41
Michigan City, IN 46361

Dear Mr. Sumbry:

I have received your letter in which you appealed to the Committee on Open Government following an alleged denial of access to records by the NYS Division of Human Rights.

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 dealing with the right to appeal a denial of access to records, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

It is also noted that a written denial of access by an agency must, according to the regulations promulgated by the Committee on Open Government (21 NYCRR §1401.7), include reference to the right to appeal the denial.

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: Richard Brill
Andrew Nitzberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 15, 2004\

Mr. Ronald I. Pikuet
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pikuet:

I have received your letter in which you raised two issues relating to requests made to the Town of Chili under the Freedom of Information Law.

First, you referred to a request that was granted. You expressed concern, however, that the Town's records access officer "did not respond during the normal five day period." In this regard, although the matter is moot, for future reference, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal

> fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, on behalf of all the people in the Town, you requested that a copy of the Town assessment roll "be made by the Town and placed in Chili Public Library at the Town's expense..." The request was denied. In my view, while the Town could choose to place copies of Town records at Town's expense in the Public Library, there is no provision of law requiring that the Town must do so. I note, however, that you or any other person could obtain copies of records at your own expense and donate them to a public library or disseminate them as you see fit.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Richard J. Brongo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14803

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 15, 2004

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 in which you sought advice concerning an appeal made to the Town of Tuxedo that was not determined within the statutory period.

As you are aware, the Freedom of Information Law requires that an appeal following a denial of access to records must be determined within ten business days of its receipt. Specifically, §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."

If an agency fails to determine an appeal within the statutory time, it has been held that the person requesting the records may consider the appeal to have been denied, that the person has exhausted his or her administrative remedies, and that, therefore, he or she may seek judicial review of the constructive denial of the appeal by initiating an proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Kenneth Magar
Hon. Elaine Laurent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14804

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 15, 2004

Mr. David Jamison
01-A-3651
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-0010

Dear Mr. Jamison:

I have received your letter in which you appealed "the denial of access regarding your request which was made...and sent to Jonathan David, Records Access Appeals Officer, New York City Police Department..."

In this regard, first, 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 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, provides in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Second, I believe that Mr. David is the person designated to determine appeals at the New York City Police Department. It is unclear, however, whether your letter is intended to indicate that Mr. David denied your appeal in writing, or whether he failed to determine your appeal within ten business days of its receipt as required by the provision quoted above. In either event, I believe that you would have the right to seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [see Freedom of Information Law, §89(4)(b); also Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 91982)].

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: Jonathan David

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3835
FOIL-AO-14805

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July 15, 2004

Ms. Lavonia Scaggs
Concerned Parents to Save
the Charter Schools
P.O. Box 372
Calverton, NY 11933

The staff of the Committee on 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. Scaggs:

I have received your letter and apologize for the delay in responding. You offered a series of allegations concerning "the persistent abuse of executive power" by the Board of Trustees of the Riverhead Charter School and its president.

Specifically, you referred to "work sessions", closed sessions held without an indication of the purpose or a vote to do, the absence of minutes, meetings held without notice, failures to reply to requests made under the Freedom of Information Law, and a prohibition against speaking at meetings, "unless the board approves the content." You added that comments by the public are limited to three minutes per month, unless they are "positive in nature", in which case there is no time limit on the length of the comments.

In this regard, as you are likely aware, §2854(1)(e)of the Education Law specifies that charter schools are subject to the Open Meetings and Freedom of Information Laws. The former is applicable to "public bodies", the latter pertains to "agencies", and those terms will be used for purposes of the following remarks.

First, the Open Meetings Law is applicable to meetings of public bodies, and it was held more than twenty-five years ago that any gathering of a majority of a public body for the purpose of conducting a public business is a meeting that falls within the coverage of the Open Meetings Law, even if there is no intent to take action and irrespective of its characterization [Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. The decision focuses specifically on "work sessions" held solely for the purpose of discussion, and it was concluded that work sessions are meetings subject to the Open Meetings Law.

Second, §104 of the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

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.

Third, every meeting must be convened as an open meeting, for §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. That being so, 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. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Fourth, the Open Meetings Law includes direction concerning the minimum contents of minutes and the time within which they must be prepared. Specifically, §106 states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals,

> resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks, but that they need not consist of a verbatim account of all that is expressed at a meeting. I note, too, that if no action is taken during an executive session, minutes of the executive session need not be prepared.

It might also be important to point out 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.

Next, 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.

I note that there are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited. It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

> "In a traditional public forum, like a street or park, the government may enforce a content-based exclusion only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n., 460 U.S. at 45. A designated or 'limited' public forum is public property 'that the state has opened for use by the public as a place for expressive activity.' Id. So long as the government retains the facility open for speech, it is bound by the same standards that apply to a traditional public forum. Thus, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 46."

The court in Schuloff determined that a "compelling state interest" involved the ability to protect students' privacy in an effort to comply with the Family Educational Rights Privacy Act, but that expressions of opinions concerning "the shortcomings" of a law school professor could not be restrained.

Lastly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Additionally, that statute provides direction concerning the time and manner in which an agency must respond to a request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1806

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July 15, 2004

Mr. Vincent Stalis
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Stalis:

I have received your letter and the materials attached to it. In brief, in response to a series of requests for records maintained by the New York State Department of Health, you were granted access to many, but others are "missing." Mr. Robert LoCicero, the Department's records access officer, indicated that "some parts of these materials have been redacted" in accordance with §87(2)(b) of the Freedom of Information Law; others were withheld based on the assertion of the attorney-client privilege. He added that you have the right to appeal the denial of access to those portions of the records. You have repeatedly requested a list of the records that were not disclosed.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

As I understand it, Mr. LoCicero's response indicates that records or portions thereof have been withheld based on the assertion of two of the exceptions to rights of access. As he suggested, §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." That provision is often asserted to protect against the disclosure of intimate or personal information or when disclosure of information identifiable to an individual would result in personal or economic hardship and is irrelevant to the agency's duties. The other exception, although not specifically referenced, would be §87(2)(a). That provision pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §4503 of the Civil Practice Law and Rules. In short, when a client seeks legal advice from an attorney, and the attorney provides legal advice, those communications are privileged. I would conjecture that the records withheld involve legal advice given by an attorney for the Department of Health to an employee of the Department.

To seek review of the denial, it is suggested that you appeal as Mr. LoCicero offered. When a request for records is denied in whole or in part, §89(4)(a) of the Freedom of Information Law provides a right to appeal to the person denied access. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Lastly, although the Department of Health could choose to prepare and provide a list specifying the records that have been withheld, it is not required to do so [Nalo v. Sullivan, 125 AD2d 311 (1986)].

I hope that the foregoing serves to clarify your understanding of the matter and the Freedom of Information Law, and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Robert LoCicero

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14807

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July 15, 2004

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 and the materials attached to it. You have sought assistance concerning your unsuccessful efforts in gaining access to the "Subject Matter List of the Town of Tuscarora...and Records Retention & Deposition Schedule for same."

In this regard, an agency, such as a town, has been required to maintain a "subject matter list" since the Freedom of Information Law went into effect in 1974. By way of background, the Freedom of Information Law generally pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. 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 recommended that the records retention and disposal schedules developed by the State Archives at the State Education Department may be used as a substitute for the subject matter list. It is suggested that you might request to review the retention schedule applicable to the Town from the State Archives by calling (518)474-6928.

In an effort to enhance compliance with and understanding of the matter, a copy of this response will be sent to the Town Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Jeffrey Post

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14808

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July 16, 2004

Mr. Mark Lowrey
203227
C.C.I.
986 Norwich New London Tnpk.
Uncasville, CT 06382

Dear Mr. Lowrey:

I have received your letter in which you asked that this office obtain police reports pertaining to a certain person arrested in Colonie, NY.

In this regard, the Committee on Open Government is authorized to provide advice concerning access to government information, primarily under the state's Freedom of Information Law. This office does not have custody or control of records generally, nor does it have the authority to obtain records on your behalf. However, I offer the following comments.

First, it is suggested that you direct your request to the records access officer at the agency that you believe maintains the records. The records access officer has the duty of coordinating an agency's response to requests.

Second, with respect to a request for a police report, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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.

I point out that when a person is charged with a criminal offense and the charge is dismissed in his or her favor, the records become sealed pursuant to §160.50 of the Criminal Procedure Law.

Assuming that the arrest resulted in a conviction and that the records have not been sealed, several of the grounds for denial may nonetheless be relevant.

For example, police reports would likely fall within §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, 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 records were disclosed during a public judicial proceeding, they are accessible, notwithstanding the exceptions appearing in the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 19, 2004

Mr. Steven Singh
95-A-0393
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589-0700

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Singh:

I have received your letter concerning a request made to the Yaphank Police Department for a copy of your arrest report. You indicated that there are erroneous statements in your file, and the Inmate Records Coordinator informed you that a copy of your arrest report would have to be forwarded to the Deputy Inspector General by the Police Department. Having made such a request, you questioned whether the Police Department has an obligation to forward the report to that person. As of the date of your letter to this office, you had not received a response.

In this regard, I offer the following comments.

First, with respect to your question concerning the Police Department's obligation to forward the arrest report to the Deputy Inspector General, I point out that, although it may choose to do so, there is nothing in the Freedom of Information Law that would require the Department to do so. However, assuming that the report is accessible under the Freedom of Information Law, you may obtain a copy and distribute it as you see fit. I note that §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..." It is suggested that you seek such a certification. It is assumed that the Deputy Inspector General would accept a copy with such a certification.

Second, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Janet M. Mercer

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 19, 2004

Ms. Debra 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 facts presented in your correspondence.

Dear Ms. Cohen:

I have received your letters of May 20, as well as related materials. You have raised a variety of questions and sought an advisory opinion pertaining to the responsibilities and status of three entities under the Freedom of Information Law, the Yonkers Industrial Development Agency ("YIDA"), Yonkers Baseball Development Inc. ("Yonkers Baseball"), and the Ridge Hill Development Corporation ("Ridge Hill").

Each of your questions must be preceded by consideration of whether the entities at issue are subject to the requirements of the Freedom of Information Law. In this regard, every industrial development agency is, according to §856(2) of the General Municipal Law, a corporate governmental agency, constituting a public benefit corporation." Since a public benefit corporation is a kind of public corporation (see General Construction Law, §66), and since public corporations are "agencies" as defined by §86(3) of the Freedom of Information Law, it is clear that industrial development agencies fall within the scope of the Freedom of Information Law. In a letter addressed to you May 24, it was concluded, apparently by its attorney, that Yonkers Baseball is subject to the Freedom of Information Law, which, as you know, is consistent with the advice rendered in an advisory opinion addressed to you in April of 2003. In that same letter, you were advised, however, that Ridge Hill "is not an entity that is subject to provisions of Public Officers Law Section 87 et seq."

Although Ridge Hill was initially formed at direction of YIDA "and the YIDA was the sole member of the corporation, the membership of the board of directors has since changed. Based on the material that you provided, I do not have sufficient information to advise as to the status of Ridge Hill under the Freedom of Information Law. However, considerations analogous to those offered in the opinion of April, 2003, i.e., the extent to which there may be government control over the entity, would, in my view, be pertinent in determining whether Ridge Hill may be characterized as an "agency" falling within the scope of that statute.

The following comments will based on the assumption that the Freedom of Information Law is applicable to an entity.

In requests to each of the three entities, you cited "Public Officers Law §88(3)(c) and asked for a "current list, reasonably detailed, by subject matter of any records required to be made available for public inspection and copying." That provision applies only to the State Legislature, and it differs from the equivalent provision applicable to agencies. I note the definition of the term "agency" excludes the State Legislature, that §88 pertains only to the State Legislature, and that subdivision (2) lists the kinds of records that the State Legislature must disclose. If records do not fall within that list of accessible records, the public does not have rights of access to records of that institution.

As the Freedom of Information Law applies to agencies, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The authority to assert an exception frequently is based on the contents of records and potentially harmful effects of disclosure. That being so, there are many instances in which a record might justifiably be withheld today, but which may become available in the future because the harmful effects of disclosure described in an exception or exceptions may have diminished or disappeared. It is for that reason, in my view, that the provision involving agencies' subject matter lists reflects a different requirement.

By way of background, §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, it is emphasized that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

Because a subject matter list is a factual categorization of the kinds of records maintained by an agency, I believe that it is clearly accessible to the public. Although that document might be characterized as "intra-agency material" falling within §87(2)(g), which is one of the exceptions to rights of access, subparagraph (i) specifies that, insofar as such material consists of factual information, it must be disclosed.

If Yonkers Baseball is a subsidiary of YIDA, the latter's subject matter list might include reference to records maintained by the former. If Yonkers Baseball is largely independent, it might have its own list.

You asked whether "thirty days [is] a reasonable time to produce the list for inspection." Since the subject matter list is required to be "maintained" by an agency on an ongoing basis, and since that requirement has applied since the Freedom Information Law was enacted in 1974, I believe that it must exist on a continual basis. That being so, assuming that such a list has been prepared as required by §87(3)(c), a delay in disclosure of as much as thirty days would, in my view, be inconsistent with the thrust of the law and its judicial construction.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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)].

Next, 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, you raised the following question pertaining solely to Ridge Hill:

> "If changes in Ridge Hill's corporate structure as of March 27, 2003 render it no longer subject to FOIL, are records created prior to that date, during the period where the YIDA was the sole shareholder and YIDA and City officials served on the Board, still subject to FOIL?"

While I am unaware of any analogous situation, I note that the Freedom of Information Law is expansive in its coverage, for it pertains to all agency records and defines the term "record" 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 language quoted above, the Freedom of Information Law applies not only to records in the physical possession of an agency, such as the YIDA, but also to records produced *for* an agency.

From my perspective, to the extent that Ridge Hill maintains records that were produced for YIDA or any other agency, those records would fall within the coverage of the Freedom of Information Law, irrespective of their location or changes in Ridge Hill's corporate structure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Maria Fazekas
Dana Robideau
Dennis E. A. Lynch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 20, 2004

Hon. Eugene E. Scarpato
Mayor
Village of Lynbrook
Lynbrook, NY 11563

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mayor Scarpato:

I have received your letter in which you sought guidance concerning an appeal made under the Freedom of Information Law. The issue involves a request for "interoffice memos between then Supt. of Buildings Lou Bello and the Mayor." Based on the appeal, it appears that the records sought were withheld in their entirety.

In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals , the state's highest court, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly

> where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Department contended that certain reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275).

I believe that the records in question clearly consist of "intra-agency" materials that fall within the coverage of §87(2)(g). While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure, for the contents of those materials serve as the factors in determining rights of access, or conversely, the ability to deny access. Specifically, §87(2)(g) authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> I. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The Court of Appeals in Gould, supra, analyzed the provision quoted above and found that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers

> Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) (id., 276-277).

In short, it is unlikely that the records requested may properly be withheld in their entirety. Rather, based on the preceding commentary, I believe that the Village is obliged to review their contents to determine which portions must be disclosed in accordance with subparagraphs (i) through (iv) of §87(2)(g).

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

STATE OF NEW YORK
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July 20, 2004

Mr. Christopher Vescera
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Vescera:

I have received your letter in which you raised questions concerning the ability to obtain records from a government agency.

First, you asked whether a person may seek and obtain records indicating code violations associated with a particular parcel of property, "without the necessity of submitting a FOIL request." In this regard, all government records fall within the coverage of the Freedom of Information Law. Although an agency may accept an oral request or in some instances authorize searches for records without the submission of a written request, §89(3) states in part that an agency may require that request be made in writing.

If a written request is made, you asked whether it is "fair to say that a FOIL request is required to insure the confidentiality of the material requested" (emphasis yours). I am not sure that I understand your question. If you are asking whether a written request made under the Freedom of Information Law is confidential, I do not believe that would generally be so.

A written request is itself a record subject to rights of access. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 when a municipal agency may withhold 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:tt

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July 20, 2004

Ms. Ellen Sellick
[redacted]

The staff of the Committee 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. Sellick:

I have received your letter in which you sought guidance in your efforts in gaining access to certain records. In brief, it is my understanding that you are interested in obtaining records pertaining to yourself, some of which may include inaccurate information, from the Schenectady County Department of Probation and a court.

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 include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, while a county probation department would constitute an "agency" falling within the coverage of the Freedom of Information Law, a court would fall beyond the scope of that law.

This not to suggest that court records are not accessible, for other provisions of law often require the disclosure of court records. In this instance, based on the name indicated in your letter, it appears that some of the records of your interest are maintained by the Town of Rotterdam Justice Court. If that is so, §2019-a of the Uniform Justice Court Act may be pertinent. That statute states in relevant part that "The records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..." Therefore, unless a separate provision of law states that records maintained by a justice court are exempt from disclosure, I believe that its records are accessible to the public. When seeking justice court records, it is suggested that you do so citing §2019-a of the Uniform Justice Court Act.

Second, again, agency records are subject to the Freedom of Information Law, and that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I note that the Division of Probation and Correctional Alternatives has promulgated regulations concerning probation records. 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 to represents the basis upon which the County relied 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, the state's highest court, that an agency's regulations or the provisions of an administrative code or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature of congress. Therefore, I do not believe that regulations can be considered as a statute that would exempt records from disclosure or that an agency can rely upon regulations as a basis for withholding a record.

If indeed the regulations cited earlier represent the sole basis for denial by the County and have been invalidly asserted, 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 rights of access. Although one of the exceptions to rights of access, §87(2)(b), authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", since the records pertain to you, you could not invade your own privacy. However, it is likely that the records include identifying details pertaining to persons other than yourself. In those instances, it is possible that their names or other identifying details might be withheld on the ground that disclosure would result in an unwarranted invasion of their privacy.

Lastly, pursuant to the regulations promulgated by the Committee on Open Government, each agency is required to designate one or more persons as "records access officer" (21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records, and requests ordinarily should be addressed to that person. It is suggested that you might renew your request and send it to the County's records access officer, who I believe is the Clerk of the County Legislature.

In an effort to enhance your understanding of the Freedom of Information Law, a copy of our brochure, "Your right to know", has been enclosed.

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-14814

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 21, 2004

E-MAIL

TO: Philip Aubrey [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. Aubrey:

I have received your letter in which you sought assistance in obtaining a variety of records from the Wyandanch Wheatley Heights Ambulance Corps (WWHAC). You wrote that WWHAC "is the only emergency EMS provider for the hamlets of Wyandanch and Wheatley Heights", that it "receives a budget from the town", and that it is separate from the Wyandanch Volunteer Fire Company.

Although you have reviewed advisory opinions rendered by the office and contend that WWHAC is subject to the Freedom of Information Law, I do not believe that is entirely clear.

As you are aware, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, 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].

Another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein.

> Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

In consideration of the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

In the only case of which I am aware on the subject, the Appellate Division, Second Department, held that a volunteer ambulance corporation performing its duties for an ambulance district in Suffolk County 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. There appears to be no ambulance district in this instance, and in consideration of Ryan, a key factor in my view is whether WWHAC performs its duties "solely" for one or more municipalities. If it does, it is likely in my opinion that a court would find that it is indeed required to give effect to the Freedom of Information Law. On the other hand, if it performs duties pursuant to a contract or contracts with one or more municipalities, and in addition, charges individuals or entities separately for services and perhaps bills their insurance companies, I doubt that a court would conclude that WWHAC is an "agency" subject to the Freedom of Information Law, for it would not be performing its duties solely for government.

Assuming that WWHAC is an agency, I offer the following comments.

First, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the kinds of records that you requested would be accessible, for none of the grounds for denial of access would appear to be applicable.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate

a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

RJF:tt

cc: Wyandanch Wheatley Heights Ambulance Corps.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 21, 2004

E-MAIL

TO: Daniel Brooks <danny@1alphatech.com>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brooks:

I have received your inquiry in which you referred to the following statement, which has been added by the Town of Marlborough to responses to requests made under the Freedom of Information Law:

> "The information provided pursuant to the above stated foil request is information intended only for the use of the individual or entity named above. You are hereby notified that any dissemination, distribution, or distribution of copy of said information whether it be by reports, photographs or nay other documentation to third parties is strictly prohibited."

You have questioned the legality of the statement.

In my view, the prohibition is inconsistent with law and unenforceable.

From my perspective, a person seeking records under the Freedom of Information Law from an agency, such as a town, cannot be compelled, as a condition precedent to disclosure, to indicate the purpose of a request or the intended use of the records, or to promise or agree that that the records will not be duplicated, disseminated, or perhaps placed on the internet. As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant. In short, once records are made available under the Freedom of Information Law, I believe that the recipient may do with the records as he or she sees fit.

I note that in a decision rendered in 2001, the Life Insurance Council of New York attempted to bolster a denial of access to certain records maintained by the State Department of Insurance that had long been available to the public because the recipient of the records placed the records on the internet. The court rejected the argument and determined that the records remained accessible and that there was no justifiable reason for prohibiting their placement on the internet [Belth v. New York State Department of Insurance, 733 NYS2d 833].

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 21, 2004

Mr. David Jamison
01-A-3651
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582

Dear Mr. Jamison:

I have received your letter of July 8, which reached this office today. Please note that the address of the Committee on Open Government has changed. You have requested certain records from this office pursuant to the Freedom of Information Law.

In this regard, the Committee is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have custody or control of records, and it is not empowered to compel an agency to grant or deny access to records. In short, I cannot provide the records that you requested because this office does not possess them.

I point out that a request for records should be directed to the records access officer at the agency that you believe has possession of the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. It appears that you are interested in obtaining records maintained by a police department, and it is suggested that a request be made to the records access officer of that agency.

It is also important to note that §89(3) of the Freedom of Information Law requires that a person requesting records "reasonably describe" the records sought. Therefore, sufficient detail should be included in a request (i.e., dates, indictment or other identification numbers, etc.) so that agency staff can locate and identify the records of your interest.

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 21, 2004

Mr. Ralph R. Martinelli
Publisher
Martinelli Publications
40 Larkin Plaza
Yonkers, NY 10701

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Martinelli:

I have received your letter in which you sought an advisory opinion concerning a denial of access to records by the Nassau County Police Department.

You requested police reports and a variety of other materials relating to certain named individuals, and the Department denied the request in its entirety on the basis of §87(2)(e)(i) of the Freedom of Information Law. I note that I contacted Police Officer Lowery, the Department official who responded to to your request, in an attempt to learn more of the matter. Although it appears that one of those named, Bonnee Price-Linden, was convicted, Officer Lowery indicated that investigations are ongoing concerning the two others identified in your request. Officer Lowery did not know whether any such conviction was the result of a plea or a trial.

In my view, the ability of the Department to properly deny access would be dependent, in part, on the extent to which records have already been disclosed, perhaps in the context of a judicial proceeding. I note that it has been held that records in possession of an agency that were used or introduced during a public judicial proceeding are accessible to the public under the Freedom of Information Law and that the exceptions to rights of access appearing in that law cannot validly be asserted in that circumstance, [see Moore v. Santucci, 151 AD2d 677 (1986)]. In Moore, it was determined that statements made by co-defendants and witnesses obtained in the course of preparing for a criminal trial which ordinarily could be withheld under the Freedom of Information Law lose their "cloak of confidentiality" once they have been made in open court (id., 679). Therefore, to the extent that your request involves records that are accessible from a court or that were introduced during a public proceeding, I believe that the Department would be required to disclose them.

To the extent that your request involves records that have not been previously disclosed in the manner described above, the Freedom of Information Law is based upon a presumption of

access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. 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 cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74;

Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the Department has engaged in a blanket denial of access in a manner which, in my view, may be 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 that agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

The provision upon which the denial is based, §87(2)(e)(i), authorizes 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..." In an Appellate Division decision that is often cited in the context of records relating to law enforcement, Pittari v. Pirro, [258 Ad2d 202 (1999)], it was stated that:

> "[t]he question is whether the nature of the records sought and the timing of the FOIL request rendered those records exempt from disclosure under FOIL. The Court of Appeals, in *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572, 419 N.Y.S.2d 467, 393 N.E.2d 463 noted:
>
> > '[T]he purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution'" (id., 169).

As I understand the matter, the defendant in Pitari sought records under the Freedom of Information Law *prior* to discovery, for the court found that "[i]f a criminal proceeding is pending, mandating FOIL disclosure would interfere with the orderly process of disclosure in the criminal proceeding set forth in CPL article 240" (id., 171). Whether or the extent to which the holding in Pitari is precedential would be dependent on facts that Department has not clearly expressed and of which I am unaware.

In view of the nature of the records sought, it is possible that other grounds for denial of access might enable the Department to withhold portions of the records. For instance, identifying details pertaining to complainants, witnesses or others interviewed by the Department might be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Portions of inter-agency or intra-agency materials consisting of advice, opinion or recommendation offered by Department or other agency officers or employees could, in my view, be withheld under §87(2)(g) (see Gould, supra, 276-277). The remaining aspects of the

records sought, however, would appear to be accessible, for none of the grounds for denial of access appear to apply.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to the Department.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Commissioner James H. Lawrence
Thomas C. Krumpter
Daniel Lowery

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 21, 2004

Ms. Suzanne McCormick
[redacted]

The staff of the Committee 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. McCormick:

I have received your letter in which you sought an advisory opinion concerning a request made pursuant to the Freedom of Information Law to the Division of Parole.

In a letter dated February 21, you requested the following:

> "1. True accurate certified copies of any and all documents/correspondence whatsoever submitted by any party in support of any application for any Certificate of Relief from Disabilities applied for or issued to Bankers Trust Company at any time.
>
> "2. True accurate certified copies of any and all internal memoranda and/or notes pertaining to any Certificate of Relief from Disabilities issued by the Board of Parole to Bankers Trust Company at any time.
>
> "3. True accurate certified copies of any and all Certificate of Relief from Disabilities issued to Bankers Trust Company at any time."

The receipt of your request was acknowledged on March 3, when you were informed that you could expect a response "within approximately thirty days." Because you received no further response within that time, you wrote again to the Division, indicating that more than thirty days had passed. Having received no response to that communication, on May 29 you addressed a letter to the Chairman and appealed on the basis of the Division's failure to determine rights of access within the time indicated.

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)].

Although it appears that your appeal was proper, I note that the person at Division of Parole designated to determine appeals is Terrence X. Tracy, Counsel to the Division.

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, many of the records sought must be disclosed, while others may be withheld in whole or in part.

As I understand the matter, it relates to a conviction not of a person, but of an entity, the Bankers Trust Company. The materials that you attached indicate that Bankers Trust pleaded guilty in federal court and paid a fine of approximately sixty million dollars. In many instances, there would be considerations involving the protection of personal privacy in relation to an application for a certificate of relief from disabilities. Records relating to a defendant might include reference to personal or intimate details of his or her life. Those submitted by family members, neighbors, victims, co-workers and others might contain intimate or personal information pertaining to those persons or their relationship with a defendant. In those instances, §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold those portions of records the disclosure of which would constitute "an unwarranted invasion of personal privacy." I am unaware of the contents of records submitted by any "party" in support of an application. However, if they do not contain intimate or personal information relating to a natural person, I do not believe that §87(2)(b) could be asserted.

Based on the language of the Freedom of Information Law, as well as other statutes and their judicial construction, it is clear in my view that the provisions dealing with the protection of personal privacy are intended to deal with natural persons, rather than entities, such as corporations, or individuals acting in business or professional capacities. Another statute, the Personal Privacy Protection Law when read in conjunction with the Freedom of Information Law makes clear that the protection of privacy as envisioned by those laws is intended to pertain to *personal* information about natural persons [see Public Officers Law, §§92(3), 92(7), 96(1) and 89(2-a). Therefore, insofar as the information at issue would identify entities, I do not believe that the information could be withheld based upon considerations of privacy. In a decision rendered by the Court of Appeals, the state's highest court, cited earlier that focused upon the privacy provisions, the Court referred to the authority to withhold "certain personal information about private citizens" (see Federation of New York State Rifle and Pistol Clubs, Inc. supra). In another decision rendered by the Court of Appeals and a discussion of "the essence of the exemption" concerning privacy, the Court referred to information "that would ordinarily and reasonably regarded as intimate, private information" [Hanig v. State Dept. of Motor Vehicles, 79 NY 2d 106, 112 (1992)]. In view of the direction given by the state's highest court, again, I believe that the authority to withhold the information based upon considerations of privacy is restricted to those situations in which records contain *personal* information about natural persons, as opposed to information identifiable to those acting in a business capacity.

Several judicial decisions, both New York State and federal, pertain to records about individuals in their business or professional capacities and indicate that the records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons".

Like the New York 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 v. Environmental Protection Agency [575 F. Supp. 425 (D.C.D.C 1983)] it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429).

In short, in my opinion and as suggested in the decisions cited above, the exception concerning privacy does not apply to portions of a record identifying entities or individuals acting in their business or professional capacities.

With respect to internal memoranda or notes, relevant 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Terrence X. Tracy

From: Robert Freeman
To: reporterstiles@aol.com
Date: 7/21/2004 4:15:50 PM
Subject: http://www.dos.state.ny.us/coog/ftext/f12226.txt

http://www.dos.state.ny.us/coog/ftext/f12226.txt

Hi Laura - -

Attached is an advisory opinion indicating that portions of a resume must be disclosed (i.e., those that are related to a public employee's duties or which indicate his or her general educational background), while others may be withheld (those that are irrelevant to the position, i.e., marital status, social security number, hobbies, etc.).

With respect to salaries, the FOIL has long required that each agency maintain a record that contains the "name, public office address, title and salary of every officer or employee of the agency." In short, there is no question but that the salary of a public employee is accessible to the public.

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: Kathleen L Jones
Subject: Re: http://www.dos.state.ny.us/coog/Right_to_know.html

Dear Ms. Jones:

I offer two points in relation to your response.

First, the regulations promulgated by this office, which have the force of law, require that each agency, such as a town, designate one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records. In most towns, because the town clerk is the custodian of all town records, the clerk is the records access officer. It is suggested that you contact the clerk to ascertain whether he or she has been so designated. If that is so, I would resubmit the request to the clerk.

Second, when an agency receives a request, the law requires that the agency respond within five business days by granting access, denying access in writing, or acknowledging the receipt of the request in writing and including an approximate date indicating when the request will be granted or denied. If more than five business days pass, and the agency has failed to respond in any way, the request may be deemed to have been denied. When a request is denied, the person denied access has the right to appeal. In the case of a town, the appeal would be made to the town board or a person designated by the board. Again, it is recommended that you contact the town clerk to learn of the identity of the appeals person or body.

I hope that I have been of assistance.

>>> "Kathleen L Jones" [redacted] 7/21/2004 4:23:32 PM >>>
> > Dear Ms. Jones:
>
> I have received your inquiry and have attached our guide to the Freedom
> of Information Law. It is suggested that you review the passage
> entitled "Denial of access and appeal." In brief, when a request is
> denied in whole or in part, the person denied access has the right to
> appeal the denial. In the case of a local government, the appeal would
> be made to the governing body, i.e., a town board, city council,
> etc., or to a person designated by that body. It is suggested that you
> contact the clerk of the municipality and ask for the name of the person
> or body to whom an appeal may be made.
>
> 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-14821

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July 22, 2004

Mr. Aaron Mark Zimmerman
The 'A' Team
117 South State Street
Syracuse, NY 13202

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Zimmerman:

I have received your letter and the materials attached to it concerning a request for records of the Workers' Compensation Board. The records sought appear to have been distributed to Workers' Compensation law judges at a seminar during which those present were given continuing legal education (CLE) credit. Although voluminous documentation was apparently made available to you, you questioned a denial of access to portions of the documentation constituting "attorney's opinion." You have requested an opinion "as to whether or not seminar materials which provide general education to law judges about the current state of the law constitutes material which is exempt from FOIL disclosure."

In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, two of the grounds for denial of access are relevant in consideration of your question.

You referred to one of the grounds, §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.

Insofar as the materials include recommendations, advice, opinions and the like offered by an officer or employee of the Workers' Compensation Board or another agency to law judges or others employed by the Board, I believe that they may be withheld under §87(2)(g). That an opinion is offered by an attorney is not pertinent under that provision; advice or opinions communicated between or among any agency officers or employees may, in my view, be withheld.

Also relevant may be the first ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a government attorney to his or her clients, government officials, is privileged when it is prepared based on 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 state agency 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. 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Camille Jobin-Davis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14822

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July 22, 2004

Mr. Henry J. Bartosik
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bartosik:

I have received your letter concerning rights of access to records maintained by the Town of Wawarsing. Specifically, you expressed interest in "examining" "'old' maps of the early settlers of the immediate area" and the "birth, marriage and death records of a neighbor of [your] wife's grandparents who died over 75 years ago." You also asked what the "legal precedent for 'charges' [is] for obtaining such records."

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, 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."

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. When records are accessible, §87(2) indicates that they are available for inspection and copying.

You wrote that the maps of your interest are "old." If handling the maps would likely result in their destruction, provisions of law separate from the Freedom of Information Law offer guidance. For instance, regulations promulgated by the Commissioner of Education dealing with archival

records that could be damaged by means of physical access [8 NYCRR §188.27(e)] state that those records may be withheld or their use restricted when their "physical condition....might be endangered by use." In addition, the Office of Parks, Recreation and Historic Preservation has developed "Guidelines for Researchers at State Historic Sites", which include provisions regarding "Handling Historic Manuscripts and Bound Materials." Under those guidelines, historic materials are treated differently from conventional records, for their physical use, including photocopying, could result in their destruction. I note, too, that in a "Declaration of Policy", §14.01 of the Parks, Recreation and Historic Preservation Law states that:

> "The legislature determines that the historical, archeological, architectural and cultural heritage of the state is among the most important environmental assets of the state and that it should be preserved. It offers residents of the state a sense of orientation and civic identity, is fundamental to our concern for the quality of life, and produces numerous economic benefits to the state. The existence of irreplaceable properties of historical, archeological, architectural and cultural significance is threatened by the forces of change. It is hereby declared to be the public policy and in the public interest of this state to engage in comprehensive program of historic preservation to accomplish the following purposes:
>
> 1. To promote the use, reuse and conservation of such properties for the education, inspiration, welfare, recreation, prosperity and enrichment of the public;
>
> 2. To promote and encourage the protection, enhancement and perpetuation of such properties, including any improvements, landmarks, historic districts, objects and sites which have or represent elements of historical archeological, architectural or cultural significance..."

The provisions referenced above suggest such that old maps may merit special treatment. In particular, §1401 of the Parks, Recreation and Historic Preservation Law indicates that it is the public policy of this state and in the public interest to promote the "protection" and "perpetuation" of the kinds of materials at issue and to preserve them for future generations. While I do not believe that §1401 may be characterized as a statute that exempts records from disclosure, when the direction offered by that statute is considered in conjunction with the Freedom of Information Law, it would be unreasonable, in my view, to require that the public at large be granted physical access to materials that may be damaged by means of typical disclosure methods. If the maps are delicate, I believe that, of necessity, they should only be made available by means of methods that would ensure their preservation. In that circumstance, an agency might have an obligation to ensure that the handling and reproduction of the materials is conducted by experts or conservators who have the ability to guarantee their integrity and preservation.

Further, in that event, since physical access to the public would be restricted, and since photographs, rather than photocopies, would likely be made, I believe that the agency could assess a fee based on the actual cost of reproduction pursuant to §87(1)(b)(iii) of the Freedom of Information Law. If, for example, the agency would be required to retain a conservator, whatever costs associated with the reproduction of the materials are borne by the agency could be assessed upon the applicant.

Next, although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, provisions of the Public Health Law deal specifically with birth and death records and fees for services rendered relating to searches for and copies of those records; the Domestic Relations Law includes provisions pertaining to marriage records. In brief, §4173 of the Public Health Law permits the disclosure of birth records by a registrar only upon issuance of a court order, or to the subject of the birth record or the parent or other lawful representative of a minor. Similarly, §4174 of the Public Health Law limits the circumstances under which the Commissioner of the Department of Health or registrars of vital records (i.e., town clerks) may disclose death records and specifies that those records are not subject to the Freedom of Information Law. As such, birth and death records are generally confidential and exempt from the disclosure requirements found in the Freedom of Information Law. Section 19 of the Domestic Relations Law pertains to marriage records maintained by town and city clerks and provides that some aspects of those records are available to the public, while others may be withheld unless there is a showing of a "proper purpose" that would justify disclosure.

The Public Health Law includes provisions that deal directly with genealogical records. Specifically, subdivision (3) of §4174 refers to searches for and the fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., a registrar designated in a city, or town. That provision states that:

> "For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

Further, the Commissioner of Health has promulgated "Administrative Rules and Regulations" pertaining to genealogical research indicating that birth records need not be disclosed unless the subject of the birth record is known to have been deceased prior to 1924; death records need not be disclosed regarding deaths occurring after 1949. The summary also includes a restriction regarding the disclosure of marriage records. However, in an opinion rendered by this office with which the Department of Health has agreed, it was advised that basic information contained in marriage records, such as the names of the parties, the dates of a marriage or marriage application, the duration of the marriage and the municipality of residence of licensees should be made available to any person, unless a request is made for commercial or fund-raising purposes. More intimate information would only be disclosed upon a showing of a "proper purpose."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1482 3

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July 22, 2004

Ms. Susan Boice Wick
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Wick:

I have received your letter and the materials attached to it. You have sought an advisory opinion concerning requests made under the Freedom of Information Law to the Town of Esopus. You requested "any and all Building Department/Inspector's records" pertaining to certain parcels of property in the Town. In response to the requests, you were informed that the request was "too broad in spectrum" and that "[r]ecords are not kept in alphabetical files in the Building Dept. but they are retained in year order."

In this regard, the issue in my opinion involves the requirement in §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. In considering that standard, the critical factor is not necessarily the amount of detail in or breadth of a request. Rather, based on a decision rendered by the Court of Appeals, the state's highest court, I believe that the key factor involves the nature of an agency's filing or recordkeeping systems.

Specifically, it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)]. The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v. Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a)(3), may be presented where agency's indexing system was such that 'the

> requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']) (id. At 250)."

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

To the extent that the records sought can be located with reasonable effort, I believe that a request would meet the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

In sum, it is my understanding that the Town maintains the records of your request chronologically, rather than by name or location. If that is so, it appears that a request made on the basis of a name or address may not reasonably describe the records of your interest. If you can resubmit the request in a manner that is consistent with the Town's filing system, I believe that such a request would meet that standard.

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: Hon. Diane L. McCord

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14824

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July 27, 2004

E-MAIL

TO: David Menzies [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. Menzies:

As you are aware, I have received your correspondence. Again, I hope that you will accept my apologies for the delay in response. Please note that a response to you was prepared on May 18. For reasons unknown, it appears that it was not sent to you. I will now essentially reiterate remarks prepared then.

The matter that you raised concerns "an agreement between the City of Kingston Water Board and the Town of Woodstock" relating to "a long standing tax dispute filed by the Kingston Water Board." You indicated that "[t]he Town Board passed a resolution to submit the agreement to the Kingston Water Board" but that the latter "rejected the agreement." Having requested the "terms of the rejected agreement", the Town Supervisor denied access "on the basis of it being inter-agency or intra-agency material." Although you wrote that the Kingston Water Board rejected the agreement, in another communication, you expressed the understanding that the Board "accepted the agreement."

From my perspective, if indeed there is an agreement between the two boards, it must be disclosed. However, if a proposed agreement was rejected and there is no final agreement, it appears that the record at issue may be withheld. 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, §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, both the Town of Woodstock and the Kingston Water Board constitute "agencies".

Third, the provision that served as the basis for the denial of access, §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, if the document in question has been signed or approved by both parties, I believe that it would constitute a final agency determination accessible under subparagraph (iii) of §87(2)(g). If, however, it is not an "agreement" and has not been approved, it does not appear that its content would fall within the categories of accessible information described in subparagraphs (i) through (iv) §87(2)(g). If that is so, it may be withheld.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 27, 2004

Mr. John Claasen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Claasen:

I have received your letter to which you attached a "sample" of an inspection report used by the Huntington Housing Authority in carrying out a HUD housing program.

First, as suggested in previous correspondence, insofar as disclosure would enable a recipient of a record to identify a person or persons who participate because they qualify due to their low income, I believe that an agency may deny access. The basis for the denial would be §87(2)(b) of the Freedom of Information Law, which authorizes an agency to withhold records or portions of records when disclosure would constitute "an unwarranted invasion of personal privacy." Following the deletion of any such personally identifying details, I believe that other portions of the report consisting of statistical or factual information must be made available.

The sample that you sent includes several elements that have been deleted, including the name of a family and the street address. It appears that the a denial of access to those items would likely be proper. However, there appears to be no valid basis for deleting other items, such as those indicating the number of bedrooms, the number of sleeping rooms, housing type, and room code and room location. From my perspective, if the name and street address have been deleted or blocked, those other items would not, if disclosed, enable you or others to ascertain the identities of residents.

Second, the inspection report would in my view consist of "intra-agency material" that falls within §87(2)(g) of the Freedom of Information Law. Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. Specifically, that provision authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The report consists largely of factual information and final determinations, i.e., those portions in which an inspector checks either "Yes Pass" or "No Fail". The only portions of the report that may be withheld under §87(2)(g) in my view would involve expressions of opinion or recommendation offered by an inspector. Those kinds of communications might appear in the "comments" portions of the "Pass" or "Fail" sections or the Inspection Summary portions of the report.

Lastly, the Freedom of Information Law pertains to existing records. If, for example, there is no documentation containing a description of the "interior of the structure", the Authority would not be obliged to create or prepare new records containing the information of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Huntington Housing Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14826

41 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 27, 2004

Mr. Charles B. Smith
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Smith:

I have received your letter in which you asked for an opinion concerning the town of North Greenbush and its "refusal....to 'certify' certain records as accurate as well as to certify that other records which they have refused to turn over, do not exist."

As you inferred, the language of the Freedom of Information Law, specifically §89(3), pertains to certification in two contexts. That provision states in relevant part that, in response to a request for a record, "the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

You referred to a request followed by disclosure by tbe Town of "13 of 26 specific computer files from which hard copies of press releases were provided pursuant to FOIL", but a refusal "to either certify that it does not possess the remaining 13 files or provide the copies of the missing files as requested." In my view, the Town is obliged to disclose the remaining thirteen files if they exist and can be found, deny access in writing, or if the files do not exist or cannot be found, provide a certification in writing on request indicating that the Town "does not have possession of such record or that such record cannot be found after diligent search."

Related to the foregoing is another aspect of §89(3), the language requiring that an applicant must "reasonably describe" the records sought. As suggested in an opinion addressed to you on April 17, 2001, whether a request reasonably describes the records may be dependent on the nature of an agency's filing or record keeping systems. In brief, insofar as an agency can locate or retrieve records with reasonable effort, I believe that a request would meet the standard that a request reasonably describe the records. If, however, locating records would involve the equivalent of a search for what may be a very few needles in a large haystack, I do not believe that a request would meet that standard. In that latter circumstance, the provisions concerning certification would, in my opinion, be irrelevant.

The other kind of certification relates to your request that "the town certify that the tape surrendered was a true and accurate record that was untampered with in any way." In my view, the language of §89(3) quoted above concerning "the correctness of such copy" involves a certification by an agency that a copy made available to an applicant is a true copy of a record possessed by the agency. I do not believe that the certification is intended to warranty that the contents of a record are accurate. By means of example, if a record includes a statement that two plus two equals five, and if a copy of that record is requested, a certification would not deal with the accuracy of that statement, but rather would indicate that the copy produced is a true copy of the record maintained by the agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

From: Robert Freeman
To: Adelaide Camillo
Date: 7/27/2004 2:10:05 PM
Subject: Re: http://www.dos.state.ny.us/coog/otext/o3215.txt

Hi - -

Thanks for your kind words.

With respect to your question, certainly government officials may choose to do some digging to find information to accommodate the public. Nevertheless, the technical answer is that the Freedom of Information Law pertains to existing records, and that agency officials are not required by that law to create a new record in response to a request or to provide information in response to questions.

As you know, biographical information regarding elected officials often can be found in campaign literature and local newspapers. I note, too, for purposes of the Freedom of Information Law that an agency is not required to disclose a person's private employment history. Public employment history has been found to be accessible, as has a person's general educational background. When a government position requires that certain criteria be met to qualify (i.e., a license, certification, degree, etc.), it has been held those portions of a resume or application indicating that the person hired has met those criteria must be disclosed.

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-14828

41 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 28, 2004

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 5 and the materials attached to it. You have asked whether I "see a problem" with your request that the Department of Transportation's records access officer in Buffalo explain the basis for a fee for copies of records. You requested that he "list the specific items and there [sic] specific cost and how the cost was determined."

In my view, there is nothing in the Freedom of Information Law or any other provision of law that would require the preparation of a list of records to be made available or an explanation of the cost of reproducing the records.

I am unaware of the nature of the records sought. As you are likely aware, based on §87(1)(b)(iii) of the Freedom of Information Law, unless a different statute provides to the contrary, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches. When records are larger or are reproduced by means of a method other than photocopying, the fee would be based on the actual cost of reproduction.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Marc Prentice

From: Robert Freeman
To: fcl@bbl-inc.com
Date: 7/29/2004 11:06:44 AM
Subject: Dear Mr. Lont:

Dear Mr. Lont:

I have received your communication in which you indicated that you are attempting to obtain a copy of record submitted to the Department of State. You asked whether you may request the record from the records access officer pursuant to the Freedom of Information Law.

As I understand your remarks, the record in question is a report prepared in 1979. In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. If the report continues to be in the possession of the Department of State, it would constitute an agency record that falls within the coverage of the Freedom of Information Law. Certainly a request could be made to the Department's records access officer, Peter Constantakes. If the report was destroyed or is no longer maintained by the Department, the Freedom of Information Law would no longer apply.

I point out that §89(3) of the Freedom of Information Law requires that an applicant must "reasonbly describe" the record sought. Therefore, when requesting the report, it suggested that sufficient detail be provided to enable Department staff to locate and identify the report.

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-14830

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

July 29, 2004

Mr. Jorge Sprau
86-A-7925
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. Sprau:

I have received your letter in which you indicated that the New York State Library failed to respond to your request for records sought under the Freedom of Information Law.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Please note that the State Library is a unit of the State Education Department. While I believe that the recipient of your request should have responded in a matter consistent with the Freedom of Information Law or forwarded your request to the Department's records access officer, I point out that the Library does not have its own records access officer. That being so, it is suggested that you might resubmit your request to the Department's records access officer. That person is Mr. Paul Tighe, Records Access Officer, State Education Department, Room 121, 89 Washington Avenue, Albany, NY 12234.

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-14831

41 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 2, 2004

Mr. Terrence L. Olivo
Superintendent of Schools
Monroe-Woodbury Central School District
278 Route 32
Central Valley, NY 10917

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Olivo:

As you are aware, I have received your letter of July 1 in which you referred to an opinion that I prepared in response to an inquiry by Mr. John Collins. He questioned the propriety of the assessment of a fee in response to his request for certain records, contending that "no copying had been done" and that therefore, as a taxpayer, the District was "paid 'twice' for public documents."

Based on his additional remarks, I responded as follows:

> "...unless a copy of a record is made, I do not believe that an agency may charge a fee when records are made available pursuant to the Freedom of Information Law. It has been suggested that if copies of records are made in anticipation of requests for records, an agency may charge a fee for copies. In the situation that you described, however, that does not appear to have been so, and the agency did not make copies of the records sought either in response to your request or in anticipation of the receipt of a request. If that is so, again, I do not believe that any fee could have been charged."

In response to my opinion, you wrote that:

> "Experience has shown that, during the life of a labor agreement, typically 3-5 years, multiple copies will be requested by both state and local agencies (i.e. PERB, BOCES, school districts, etc.) as well as private individual FOIL requests.

> "In anticipation of such requests, a number of copies of each labor agreement are made beyond the number immediately needed for distribution.
>
> "Similarly, additional copies of the annual independent auditors reports are also produced in anticipation of similar requests."

In consideration of the information that you offered, it is clear that extra copies of certain records are produced in anticipation of requests for copies made pursuant to the Freedom of Information Law. If that was so in relation to Mr. Collins' request, I believe that the District could have assessed its established fee for copies.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: John Collins

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14832

41 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 3, 2004

Mr. David Donaldson
02-B-1351
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. Donaldson:

I have received your letter in which you sought assistance in gaining access to records maintained by the Chemung County District Attorney's Office. You indicated that that office advised you to obtain the records from 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 hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14833

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 3, 2004

Mr. Anthony Jones
03-A-3063/E-1-447
Franklin Correctional Facility
P.O. Box 10
Malone, NY 12953-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jones:

I have received your letter in which you asked for clarification concerning your request for photos and a tape recording from your correctional facility. You were informed that the fees would be $1.50 per tape and photo.

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, photos, computer disks and tapes, etc.), in which case the fee is based on the actual cost of reproduction. As such, it appears that the fees imposed by your correctional facility are likely consistent with law.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14834

41 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 3, 2004

Mr. John Vera Moreno
98-A-0175
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-0010

Dear Mr. Moreno:

I have received your letter in which you raised questions concerning the applicability of "AO regulations" to certain governmental entities. You also questioned the concealment of documents prepared during an investigation, such as Brady and Rosario material. You also indicated that you were told that the materials do not exist.

In this regard, I offer the following comments.

First, with respect to your questions concerning AO regulations, I am unaware of the meaning of or what constitutes AO regulations and, therefore, cannot offer guidance. I would like to point out, however, that rights of access to government records are governed by state or federal statutes, and that regulations must be consistent with statutory direction.

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, since you mentioned Brady and Rosario material, I noted that the principles reflected in those decisions 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.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14835

41 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 3, 2004

Mr. Michael Williams
03-B-0907
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582

Dear Mr. Williams:

I have received your letter in which you sought assistance in obtaining a copy of your court transcript under the Freedom of Information Law.

In this regard, it is emphasized that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you resubmit your request to the clerk of the court, citing an applicable provision of law as the basis for your request.

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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1836

41 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 3, 2004

Mr. Robert E. Burke, Jr.
RESCOM Consultants, LLC
28 Fieldstone Drive, Suite 13C
Hartsdale, NY 10530

The staff of the Committee 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. Burke:

I have received your letter in which you sought a "determination" concerning a request made under the Freedom of Information Law to the Assessor of the Town of Rye, Mr. Mitchell Markowitz.

You requested a database and log file that include assessment and inventory data and wrote that "[t]hese are to be provided in a digital format as required by New York State Law." You indicated, however, that Mr. Markowitz informed you, in your words, that "the information was proprietary and unavailable."

Having discussed the matter with an attorney at the Office of Real Property Services ("ORPS"), Mr. Stephen Harrison, neither your contention nor that of Mr. Markowitz appears to be fully accurate. In this regard, I offer the following comments.

First, it is noted that this office is not empowered to render what may be characterized as a "determination" that is binding. The Committee on Open Government and its staff are authorized to provide advice and opinions, and the content of this response should be considered advisory.

Second, the contents of an assessment roll and an inventory have historically been accessible to the public in great measure, pursuant to provisions of the Real Property Tax Law. That being so, I disagree with Mr. Markowitz' contention that the information is "proprietary or unavailable." I note, however, that the records in question likely include items that may be withheld. For instance, when senior citizens seek exemptions, they may be required to file income tax records that may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]; business entities may file income and expense statements that might be deniable in part on the ground that disclosure would "cause substantial injury" to their "competitive position" [see §87(2)(d). In consideration of those possibilities, ORPS has developed a "foilable version" of the records at issue that can be "scrubbed"

by municipalities, so that information that may properly be withheld can be segregated from the remainder.

Mr. Harrison indicated that an assessor has the ability using ORPS' program to make the public data accessible after having removed the data that need not be disclosed. He informed me that if Mr. Markowitz has questions or needs guidance in making accessible data available, he can be contacted by Mr. Markowitz at (518)474-8821.

Lastly, although the courts have held that an agency is required to make records available in the storage medium of an applicant's choice when it has the ability to do so [see e.g., Brownstone Publishers v. NYC Dept. of Buildings, 550 NYS2d 564, aff;d 166 AD2d 294 (1990) and NYPIRG v. Cohen, 729 NYS2d 379; 188 Misc.2d 658 (2001)], I know of no statute that specifies support for your contention that the records at issue must "be provided in a digital format."

In an effort to enhance compliance with and understanding of applicable law, a copy of this response will be sent to Mr. Markowitz.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mitchell Markowitz
Stephen Harrison

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14837

41 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 3, 2004

Mr. Pedro Bonet
95-A-3153
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. Bonet:

I have received your letter in which you asked for assistance in obtaining a "Daily Outdoor Exercise Chart" from your correctional facility. You were informed that the charts no longer exist.

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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1838

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 3, 2004

Mr. Steven Smith
91-A-2339
Arthur Kill Correctional Facility
2911 Arthur Kill Road
Staten Island, NY 10309

Dear Mr. Smith:

I have received your letter in which you asked for assistance in obtaining a copy of a log book entry from the Kings County Court Clerk under the Freedom of Information Law. You also asked if you can "compel the county clerk to provide a written statement that a diligent search was made."

In this regard, 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. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

With respect to your question concerning a written statement that a diligent search has been made by the clerk, §255 of the Judiciary Law provides that:

> "Clerk must search files upon request and certify as to result. 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."

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14839

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 4, 2004

E-MAIL

TO: Patrick Strodel <patrick.strodel@lead-safe.com>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Strodel:

As you are aware, I have received your letter. You referred to a denial of your request for records by the City of Syracuse that you appealed to the Mayor. You indicated, however, that your appeal was not determined within a timely manner, and that a second appeal "simply was not accepted..." You have asked what your remedies may be.

In this regard, when a request for agency records is denied, the person denied access has the right to appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

It has been held that an agency's failure to determine an appeal within ten business days of the receipt of an appeal constitutes a constructive denial of the appeal. In that circumstance, the person seeking the records would have exhausted his or her administrative remedies and may seek judicial review of the denial of 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)]. In an effort to avoid litigation, it is suggested that you contact the office of the Mayor or the Department of Law by phone to discuss the matter and to ascertain the status of your appeal.

I hope that I have been of assistance.

RJF:tt

cc: Hon. Matthew J. Driscoll
Terri Bright, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14840

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 4, 2004

Mr. Azem Albra
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Albra:

I have received your letter in which you sought assistance in your efforts in obtaining records from the Town of Fishkill.

In a letter dated March 29 addressed to the Town Supervisor you requested:

> "...all documents, minutes, recordings, votes and any other information. Regarding the authorization of the Town Board/Police Commission. Who under Town and General Business Law. Is the only legal authority to authorize such Independent Investigation."

In a letter of May 12 and characterized as an appeal addressed to the Town's records access officer, you wrote as follows:

> "I hereby appeal the denial of access regarding my request, of the Town Board/Police Commission. Who authorized Mr. Bernstein to conduct a Independent Investigation regarding a Civil Rights Incident that occurred to my uncle, and witnessed by me."

The Town Supervisor responded to the appeal, and referring to the language of your appeal, wrote that:

> "Upon the advise [sic] of legal counsel, the Town is not required to answer written questions posed by someone in a foil request.

> "Secondly, the foil request is grammatically incomplete and does not describe with specificity the subject matter of the records requested.
>
> "Lastly, on or about May 10, 2004, the town clerk provided you with documents which may or may not be responsive to your unclear request.
>
> "If you wish to rephrase that particular foil request in complete and clear form, it will be reviewed accordingly."

Based on the foregoing, I offer the following comments.

First, by way of background, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and initial requests should ordinarily be made to that person. I note, too, that the records access officer is responsible for ensuring that agency personnel "assist the requester in identifying requested records, if necessary" [see §1401.2(b)(2)]. For reasons to be discussed, it is suggested that you resubmit your request, perhaps after clarifying the nature of the records sought through discussion with the records access officer.

Second, a person seeking records is not required to "describe with specificity" the records of his or her interest. In the original enactment, the Freedom of Information Law required that an applicant seek "identifiable" records. However, since 1978, when the current version of that statute became effective, §89(3) has required that an applicant must "reasonably describe" the records of interest. Therefore, even though a request may not specify with particularity the records sought, insofar as agency staff can locate and identify records falling within the scope of a request, the request would meet the standard of reasonably describing the records [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Third, I agree with the Supervisor's statement that an agency is not required to answer questions to satisfy a request made under the Freedom of Information Law. That law pertains to existing records and provides in part in §89(3) that an agency need not create a record in response to a request for information or in order to answer a question. I also agree with her contention that your request is "grammatically incomplete." While I do not mean to be unnecessarily critical, due to the punctuation in your request, there may have been uncertainty concerning the records sought. As I interpret your correspondence, it appears that you are interested in obtaining records, including but not limited to minutes, recordings and indications of votes taken, regarding an authorization to expend public money to investigate the conduct of Town employees in relation to an incident involving your uncle that you witnessed. If my understanding is accurate, it is suggested that you resubmit the request, using the language in the preceding sentence, and including your uncle's name and the date of the event. I would conjecture that a request of that nature would "reasonably describe" the records as required by the law.

Next, I note that rights of access under the Freedom of Information Law are not affected by the initiation of litigation or the threat of litigation. As stated by the state's highest court, the Court of Appeals, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules (CPLR). Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Joan A. Pagones

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14841

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August 4, 2004

Mr. John Mandela
89-A-1920
Route 208, Box G
Wallkill, NY 12589

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mandela:

I have received your letter in which you sought an advisory opinion concerning a request directed to the Division of Parole for attendance records pertaining to Brion Travis, who had served as Chairperson of the Board of Parole. You also indicated that you requested documentation reflective of a final determination concerning the transfer of Mr. Travis to a different position.

In this regard, based on a unanimous decision rendered by the state's highest court, the Court of Appeals, the attendance records of public a public employee are generally accessible under the Freedom of Information Law.

As a as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, §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).

With respect to records reflective of the transfer of a particular person to a different position, of significance is §87(2)(g), which states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Insofar as there is a final agency determination, I believe that the content of such a determination must be disclosed, unless a different ground for denial may be asserted.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3850
FOIL-AO-14842

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August 4, 2004

Mr. William Huston
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Huston:

As you are aware, I have received your letter in which you asked whether WSKG, a public radio station in Binghamton, is subject to the Open Meetings and Freedom of Information Laws. You wrote that the entity that operates WSKG is a not-for-profit corporation that was chartered by the Board of Regents.

Both of those statutes ordinarily apply to governmental entities, and in my view, WSKG is subject to neither. In this regard, I offer the following comments.

First, I note that all educational and similar institutions in New York are chartered by the Board of Regents, including private schools, colleges and universities. The grant of a charter would not signify that an entity is governmental in nature. Further, having performed research concerning WSKG and public radio stations generally, although licensed by the government, they are not operated or largely funded by the government. It is my understanding that the operating costs are funded primarily through payment of membership fees, contributions and underwriting by corporate organizations.

Second, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of that law defines the phrase "public body" to include:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based upon my understanding of the organization, it would not constitute a public body, for it does not perform a governmental function for the state or any particular group of municipalities or other governmental entities.

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."

Again, since WSKG is not a "governmental entity", it is not in my opinion an "agency", and rights conferred by the Freedom of Information Law would not extend to the WSKG.

Lastly, you referred to "business matters from and to politicians." If, for example, there are written communications between WSKG and state, county or other municipal officials, and if copies of those communications are maintained by state or municipal agencies, those communications would constitute agency records. In that circumstance, while WSKG would not be required to give effect to a request made under the Freedom of Information Law, that statute would apply to records maintained by those agencies and would be subject to 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-14843

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 6, 2004

Hon. Mary Ann Roberts
Town/Village Clerk
Town/Village of Ossining
Municipal Building
16 Croton Avenue
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 Ms. Roberts:

I have received your letter in which you referred to a request by a resident to "review the Notice of Claim files." You advised her that you "must make copies after reviewing each file but must be paid in full prior to any copying of material...." She asked that I confirm your advice in writing.

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.

From my perspective, notices of claim, like all other records, are presumptively available to the public. In some instances, they may be available in their entirety. In others, they may include information that may properly be redacted. For instance, if a notice of claim involves a personal injury, there may be medical information that may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §89(2)(b)]. Because the records at issue may include information that need not be disclosed, it would be appropriate in my opinion to review them prior to disclosure to determine the extent to which portions of the records might properly be withheld.

Second, 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, in 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), 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 copies of the records. In the context of the situation that you described, the Town/Village could seek payment of the requisite fee for photocopies, which would be made available after the deletion of certain details (see Van Ness v. Center for Animal Care and Control and the New York City Department of Health, Supreme Court, New York County, January 28, 1999).

Lastly, it has been held that an agency may require payment in advance of preparing photocopies of records sought under the Freedom of Information Law (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14844

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August 6, 2004

Mr. Anthony McGhee
00-A-5649
Wende Correctional Facility
P.O. Box 1187
Alden, NY 14004-1187

Dear Mr. McGhee:

I have received your letter in which you appealed a denial of access to records by the Suffolk County Sheriff's Department. You indicated that you appealed on the ground that you are a poor person and cannot pay for copies.

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 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, provides in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, I point out that there is nothing in the Freedom of Information Law that 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)].

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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1485

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August 6, 2004

Mr. Frederic Gang
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gang:

I have received your letter in which you asked whether an agency, a school district, must respond to questions raised by means of a request made pursuant to the Freedom of Information Law.

In this regard, the title of the Freedom of Information Law may be somewhat misleading. That statute does not pertain to information *per se*; rather, it pertains to records. A "record", according to §86(4), is information that exists in some "physical form". I note, too, that §89(3) provides in part that an agency is not required to create a record in response to a request. In consideration of the foregoing, although an agency *may* provide information in response to questions, I do not believe that it would be required to do so to comply with the Freedom of Information Law.

Rather than seeking information by asking questions that an agency is not required to answer, it is suggested for purposes of using the Freedom of Information Law, that you request existing records. For example, instead of asking "how many school district employees have district credit cards", you might request a record or records identifying district employees to whom district credit cards have been issued.

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-14846

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 6, 2004

Mr. Rod Kovel
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kovel:

I have received your letter in which you sought an opinion relating to a request that you "faxed...to the Port Authority's main number" which was "totally ignored." You requested:

> "...a detailed (hour by hour) breakdown of paid passenger travel on JFK Airtrain to and from Howard Beach and from Jamaica Station for the 17th day of each month since opening. [You] also asked if there [is] a way of separating out the individual paid fares from the people using commuter tickets, and whether the free shuttle bus service from Howard Beach subway station and parking lot had been discontinued."

In this regard, I offer the following comments.

First, as you are likely aware, the Port Authority is a bi-state agency. That being so, I do not believe that it is required to comply with the New York Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In a case involving the application of the New York Freedom of Information Law to the Waterfront Commission of New York Harbor, which is a bi-state agency, it was held in Metro-ILA Pension Fund v. Waterfront Commission of New York Harbor (Supreme Court, New York County, NYLJ, December 16, 1986) 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." In short, I do not believe that the Port Authority is subject to the Freedom of Information Law.

Notwithstanding the foregoing, the Port Authority has adopted a policy which in many respects is analogous to provisions of the New York Freedom of Information Law. Further, the Port Authority has designated an individual to coordinate its responses to requests in much the same manner as a "records access officer" designated in accordance with the regulations promulgated by the Committee on Open Government (see 21 NYCRR Part 1401). I am unaware of whether your fax reached the proper person, and consequently, it is suggested that you might resubmit a proper request to Ms. Kathleen Bincoletto, FOI Administrator, Port Authority of New York and New Jersey, 225 Park Avenue South, 18th Floor, New York, NY 1003.

Second, assuming that the Port Authority's policy is consistent with the Freedom of Information Law, as indicated in the earlier opinion addressed to you, it is emphasized that that statute pertains to existing records and provides that an agency is not required to create a record in response to a request. Similarly, because the law concerns requests for existing records, it does not require that agency officials supply information in response to questions. In the context of your request, if there are no "breakdowns" containing the information of your interest, neither the Port Authority nor an agency clearly required to give effect to the Freedom of Information Law would be required to prepare new records to satisfy your request or answer your questions. In the future, rather than seeking information that may not exist or attempting to elicit responses to questions, it is suggested that your requests involve existing 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14847

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August 16, 2004

Mr. Mauricio Espinal
90-T-3055
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

Dear Mr. Espinal:

I have received your letter in which you appealed a denial of access to records by the Anna M. Kross Center. You indicated that you received no response from the records access officer at that facility and you subsequently wrote to the Commissioner of the NYS Department of Correctional Services.

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 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, provides in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Second, I point out that the Anna M. Kross Center is part of the New York City Department of Corrections. As such, the person designated to determine appeals by that entity is Captain Lugo, whose address is 60 Hudson Street, 6th Floor, New York, NY 10013.

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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14848

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August 16, 2004

Mr. Frank Novick
00-A-2821
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Novick:

I have received your letter in which you asked for assistance in obtaining a variety of documents from the Dutchess County Court and the New York State Police relating to your arrest.

In this regard, it is noted that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts 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, with respect to your request directed to the New York State Police, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records falling within the scope of your request, relevant is a decision by the Court of Appeals concerning records prepared by police officers in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate. The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, it was determined that the agency could not claim that the records can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness, or others interviewed in an investigation.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

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., inconjunction 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 18, 2004

Ms. Jodi M. Tuttle
Authority Secretary
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 facts presented in your correspondence.

Dear Ms. Tuttle:

I have received copies of the correspondence between yourself and Melissa Wagner Dano, Lewis Town Clerk, concerning your unanswered request for a copy of a resolution adopted by the Town Board in May. At the end of a letter to Ms. Dano, you indicated that you were "referring this matter" to this office "for...advice and recommendation."

From my perspective, there is no valid basis for delaying disclosure of a resolution adopted by the Board.

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, 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 sent to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Melissa Wagner Dano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14850

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August 18, 2004

E-Mail

TO: Gina Del Latto [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. Del Latto:

I have received your letter and attempted to return your phone call without success. You indicated that the clerk of a village court, in your words, "will not hand over any records until a Foil request is made to the Public Records Access Officer for the Village." You asked whether "this clerk of the court [is] in violation against Judiciary Law 255 or can he/she require [you] to fill out a Foil request to the PARO for the Village."

In this regard, I note that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Uniform Justice court Act, §2019-a; Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court

records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable

.

Since you are seeking records from a justice court, it is suggested that a request for records be made to the clerk of the court, citing §2019-a of the Uniform Justice Court Act as the basis for the request. The first sentence of §2019-a states in relevant part that "The records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..." As I understand the foregoing, unless there is a provision of law specifying that certain records of a justice court are exempt from disclosure, justice court records are accessible, not pursuant to the Freedom of Information Law, but rather §2019-a of the Uniform Justice Court Act.

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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August 18, 2004

Mr. Lars Mortensen
02-A-5686
Woodbourne Correctional Facility
P.O. Box 1000
Woodbourne, NY 12788-1000

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mortensen:

I have received your letter in which you wrote that you have been denied access to grievance complaints, apparently made against correction officers, and the ensuing determinations.

In this regard, I offer the following comments.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (I) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners'

Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)].

Insofar as the records of your interest pertain to correction officers, I believe that the records of your interest would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

If a facility employee is not a correction officer, I believe that the Freedom of Information Law would be the governing statute, and that final determinations reflective of findings of misconduct would in my view be available. Pertinent to an analysis of rights of access would be two of the grounds for denial.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138

AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Insofar as a request involves final agency determinations, I believe that those determinations must be disclosed, again, unless a different ground for denial could be asserted.

In terms of the judicial interpretation of the Freedom of Information Law, in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In contrast, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

In sum, if a person who is the subject of your inquiry is a correction officer, I believe that §50-a of the Civil Rights Law would govern, and that a court order would be needed to obtain the

records. If, however, that person is not a correction officer, the Freedom of Information Law would govern, and the records would be accessible to the extent described above.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14852

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August 18, 2004

Mr. Eugene F. Meenagh
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Meenagh:

I have received your letter in which you referred to an executive session held by the Copake Town Board during which the Town Attorney "reviewed material from 1995 file regarding relationships between then Town Justice Meenagh and the Copake Police Department." You have raised the following question in relation to the foregoing:

> "May the town attorney inform some people of information contained in an official town record and deny the same information to an applicant seeking it under the provisions of the FOIL by claiming it is 'material is [sic] exempt from disclosure.'"

As I understand the facts, when the Town Attorney reviewed records with members of the Town Board, the disclosure of those records would not have been made to those persons as members of the public who requested them under the Freedom of Information Law. On the contrary, it is assumed that the records were disclosed to Town Board members in their capacities as government officials.

There are numerous circumstances in which records, of necessity, are made available to government officers or employees in the performance of their official duties that may be withheld from the general public based on one or more of the grounds for denial of access appearing in §87(2) of the Freedom of Information Law. By means of example, if a municipal attorney prepares a memorandum offering legal advice to the municipal board that he or she serves, that record may in my opinion be withheld from the public based on the assertion of the attorney-client privilege (see Civil Practice Law and Rules, §4503) and, therefore, §87(2)(a) of the Freedom of Information Law concerning records that "are specifically exempted from disclosure by state or federal statute", or pursuant to §87(2)(g) concerning the ability to withhold "intra-agency" materials. The transmittal of the memorandum to the municipal board in the performance of its official duties would not in my

view create a waiver of the ability to deny access or a right of access on the part of the public seeking the record pursuant to the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14853

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August 18, 2004

Mr. Robert E. Koch
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Koch:

As you are aware, I have received your letter in which you questioned the propriety of certain practices of your local planning board. Specifically, you wrote that the Board "has established a practice of not placing material or documents submitted to them, in the file, until copies have been distributed to and reviewed by all members of the Board." You added that "[t]his effectively denies interested parties access to the new material from the date the material is received, until after the Board meets to review and discuss that material as a body."

From my perspective, the practice of the Board as you described it is inconsistent with law. In this regard, I offer the following comments.

First, as soon as the materials or documents come into the possession of or are produced for a government agency, such as a municipality, I believe that they fall within the coverage of the Freedom of Information Law. That statute applies to all agency records, and §86(4) defines the term "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when records are submitted to the Planning Board or any government agency or government officer or employee, they fall within the scope of the Freedom of Information Law. That they are not placed in a file, distributed to certain persons, approved or accepted is of no significance; they are subject to rights of access conferred by law.

Second, I do not believe that the Planning Board is authorized to establish the practice to which you referred. 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 or village board of trustees, 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 governing body of the municipality 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.

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)].

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 19, 2004

Mr. Lewis Wayne Bogue
95-B-1859
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929-2001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bogue:

I have received your letter in which you indicated that you requested a copy of your pre-sentence report from the Genesee County District Attorney's Office and were informed that "all communications with this Office should be through your attorney."

In this regard, I offer the following comments.

First, I know of no judicial decision that would serve to prohibit an inmate or any other person from asserting rights under the Freedom of Information Law. On the contrary, it has been held that when a person seeks records under the Freedom of Information Law, that person is as a member of the public [see M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984)], and that records accessible under that statute must be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Similarly, in a decision rendered by the Court of Appeals, the State's highest court, the court

> "recognize[d] that petitioners seek documents relating to their own criminal proceedings, and that disclosure of such documents is governed generally by CPL article as well as the *Rosario* and *Brady* rules. However, insofar as the Criminal Procedure Law does not specifically preclude defendants from seeking these documents under FOIL, we cannot read such categorical limitation in the statute" [Gould v. New York City Police Department, 89 NY2d 267, 274 (1996)].

Second, 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..."

Most recently, it was confirmed that "Criminal Procedure Law Sec. 390.50 is the exclusive procedure concerning access to such reports, as they are confidential and specifically exempted from disclosure pursuant to State and Federal Freedom of Information Laws. Petitioner...must make a proper application to the Court which sentenced him" (Matter of Roper v. Carway, Supreme Court, New York County, NYLJ, August 17, 2004).

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. It is suggested that you review that statute.

I hope that I have been of some assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm
cc: David E. Gann

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 19, 2004

Mr. Daniel Rivera
01-A-4524
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

Dear Mr. Rivera:

I have received your letter in which you appealed a denial of access to records by your correctional facility for the job training history and certifications of sex offender counselors.

In this regard, first, 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 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, provides in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I point out that the person designated to determine appeals by the Department of Correctional Services is Anthony J. Annucci, Counsel.

Second, with respect to your request for the job training history and certifications of particular counselors, 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 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 on the kinds of records at issue, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that portions of resumes must be disclosed in accordance with the previous commentary. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position."

I note that Kwasnik was affirmed by the Appellate Division [691 NYS2d 525, 262 AD2d 171 (1999)]. Based on that decision and others dealing involving analogous principles, those portions of a resume that are relevant to the performance of one's duties, 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)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Sr. Counselor Spurgin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 19, 2004

Mr. Leon J. Campo
East Meadow School District
718 The Plain Road
Westbury, NY 11590

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Campo:

As you may be aware, I have received your letter concerning your responses to requests made under the Freedom of Information Law by Mr. Robert Zafonte. If I understand one aspect of your comments correctly, the District requires the completion of an "official Freedom of Information application form" in order to request records. In this regard, I do not believe that a person seeking records can be required to complete a prescribed form as a condition precedent to seeking records.

Section 89(3) of the Freedom of Information Law and 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 I, in Albany, request a record in writing from the District, and the District responds by directing that a standard form must be submitted. By the time that I receive and submit the form, and the District 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. 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.

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 19, 2004

Mr. Donald Hurtubise
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hurtubise:

I have received your letter in which you raised a variety of issues relating to your efforts in obtaining information from the City of Geneva pursuant to the Freedom of Information. Having reviewed the letter and the materials attached to it, I offer the following comments.

It is noted at the outset that 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 enforce the law or impose penalties concerning failures to comply with law. It our hope, however, that opinions rendered by this office are educational and persuasive, and copies of this opinion will be forwarded to City of Geneva officials in an effort to enhance compliance with and understanding of the Freedom of Information Law.

Your requests apparently related to attempts to defend yourself after having received a traffic ticket, and the City Attorney wrote that "[u]nder the terms of the Freedom of Information Act, the City is not required to provide you with information to construct a defense to impede prosecution." Based on judicial decisions, however, the purpose of a request is irrelevant. As stated by the Court of Appeals, the state's highest court, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. More recently, the Court of Appeals held that the Criminal Procedure Law does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law [Gould v. New York City Police Department, 89 NY 2d 267 (1996)].

In short, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a litigant or defendant, and the nature of the records or their materiality to a proceeding.

It appears that the City may not have promulgated procedural rules and regulations as required by 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, I believe that the public corporation is the City, and that the governing body would be the City Council or equivalent body. If that is so, the governing body was required to promulgate appropriate uniform rules and regulations applicable to entities within City 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. 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 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).

A copy of model regulations designed to enable agencies to develop appropriate procedures easily will be sent to the City.

Since you asked whether the City sent copies of your appeal and its determination to this office, a search of our files was made, and no such records were found.

You asked whether the City could ask for payment in advance of making copies. Based on case law, an agency may require payment prior to preparing copies of records sought under the Freedom of Information Law (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

Next, §1401.2(b) of the Committe's regulations describes the duties of a records access officer and states in relevant part that:

> "The records access Officer is responsible for assuring that agency personnel...
>
> (5) Upon request, certify that a record is a true copy..."

Pursuant to §1401.2(b)(5) and to implement §89(3) concerning an agency's duty to provide certification, the records access officer has the duty of ensuring that agency personnel certify that copies of records are true copies.

It is noted that a certification made under the Freedom of Information Law does not pertain to the accuracy of the contents of a record, but rather would involve an assertion that a copy is a true

copy. In other words, a certification prepared pursuant to §89(3) would not indicate that the contents of a record are complete, accurate or "legal"; it would merely indicate that the copy of the record is a true copy.

Additionally, it has been consistently advised, particularly when certification is requested with respect to a voluminous number of records, that a single certification, given by means of a written assertion, statement or affidavit, for example, describing or identifying the records that were copied, would be sufficient. I do not believe that each copy of records made available under the Freedom of Information Law must be stamped or "certified" separately.

Lastly, part of your request concerned the provision of law upon which the City Attorney relied in taking certain action. That kind of request may not be a request for a record, but rather an interpretation of law that requires a judgment. Depending on the nature of the matter, any number of provisions might be applicable, and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Further, two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 10 of the City Ordinances", no interpretation or judgment is necessary, for sections of the law appear numerically and can readily be identified. That kind of request, in my opinion would involve a portion of a record that must be disclosed. In sum, a request for laws that might be applicable is not, in my view, a request for a record as envisioned by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: City Council
Margaret A. Cass
A. Clark Cannon

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 19, 2004

Mr. Robert J. Zafonte
[redacted]

Dear Mr. Zafonte:

I have received your correspondence in which you complained that the East Meadow School District has failed to respond to your requests in a manner consistent with law. Nevertheless, I received a letter from the District's Freedom of Information Officer, Mr. Leon J. Campo, that suggests the contrary.

Although you wrote that the District provided summaries of evaluations of the Superintendent, Mr. Campo wrote that portions of the evaluations themselves were made available. He added that a copy of the Superintendent's contract would be made available upon your compliance with the District's procedures.

Also significant is Mr. Campo's statement that many of your requests "do not pertain to a specific item but are so broad, general and non-specific in nature as to result in a denial rather than an accommodation of the request." Although a person seeking records is not required to specify the record of his or her interest, a "broad, general" request might not satisfy the standard required by the law.

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 "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 District, 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, even if a request is specific, if staff cannot locate the record with reasonable effort, i.e., if the record can be found only after reviewing hundreds or thousands of records individually, I do not believe that the request would reasonably describe the records as required by law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Leon J. Campo

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 20, 2004

Mr. Sean Rourke
02-A-1018
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rourke:

I have received your letter in which you complained that the New York City Police Department has denied your request "on the basis that your request is duplicative of your numerous previous requests."

In this regard, 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 23, 2004

Mr. Steven Simone
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Simone:

I have received your letter in which you wrote that it is common practice in public works construction for "awarding agencies to release the names of those contractors who have obtained the specifications for a project currently out for bid." You wrote, however, that in some instances those "bidding lists" have been withheld based on a contention that denying access "somehow prevents collusion among the bidders." You suggested that "choosing to not disclose the bidders actually undermines the process", for "many subcontractors who routinely bid to the prime contractors are prevented from doing so because they are unable to ascertain which primes are bidding the project", and that "[i]t is always in the best interest of the awarding agency to have as many bidders as possible."

You have sought my views concerning the matter. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The only ground for denial of access that would be pertinent in the context of the matter described is §87(2)(c), which authorizes an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." From my perspective, the key word in the quoted provision is "impair", and the question involves how or the extent to which disclosure would impair the process of awarding contracts.

Section 87(2)(c) often is pertinent in situations in which agencies seek bids or requests for proposals ("RFP's"). While I am not an expert on the subject, I believe that bids and the processes relating to bids and RFP's are different. As I understand those processes, prior to the purchase of goods or services, when an agency solicits bids, so long as the bids meet the requisite specifications, an agency must accept the low bid and enter into a contract with the submitter of the low bid. When an agency seeks proposals by means of RFP's, there is no obligation to accept the proposal reflective of the lowest cost; rather, after the receipt of the proposals, the agency may engage in negotiations with the submitters regarding cost as well as the nature or design of goods or services, or the nature

of the project in accordance with the goal sought to be accomplished. As such, the process of evaluating RFP's is generally more flexible and discretionary than the process of awarding a contract following the submission of bids.

When an agency solicits bids, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage *vis a vis* those who already submitted bids. If, for example, there are no bidders, only one or very few bidders, and if the transaction is simple and direct and does not involve subcontractors as in the kind of situation that you presented, disclosure of the fact that there are no bidders or perhaps the number of bidders might enable a potential bidder to tailor a bid in a manner that provides an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. In that instance, when the deadline for submission of bids has been reached, all of the submitters are on an equal footing and, as suggested earlier, an agency is generally obliged to accept the lowest appropriate bid. At that point, the identities of the bidders and in most instances bids themselves would, in my opinion, be available, for any impairment that might have occurred due to premature disclosure would essentially have disappeared. Moreover, bids are often opened publicly, before a contract is awarded.

In the case of RFP's, even though the deadline for submission of proposals might have passed, an agency may engage in negotiations with or evaluations of the submitters resulting in alterations in proposals or costs. The extent to which disclosure of the proposals or ancillary materials would at that juncture "impair" the process of awarding a contract is, in my view, a question of fact. In some instances, disclosure of portions of the submissions might impair the process; in others, disclosure may have no harmful effect or might encourage firms to be more competitive, thereby resulting in benefit to the agency and the public generally. Nevertheless, I do not believe that the identities of those who expressed interest or submitted proposals could justifiably be withheld. Disclosure of their identities would not, in my view, have an impact on the contracting process.

In sum, whether or the extent to which disclosure would "impair" an agency's ability to reach an optimal contractual agreement on behalf of taxpayers is dependent on factual circumstances. As suggested earlier, if an agency must accept the low appropriate bid, if the deadline for submission of bids has not been reached, and if there are no or few bidders, it is possible in my opinion that disclosure could impair an agency's ability engage in an optimal agreement on behalf of taxpayers. However, in the kind of situation that you described, where there is a prime contractor and a variety of subcontractors, it appears that disclosure of the bidders list would enhance an agency's ability to reach an optimal agreement or series of agreements on behalf of the public. When that is so, I do not believe that there would be any basis for withholding the list.

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 24, 2004

Mr. George O'Donnell
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. O'Donnell:

I have received your letter of July 13 and a variety of correspondence relating to it. The materials pertain to your efforts in gaining access to records of the New York City Police Department.

Your first question involves "case precedent" involving a situation in which records are found to be accessible following an appeal but are not released. In short, I know of no precedent that focuses on that kind of situation. As I suggested to you by phone, I would conjecture that a clerical error was made, and my hope is that it has been resolved.

The second concerns the right "to obtain a date, time and place to personally review all entries made in a Police Blotter" relative to a particular date at a certain precinct in New York City. Rather than being granted the ability to do so when you made such a request, you indicated that a "written statement [was] made...as to what is contained in the Police Blotter over one entry, thereby deny access under [your] Freedom of Information Law request to review all entries."

In this regard, first, §87(2) of the Freedom of Information Law specifies that records are presumptively available for inspection and copying. Therefore, when a record is available in its entirety, the public has the right to inspect it, and no fee can be assessed in that instance. If, however, portions of a record may justifiably be withheld, the public would not have the right to inspect the record, and in that circumstance, it has been advised and held that the agency must prepare a copy from which appropriate deletions would be made, and that the agency may charge for copies (see Van Ness v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999).

Second, §§87(1) and 89(1) require the Committee on Open Government to promulgate rules and regulations that include direction concerning the times and places that records are available to the public. The Committee has done so (see 21 NYCRR Part 1401). In turn, §87(1) requires that

each agency adopt rules and regulations consistent with the Freedom of Information Law and those promulgated by the Committee. In short, an agency must, by regulation, indicate the times and places that records may be requested and inspected.

Lastly, as suggested earlier, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, 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 one or more of the grounds for denial that follow. Based on the quoted language, I believe that there may be situations in which a single record might be both available or deniable in part. The same language, in my opinion, imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. As such, even though some aspects of a police blotter or other record might properly be denied, the remainder might nonetheless be available and would have to be disclosed.

The phrase "police blotter" is not specifically defined in any statute. It is my understanding that it is a term that has been used, in general, based upon custom and usage. The contents of what might be characterized as a police blotter may vary from one police department to another and often police departments use different terms for records or reports analogous to police blotters. In Sheehan v. City of Binghamton [59 AD 2d 808 (1977)], it was determined that, based on custom and usage, a police blotter is a log or diary in which any event reported by or to a police department is recorded. The decision specified that a traditional police blotter contains no investigative information, but rather merely a summary of events or occurrences and that, therefore, it is accessible under the Freedom of Information Law. When a police blotter or other record is analogous to that described in Sheehan in terms of its contents, I believe that the public would have the right to review it in its entirety.

If police blotters or equivalent records are more expansive than the traditional police blotter described in Sheehan, portions might be withheld, depending upon their contents and the effects of disclosure. Several grounds for denial may be relevant, and the following paragraphs will review the grounds for denial that may be significant.

The initial ground for withholding, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". In brief, when a statute exempts particular records from disclosure, those records may, in my view, be considered "confidential". For instance, a log entry other record might refer to the arrest of a juvenile. In that circumstance, a record or portion thereof might be withheld due to the confidentiality requirements imposed by the Family Court Act (see §784).

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". It might be applicable relative to the deletion of identifying details in a variety of situations, such as domestic disputes, complaints that neighbors' dogs are barking, or where a record identifies a confidential source or a witness, for example.

The next ground for denial of relevance is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my opinion, a record containing the kind of information described in Sheehan could likely be characterized as a record prepared in the ordinary course of business, rather than a record "compiled for law enforcement purposes". When that it so, §87(2)(e) would not be applicable. More detailed records, such as investigative reports, would likely fall within the scope of §87(2)(e). Those records would be accessible or deniable, depending upon their contents and the effects of disclosure.

Another ground for denial of possible relevance is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person." The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The remaining relevant ground for denial is §87(2)(g). The cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could

appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Since the police blotters are prepared by employees of a police department, I believe that they could be characterized as "intra-agency material". However, insofar as they consist of factual information, §87(2)(g) could not, in my opinion, be asserted as a basis for denial.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jonathan David
Lt. Michael Pascucci

STATE OF NEW YORK
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August 24, 2004

Mr. Jeffrey Shankman
[redacted]

The staff of the Committee 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. Shankman:

I have received your note in which you sought advice concerning a denial of access to records by the New York City Department of Housing Preservation and Development. The note was written in a letter addressed to you consisting of the Department's determination of your appeal made pursuant to the Freedom of Information Law.

As I understand the matter, ten pages of material were withheld in their entirety, and you have questioned the propriety of the breadth of the denial of access. The records sought were withheld on the grounds that they "constitute either attorney-client work product and are therefore exempted from disclosure in accordance with Public Officers Law Article 6 Sec. 87(2)(a), or inter-agency materials which are not final agency policy or determination and are thereby exempted under....Sec. 87(2)(g)(iv), or materials which are exempted under both statutes."

In this regard, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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).

I note that the Court in Gould 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).

In the context of your request, if the materials may properly be withheld in their entirety, I believe that the denial of access is proper. However, if portions of the materials do not fall within any of the grounds for denial of access, the Department in my view should have reproduced and disclosed those portions of the records.

It may be that the records were properly withheld in their entirety. The determination of your appeal refers to "attorney-client work product." It is assumed that the quoted phrase is intended to encompass both the attorney-client privilege and the work product of an attorney. Section 87(2)(a) is pertinent to both, for it authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute is §4503 of the Civil Practice Law and Rules, which codifies the attorney-client privilege, and 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 are considered privileged under §4503. 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 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)].

If the records in question wholly fall within the scope of the attorney-client privilege and/ or the exclusion regarding attorney work product, I believe that they could appropriately have been withheld in their entirety.

On the other hand, if the records may not be withheld in their entirety on those grounds, the remainder would appear to be subject to §87(2)(g). That provision, due to its structure and its interpretation by the Court of Appeals, may require disclosure.

Specifically, §87 (2)(g) enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

One of the contentions offered by the New York City Police Department in Gould was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers

> Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record falling within the scope of §87(2)(g) is predecisional or 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Joseph Fiocca
Donald Appel

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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August 25, 2004

Mr. Randy Woodbury
Code Enforcement Officer
Town of Ellicott
215 South Work Street
Falconer, NY 14733

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Woodbury:

I have received your letter and the materials attached to it. You have sought advice concerning whether there are "any further FOIL requirements" relative to a letter addressed to you by an attorney, Ms. Christen Archer Pierrot, which you "interpret as demand for document(s) and or written explanation for *supposed* building permit activity after the 2001 sale" of a certain parcel (italics yours). Ms. Pierrot's letter states in relevant part as follows:

> "With respect to the documents that we have requested and that you have indicated you do not have, i.e., all applicable building permits, building permit applications, and all other relevant documentation that should exist with the property file, please indicate in writing why such documentation cannot be produced. Alternatively, if the documentation can be produced, please indicate when it will be available."

You wrote that all of the documents requested were made available, and that "[t]here has been no building permit activity from 2001 on relative to the subject building other than...the Order to Remedy an exterior condition that is included in the completed FOIL response."

In this regard, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency, such as a town, is not required "to prepare any record not possessed or maintained by such entity..." That being so, insofar as records sought do not exist or are not maintained by or for the Town, the Freedom of Information Law would have no application. In a somewhat related vein, while I am not sure that I would agree with your characterization of Ms.

Pierrot's comments as a "demand...for a written explanation" concerning building permit activity, there is nothing in the Freedom of Information Law that would require that an agency or agency official "explain" why a record that perhaps should be included within a file does not exist.

Lastly, when a request is made for a record that does not exist or cannot be found, §89(3) also provides that the person seeking the record may request that the 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, Ms. Pierrot would have the right to request and obtain the certification envisioned by the provision quoted in the preceding sentence.

If I have misinterpreted the matter in any way, please contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Christen Archer Pierrot

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August 25, 2004

E-Mail

TO: Joe Kelleher [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. Kelleher:

I have received your inquiry in which you asked whether the Freedom of Information Law provides you with the ability to "search the New York birth records from 1950 through to 1970." You indicated that you are attempting to "find/trace any of [your] birth siblings."

In this regard, although the Freedom of Information Law generally provides broad rights of access to government records, one of the exceptions pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §4173 of the Public Health Law, pertains to birth records. In brief, §4173 permits the disclosure of birth records by a registrar or the State Department of Health only upon issuance of a court order, or to the subject of the birth record or the parent or lawful representative of a minor. That being so, birth records are generally confidential and exempt from the disclosure requirements found in the Freedom of Information Law.

I regret that I cannot be of greater assistance.

RJF:jm

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August 25, 2004

Mr. Martin A. Luster
City Attorney
City of Ithaca
108 East Green Street
Ithaca, NY 14850-5690

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Luster:

I have received your letter in which you sought an advisory opinion concerning rights of access to "a police report involving an alleged child abuse incident that occurred in the City of Ithaca." You wrote that the Police Department advised that "the 13-year old child who is the alleged victim of abuse said to have been perpetrated by her father has been placed in foster care under the auspices of the Tompkins County Child Protective Service." Further, the defendant has been charged with endangering the welfare of a child.

You suggested that disclosure of the report might violate §372 of the Social Services Law. From my perspective, that statute, as well as others, may be pertinent in considering whether the police report is required to be or may be withheld. In this regard, I offer the following comments.

As you are aware, the Freedom of Information Law pertains to all government agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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, as you indicated, 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 of what formerly had been the Department of Social Services and the Division for Youth. While I know no judicial decision concerning the status of a police report in relation to §372, if the Police Department can be characterized as an entity having powers or duties relative to any category of children referenced in that statute, the City, in my view, would be prohibited from disclosing the report.

While I do not believe that it clearly applies in this instance, §422 of the Social Services Law also offers guidance relative to the kind of record at issue. That statute pertains to the statewide central register of child abuse and maltreatment. Subdivision (2)(c) refers to a situation in which a call made to the central register is transmitted to a local department of social services, and that agency contacts "the appropriate law enforcement agency, district attorney or other public official empowered to provide necessary aid or assistance." In that situation, a report prepared by a police department in response to a request for assistance in the possession of a department of social services "shall be confidential" and beyond the scope of public rights of access pursuant to subdivision (4)(A) of §422. Although the City of Ithaca is not a department of social services subject to that statute, there is, in my view, a clear indication of an intent to confer confidentiality.

In addition to the provisions cited above, there are exceptions in the Freedom of Information Law that are pertinent as well.

Section 87(2)(b) authorizes an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." That provision in my opinion may generally be asserted to withhold records or portions thereof identifiable to a victim, a complainant, or perhaps a witness.

Section 87(2)(e) enables an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:

> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

You wrote that the matter to which the report relates "is still pending in local criminal court." That being so, disclosure might at this juncture interfere with a judicial proceeding; the report might also identify a confidential source. If either would be the result, subparagraphs (i) or (iii), respectively, may be asserted to deny access.

A police report would also fall within §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted [i.e., §87(2)(b) or (e)]. Concurrently, those 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 records have been introduced in a public judicial proceeding and are accessible from a court, it has been held that an agency loses its ability to withhold those records under the Freedom of Information Law [see Moore v. Santucci, 151 AD2d 677 (1989)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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August 26, 2004

[redacted]

The staff of the Committee 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 [redacted]

As you are aware, I have received your letter and the correspondence attached to it. You have sought assistance in relation to requests for records pertaining to "the molestation of your son." The incident, which allegedly occurred in March or April of 1994, was investigated by the Division of State Police, and your requests were denied on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." When I contacted you by phone to learn more of the matter, you indicated that there was never an arrest or a charge. Based on the foregoing and other aspects of our conversation, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that a government agency is not required to prepare a record in response to a request. Similarly, while an agency is obliged to disclose existing records to the extent required by law, it is not required by the Freedom of Information Law to provide information in response to questions.

Second, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If a incident is investigated, but there is no arrest or charge, it has consistently been advised that the identity of the person complained of or a suspect may be withheld for the reason offered by the Division of State Police, that records may be withheld pursuant to §87(2)(b) of the Freedom of Information Law on the ground that disclosure would result in an unwarranted invasion of personal privacy. In short, when an allegation or charge does not result in an admission or finding of guilt, I believe that an agency may deny access to protect the privacy of the accused. I note, too, that when

a person is charged with a criminal offense and the charge is dismissed in favor of the accused, the records pertaining to the incident ordinarily are sealed in accordance with §160.50 of the Criminal Procedure Law.

Also pertinent is §87(2)(a) of the Freedom of Information Law, which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §50-b of the Civil Rights Law, prohibits disclosure of records which identify a victim of a sex offense. Subdivision (1) of §50-b states that:

> "The identity of any victim of a sex offense, as defined in article one hundred thirty or §255.25 of the penal law, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."

Based on §50-b, the Freedom of Information Law provides no rights of access to records that identify a victim of a sex offense. Any authority to disclose or obtain the records in question would be based on the direction provided by the ensuing provisions of §50-b.

Since you referred during our conversation to child protective services, §372 of the Social Services Law may also be pertinent. That statute 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 of what formerly had been the Department of Social Services and the Division for Youth. While I know no judicial decision concerning the status of a police report in relation to

§372, if the State Police can be characterized as an entity having powers or duties relative to any category of children referenced in that statute, that agency, in my view, would be prohibited from disclosing the report.

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: William J. Callahan
Captain Laurie M. Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14867

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, 2004

Ms. Carole Wollenweber
Water Control Commission
Town of Pound Ridge
179 Westchester Avenue
Pound Ridge, NY 10576-1743

Mr. Daniel M. Richmond
Zarin & Steinmetz
81 Main Street, Suite 415
White Plains, NY 10601

Dear Ms. Wollenweber and Mr. Richmond:

I have received a copy of Mr. Richmond's request made pursuant to the Freedom of Information Law to Ms. Wollenweber in her capacity as Secretary of the Town of Pound Ridge Water Control Commission. In the request, Mr. Richmond wrote as follows and emphasized by means of italics: "*Please take notice that this request is continuing.*" He added that: "Accordingly, your Office must update its response as Records responsive to this request are created, come into existence, or come into the possession of your Office in any form for any period of time whatsoever."

In this regard, it has consistently been advised that an agency is not required to honor an ongoing, prospective or "continuing" request for records. 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, while an agency, such as the Town, is obliged to grant or deny access in accordance with the direction provided by the Freedom of Information Law when the request involves records kept by or for the Town, in my opinion, it is not required to give effect to a request for records that do not yet exist or which have not yet come into its possession.

Should any questions arise concerning the foregoing, please feel free to contact me. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Joanne Pace, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14868

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, 2004

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, unless otherwise indicated.

Dear Mr. Risman:

As you are aware I have received a variety of correspondence relating to your requests made pursuant to the Freedom of Information Law for records of the City of Saratoga Springs. Based on a review of those materials and our telephone conversations, I offer the following comments.

Your initial communications relate to a request for personnel records, particularly resumes or similar records relating to the Assistant City Attorney, Anthony J. Izzo, that was denied pursuant to §89(2)(b) of the Freedom of Information Law. That provision indicates that an agency may withhold records insofar as disclosure would constitute an unwarranted invasion of personal privacy and makes reference to employment histories.

As suggested to you in an opinion involving an unrelated matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Based on judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 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 a resume or an employment application that are irrelevant to the performance of one's duties may generally be withheld. However, in consideration of the foregoing, 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.

You also requested vouchers submitted by Mr. Rizzo over the course of eighteen years. Here I note that the Freedom of Information Law pertains to existing records, and I would conjecture that the City has, in accordance with law, disposed of vouchers completed more than a certain number of years old (see Arts and Cultural Affairs Law, §57.25). Additionally, an issue of likely significance 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 City, to extent that the records sought can be located with reasonable effort, I believe that a request would meet the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. In the case of the vouchers, those recently prepared may be relatively easy to locate, especially if they are referenced or retrievable electronically. Others, however, may be stored in a manner in which those of your interest cannot be found with reasonable effort. To that extent, the request would not, in my opinion, reasonably describe the records.

Several references were made to criminal history checks, and your inability to obtain the results of those background checks. Having discussed the matter with City officials, I was told that those references were inaccurate and that no background checks pertaining to you were carried out. If that is so, there is no record to be disclosed or withheld.

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.

Another aspect of a request involved records relating to a police officer. I note in this regard that rights of access to some personnel records pertaining to police officers are subject to a statute other than the Freedom of Information Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute 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)].

Based on the language of §50-a of the Civil Rights Law, various personnel records 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.

You referred to your inability to locate provisions adopted by the City to implement 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, I believe that the public corporation is the City, and that the governing body would be the City Council. If that is so, the City Council 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."

It is emphasized that the records access officer is not required to respond directly to each request. Again, it is that person's duty to "coordinate" an agency's responses to requests for records, and persons other than the records access officer may respond in accordance with the direction provided by the records access officer.

When a request is denied, it may be appealed in accordance with §89(4)(a) of the Freedom of Information Law, and 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).

Next, since you referred to delays following your submission of requests for records, 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) states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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

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)].

You referred to the absence of a subject matter list. In this regard, it is reiterated that, as a general rule, an agency is not required to create records to comply with the Freedom of Information Law. An exception that rule relates to the record in question. Specifically, §87(3) 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. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. It is suggested that you ask to review the retention schedule applicable to the City. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

Lastly, you asked whether a request for a record is properly satisfied when the applicant for the record is informed that the record is accessible via the internet, presumably through an agency's website. While records are now routinely made available via the internet without any necessity of seeking them by means of a request made under the Freedom of Information Law, I believe that an applicant may, in the alternative, seek and obtain a hard copy of the record. As you suggested, if there is a need to require a certification that a copy of a record is a true copy, which may be requested under §89(3), that requirement might not be met if a record is viewed or acquired via the internet.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Matthew J. Dorsey
Anthony J. Izzo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14869

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, 2004

Mr. Reggie Brown
98-B-1811
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brown:

I have received your letter in which you complained that, in response to your request, the Erie County District Attorney's Office stated that "the Freedom of Information Law does not require them to answer questions."

In this regard, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information responsive to a request, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Janet M. Mercer

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14870

41 State Street, Albany, New York 12231
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August 27, 2004

Mr. Eon Shepherd
96-A-0356
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. Shepherd:

I have received your letter in which you asked for assistance in obtaining your medical records from your correctional facility.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (I) of the Law.

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 correctional facility personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you resubmit your request and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

As requested, I am returning the materials that you sent to this office.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14871

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 30, 2004

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 Bill:

As you are aware, I have received your letter in which you asked whether the public may obtain a copy of a village's zoning code "on a floppy disk." You also asked what "a reasonable charge" would be.

In this regard, first, the Freedom of Information Law pertains to agency records, such as those of a county, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than twenty years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of

situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or duplicating the data on another storage mechanism, such as a computer tape or disc.

Lastly, with respect to the fee that may be charged for the reproduction of or transfer of data onto a disk, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy or the actual cost of reproduction unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, 226 AD 2d 339 (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

Further, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...

> (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR 1401.8)."

Based upon the foregoing, it is likely that a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape, a disk or cd) to which data is transferred.

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14872

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 30, 2004

Ms. Linda A. 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 information presented in your correspondence.

Dear Ms. Mangano:

I have received your letter and the correspondence attached to it concerning requests made to the Village of Ossining pursuant to the Freedom of Information Law.

The initial issue involves a situation in which you were informed that the records sought do not exist. 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.

As you know, insofar as records exist and are maintained by or for an agency, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With respect to notices of claim, when a record is available in its entirely under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there are often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the ground for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the record after having made appropriate deletions from a copy of the record.

For example, if a notice of claim includes personally identifiable information concerning personal injuries or a medical problem, I do not believe that you would have the right to inspect the record, for those portions, in my view, may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see §89(2)(b)(i)]. In short, while portions of the records must be disclosed, others could be withheld, and the Village could seek payment of the requisite fee for photocopies, which could 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 believe that the other matters raised in your letter have been addressed in previous correspondence.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Liens
Mary Ann Roberts

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1873

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 1, 2004

Mr. John Doe
349041317
Rikers Island
1500 Hazen Street
Bronx, NY 11370

Dear Mr. Doe:

I have received your letter in which you requested information concerning your medical records as they pertain to an injury that you incurred while incarcerated.

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 possess any of the records of your interest.

When seeking records from a government agency, a request should be directed to the agency's "records access officer." The records access officer has the duty of coordinating an agency's response to requests. In this instance, since Rikers Island is an entity within the New York City Department of Correction, it is suggested that a request be made to the records access officer of that agency.

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 14874

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 1, 2004

Mr. Michael Ebron
97-A-0195
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

Dear Mr. Ebron:

I have received your letter in which you appealed denials of access to records by the Albany County Clerk and the City of Albany.

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, §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."

Any appeal should be made in accordance with the provision quoted above.

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-14875

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 2, 2004

Mr. Laurante Sumbry
DOC #965137 Location DE-324
Indiana Department of Correction
Indiana State Prison
P.O. Box 41
Michigan City, IN 46361-0041

Dear Mr. Sumbry:

I have received your letter, which is addressed as a "records appeal." As I understand the matter, you requested records from certain agencies but received no response.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions relating to the New York Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records.

It appears that you are aware that the Freedom of Information Law provides direction concerning the time within which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

If, at this juncture, you have not received a response to a request, I believe that you may appeal to the head of either of the agencies to which you referred in accordance with §89(4)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14876

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 2, 2004

Mr. Richard White
93-A-8498
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. White:

I have received your letter in which you indicated that you are having problems in gaining access to victim and witness statements from the Nassau County District Attorney's Office and the Nassau County Police Department.

In this regard, I offer the following comments.

The decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)] appears to be relevant to the matter. In Moore, it was found that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

Based on the foregoing, insofar as witnesses' statements are submitted into evidence or disclosed by means of a public judicial proceeding, I believe that they must be disclosed.

On the other hand, if witness statements have not been previously disclosed, two grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As a general

matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 dealing directly with privacy, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would be dependent upon the nature of statements by the witness or other records pertaining to the witness that have already been disclosed. If disclosure of the records would not serve to infringe upon the witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14877

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September 2, 2004

Raymond C. Speciale, P.C.
Attorney at Law
3617 Byron Circle
Frederick, MD 21704

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Speciale:

I have received your letter and the materials attached to it. You indicated that you were retained in relation to an effort to gain access to various records, particularly "two software packages which were developed and are offered by the Broome-Tioga BOCES, Part 200 and ClearTrack 200." You added that "[t]hese Special Education Management Software packages are used by school districts to assist them in developing individualized education plans (IEPs), administering special education programs, and tracking special education student information and data." According to your letter, the BOCES "offers these products exclusively to public school districts, and have limited if any private sector audience. However, you also indicated that several private firms offer "competitive Special Education Management Software products in New York State."

In denying access to the software, the BOCES District Superintendent wrote that:

> "We made the denial of information you requested on the basis of §87 (2)(d) of the Freedom of Information Law which is sometimes known as the trades secret exception. We have consulted with counsel and we believe that the situation of Broome-Tioga BOCES and Clear Track 200 is analogous to the situation of the State Insurance Fund as it is described in the opinion of the Committee on Open Government, FOIL-AO-12657 (2001). We do not believe that any of the information you requested could be found at little or no cost from other sources. We do believe that you will gain a considerable competitive advantage by garnering this information though the method of FOIL. Certainly, this competitive advantage is not contemplated by the Freedom of Information Law and on that basis we deny your appeal."

It is your view that the "trade secret exemption" does not apply in this instance, and you have sought an advisory opinion concerning the propriety of the denial of your request.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision upon which the denial of your request is based, §87(2)(d), permits an agency to deny access to 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..."

I recognize that the exception quoted above refers to a commercial enterprise. However, it has been advised and held that when an agency carries out certain of its functions in competition with private businesses, it may withhold records pursuant to §87(2)(d) in appropriate circumstances (see Syracuse & Oswego Motor Lines, Inc. v. Frank, Supreme Court, Onondaga County, October 15, 1985).

From my perspective, the opinion cited in the denial of your request did not involve a situation analogous to that of the BOCES. It dealt primarily with the State Insurance Fund, which is a source of last resort of workers' compensation insurance and clearly competes with commercial entities that provide essentially the same product. In that instance, the agency carried out its functions as a player in a competitive commercial marketplace, and disclosure would have caused substantial injury to its competitive position, thereby potentially resulting in the inability of many businesses to obtain workers' compensation insurance at a reasonable price or perhaps at all. The Fund's capacity to carry out its critical functions or even to continue to exist would have been jeopardized by means of disclosure. I do not believe that disclosure in the context of your inquiry would have a similar or such drastic effect on the BOCES ability to carry out its statutory duties. Nevertheless, depending upon facts with which I am not familiar, it is possible that §87(2)(d) might serve as a basis for a denial of access.

For purposes of offering guidance concerning the scope of §87(2)(d) and by way of background, the concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over

> competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of record, the area of commerce in which an entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Perhaps most relevant is a decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury." In Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale [87 NY2d 410(1995)], 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)."

Based on the foregoing, if it can be concluded that the software developed by the BOCES is being used or sold as a commercial product in a competitive market, it would appear that it might justifiably be withheld pursuant to §87(2)(d). It is emphasized that the language of §87(2)(d) refers to the ability to deny access when disclosure would cause "*substantial injury*", not slight or some degree of injury, to the competitive position of an entity. Whether the BOCES could meet its burden of proof in a judicial proceeding is, in my view, questionable.

While I do not have sufficient facts regarding the matter to offer an unequivocal response, I believe that the preceding commentary considers the factors pertinent in determining rights of access or, conversely, the propriety of the denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence A. Kiley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14878

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 2, 2004

Mr. Angel Herrera
79-A-0897
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Herrera:

I have received your letter in which you asked for assistance in obtaining witness statements and other records from the New York County District Attorney's Office.

In this regard, I offer the following comments.

The decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)] appears to be relevant to the matter. In Moore, it was found that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

Based on the foregoing, insofar as witnesses' statements are submitted into evidence or disclosed by means of a public judicial proceeding, I believe that they must be disclosed.

On the other hand, if witness statements have not been previously disclosed, two grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 dealing directly with privacy, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would be dependent upon the nature of statements by the witness or other records pertaining to the witness that have already been disclosed. If disclosure of the records would not serve to infringe upon the witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Janet M. Mercer

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14879

41 State Street, Albany, New York 12231
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September 2, 2004

Mr. Michael Jones
00-R-1541
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. Jones:

I have received your letter in which asked if there is any time limit for response to requests made under the Freedom of Information Law. You indicated that you have requested various documents from your correctional facility and, as of the date of your letter to this office, that you had not yet received a response.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3862
FOIL-AO-13880

41 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, 2004

Ms. Sally A. Barlow
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Barlow:

As you are aware, I have received your letter in which you sought advice concerning your efforts in obtaining minutes of meetings of the Town of Milford Planning Board. You indicated that a request for the minutes was made to the Secretary of the Planning Board and that you were told that the Town Attorney is in possession of the minutes.

In this regard, first, irrespective of where or by whom the minutes are kept, I believe they constitute Town records subject to rights of access. The Freedom of Information Law is expansive in its coverage, for it pertains to all agency records, such as those of a town, and defines the term "record" 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."

Second, §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.

Lastly, while the Town Attorney may have physical possession of the minutes, §30(1) of the Town Law provides that the Town Clerk is the custodian of all Town records. Further, pursuant to the regulations promulgated by the Committee on Open Government, which have the force of law (see 21 NYCRR Part 1401), each agency must designate one or more persons as "records access officer." The records access officer has the duty to coordinate an agency's response to requests, and requests should ordinarily be made to that person.

In the majority of towns, the town clerk is the records is the records access officer. While I believe that the person in receipt of your request should have responded directly to you in a manner consistent with law or forwarded the request to the records access officer, if you still have not received the minutes, it is suggested that you contact the Town Clerk. If he/she is the records access officer, the Clerk would have the authority to direct the person in possession of the records to make them available to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sandra Currie
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3861
FOIL-AO-14881

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, 2004

Hon. Daniel Rosen
Town of Springfield
Box 408
Springfield Center, NY 13468

Hon. James Willsey
Town of Springfield
336 McRorie Road
Richfield Springs, NY 13439

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Board Members Rosen and Willsey:

I have received your letter in which you, members of the Springfield Town Board, described a variety of instances in which records have not been made available to the Town Clerk. You added that "[t]he Town Supervisor and the Planning Board do not allow the Town Clerk in executive sessions or assigns anyone to take minutes" and that "[a]s a result, decisions are not made available to the public."

From my perspective, several provisions of law are pertinent to the matter. In this regard, I offer the following comments.

First, §30(1) of the Town Law provides in relevant part that a town clerk "Shall have the custody of all the records, books and papers of the town." As I understand that provision, the clerk is the legal custodian of all town records, irrespective of where or by whom the records are kept.

Second, in a related vein, the Freedom of Information Law is expansive in its scope, for it pertains to all agency records and defines the term "record" 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."

In view of the foregoing, any record maintained by or for a town constitutes a town record that falls within the coverage of the Freedom of Information Law.

Third, 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 provisions quoted above, 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.

Next, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

While others may have physical possession of town records, it is reiterated that §30(1) of the Town Law indicates that the clerk is the legal custodian of all town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

A failure to share the records or to inform the Clerk of their existence may effectively preclude the clerk from carrying out her duties as records management officer, or if she or someone else is so designated as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if the records access officer does not know the existence or location of Town records, or cannot obtain them, that person may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law.

Lastly, in addition to a town clerk's role as the legal custodian of town records, §30(1) of the Town Law also states that the clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting." The direction given in the Town Law is clear, as is §106 of the Open Meetings Law, which requires 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 a situation in which the Town Board might want to take action during an executive session, §105(2) of the Open Meetings Law permits the Board to enable the Town Clerk to be present during an executive session. However, there is no right to attend, because the Clerk is not a member of the Board.

To give effect to both the Open Meetings Law and §30 of the Town Law, which imposes certain responsibilities upon a town clerk, it is suggested that there may be three options. First, the Town Board could permit the Clerk to attend an executive session in its entirety. Second, the Town Board could deliberate during an executive session without the Clerk's presence. However, prior to any vote, the Clerk could be called into the executive session for the purpose of taking minutes in conjunction with the duties imposed by the Town Law. And third, the Town Board could deliberate toward a decision during an executive session, but return to an open meeting for the purpose of taking action.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Jeannette Armstrong

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14882

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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 3, 2004

Mr. Tim Hughes
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hughes:

I have received your letter in which you referred to delays and a failure to respond to requests made under the Freedom of Information Law to the City of Gloversville.

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:tt

cc: Hon. Frank LaPorta

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14883

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 3, 2004

Hon. Robert North
Town Clerk
Town of Richland
P.O. Box 29
Pulaski, NY 13142

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. North:

As you are aware, I have received your letter concerning your ability, as Town Clerk of the Town of Richland, to gain access to Town records in order to perform your official duties.

From my perspective, several provisions of law are pertinent to the matter. In this regard, I offer the following comments.

First, §30(1) of the Town Law provides in relevant part that a town clerk "Shall have the custody of all the records, books and papers of the town." That being so, the clerk is the legal custodian of all town records, irrespective of where or by whom the records are kept.

Second, in a related vein, the Freedom of Information Law is expansive in its scope, for it pertains to all agency records and defines the term "record" 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."

In view of the foregoing, any record maintained by or for a town constitutes a town record that falls within the coverage of the Freedom of Information Law.

Third, with respect to the implementation of the Freedom of Information Law, §89(1) of that statute 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 provisions quoted above, the records access officer must "coordinate" an agency's response to requests, and you indicated by phone that the town clerk years ago was designated by the Town Board as records access officer. As part of that coordination, I believe that other Town officials and employees are required to cooperate with you as the records access officer in an effort to enable you to carry out your official duties.

Next, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library

> materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

While others may have physical possession of town records, it is reiterated that §30(1) of the Town Law indicates that you are the legal custodian of all town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

A failure to share the records or to inform you, as Clerk, of their existence may effectively preclude you from carrying out your duties as records management officer, and as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if you do not know the existence or location of Town records, or cannot obtain them, you would lose the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law.

In an effort to enhance the members' understanding of the provisions referenced in the preceding commentary, as well as your functions and duties as Town Clerk, a copy of this response will be sent to the Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14884

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September 3, 2004

E-MAIL

TO: Tony Ruggiero [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. Ruggiero:

I have received your letter and variety of other material concerning your efforts in obtaining information from the Smithtown Central School District. Based on a review of the documentation, I offer the following comments.

First, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading. That statute is not a vehicle that requires that government agencies or officials supply information in response to questions. Rather, it pertains to existing records, and §89(3) provides in part that an agency is not required to create a new record in response to a request.

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."

Based upon the language quoted above, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v.

Buelow, 436 NYS2d 558 (1981)]. "Form" or "format" in my view involves the medium by which information is stored; whether information is stored on paper or on a computer tape or in a computer disk, it constitutes a "record."

In a leading decision relating to an agency's obligations regarding disclosure in an electronic medium, Brownstone Publishers Inc. v. New York City Department of Buildings [166 AD2d 294 (1990)], the question involved an agency's duty to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division:

> "The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1][b][iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" (id. at 295).

In another decision, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" [Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992); aff'd 190 AD2d 1067 (4th Dept., 1993)].

In short, assuming that the conversion of format can be accomplished, that the data sought is available under FOIL, that the data can be transferred from the format in which it is maintained to a format in which it is requested, and that the applicant pays the requisite fee, I believe that an agency would be obliged to do so.

Lastly, a request to have records e-mailed or faxed does not involve the format in which the records are or may be kept. If a record can be made available on a computer disk, for example, and

an applicant pays a fee based on the actual cost of reproduction [see §87(1)(b)(iii)], again, I believe that an agency would be required to make the record available in that kind of information storage medium. You, however, are not asking that the records be made available in a particular information storage medium; rather, you are asking that they be *transmitted* in a certain way. In my view, there is nothing in the Freedom of Information Law that requires that records be transmitted via e-mail or, for instance, by fax machine. An agency may choose to make records available via those methods of transmission, but there is no *obligation* to do so. An agency's responsibility under §§87(2) and 89(3) involves making records available for inspection and copying, and to make copies of records available upon payment of the appropriate fee.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

RJF:tt

cc: Mary Wilson
Bob Clark

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14885

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 7, 2004

E-MAIL

TO: John Quenell [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. Quenell:

I have received your letter in which you sought guidance pertaining to "a state agency's refusal to respond to a FOIL request."

In the regard, the Freedom of Information Law provides direction concerning the time within which an agency must respond to a request for records. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal

> fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14886

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 7, 2004

E-MAIL

TO: Robert Pascoal [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. Pascoal:

I have received your letter concerning access to records indicating evictions. You asked whether those records are "covered in FOIL."

In this regard, the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., 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.

If the records in question are maintained by an agency, rather than a court, and if they are maintained in manner in which they can be retrieved with reasonable effort, a request for those records could be made to the agency in possession of the records pursuant to the Freedom of Information Law. There is no particular form that must be used when records are requested under that law; any written request that reasonably describes the records should suffice. If the records are maintained by a court, a request should be made to clerk of the court, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14887

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September 7, 2004

Ms. Alice Bloom
[redacted]

The staff of the Committee on 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. Bloom:

I have received your letter and the materials relating to it. In brief, you wrote that your son's application to participate in a peer adviser program at Mamaroneck High School was rejected. In an attempt to learn the reason for the rejection, you were informed that "the selection process consisted of a 'survey' distributed to the entire faculty soliciting 'anonymous' comments about student applicants." When you requested the survey responses pertaining to your son, the request was denied on the ground that anonymity had been promised to teachers. Additional requests were made, and the School District's "records access manager" also denied access, indicating that "the survey is not part of Zachary's educational record, but rather a part of an administrative process the high school utilizes in selecting the....advisors." The denial of the request was later affirmed by the Superintendent.

From my perspective, the law requires that the records of your interest be made available to you. In this regard, I offer the following comments.

First, although the New York Freedom of Information Law generally governs with respect to rights of access to records of a school district, in this instance, I believe that the governing statute in the context of the situation that you described is a federal law. Specifically, most pertinent is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "FERPA". In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions.

A focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

"(a) The student's name;

(b) The name of the student's parents or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld from the public in order to comply with federal law. Concurrently, and most importantly in relation to this matter, if a parent of a student under the age of eighteen requests records identifiable to his or her child, the parent ordinarily will have rights of access to those portions of records that are personally identifiable to his or her child.

The regulations promulgated by the United States Department of Education (34 CFR Part 99) provide direction which, in my view, is contrary to the response offered by the District in denying your request. Section 99.10 provides a parent of a minor student with the right to inspect and review the education records pertaining to his or her child, "except as limited under §99.12." The limitations in §99.12 relate to education records maintained by "postsecondary institutions", such as colleges and universities, rather than elementary, middle or high schools. Section 99.3 defines the phrase "education records" and states, in its entirety, that

"(a) The term means 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.

(b) The term does not include:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not

accessible or revealed to any other person except a temporary substitute for the maker of the record;

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of §99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(iii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Record on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used on in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, 'treatment' does not include the remedial educational activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution."

In my opinion, none of the exclusions listed in subdivision (b) would apply or serve to remove the records at issue from the scope of "education records." If that is so, to comply with federal law, I believe that the records must be made available to you. I point out, too, that §99.20 and the ensuing related provisions provide a parent of a minor child with right to seek to amend education records that are "inaccurate, misleading, or in violation of the student's rights of privacy."

Lastly, §89(6) of the Freedom of Information Law states that nothing in that law can serve to abridge rights of access conferred by any other provision of law. Therefore, even though portions of the records at issue might fall within exceptions to rights of access appearing in the Freedom of Information Law, those exceptions cannot be asserted when a different law, in this instance, FERPA, grants rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Sherry King
Bea Cerasoli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4888

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September 8, 2004

Mr. Edward J. Harrington
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Harrington:

I have received your letter in which you requested an advisory opinion concerning a denial of access to records by the City of Oswego. You sought "Itemized cell phone records for the phones used by the Mayor and Assistant Mayor covering the time period January 1, 2004 to June 30, 2004." The City Clerk denied access on the grounds that the request involved a "confidential disclosure" and an "unwarranted invasion of personal privacy." You also asked "how to file a formal complaint regarding the City Clerk's failure to provide documents in a timely manner as well as denying the knowledge of existing records so as to prevent their release."

It is noted at the outset that I consider your letter to constitute a complaint that will be addressed in the comments that follow. Those comments are not binding, but it is our hope that opinions rendered by this office are educational and persuasive. When an agency denies access to records or when it is believed that it has failed to comply with law, a person may seek judicial review, and those issues will also be considered.

With respect to cell phone and other records, the Freedom of Information Law pertains to all agency records, and §86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, information kept by or for the City in any physical form would constitute a "record" falling 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, and the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. In my opinion, the phrase quoted in the preceding sentence indicates that a single record may be both accessible or deniable in whole or in part. I believe that the quoted phrase also imposes an obligation on agency officials to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

I point out that there is no language in the Freedom of Information Law concerning a "confidential disclosure." The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." When that exception applies, records are indeed confidential. However, it only applies when a statute, an act of Congress or the State Legislature, specifies that certain records cannot be disclosed. There is no statute that would render the records at issue exempt from disclosure or "confidential" under §87(2)(a).

The relevant exception in analyzing rights of access is the second ground cited in the denial of your request. Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

When a public officer or employee uses a telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to an officer or employee serving as a government official.

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended by some that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call.

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. As Mayor and Assistant Mayor, I would conjecture that those persons make and receive calls involving an array of subjects. Therefore, 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.

This is not to suggest, however, that the numbers appearing on every phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to contact recipients of public assistance or persons seeking certain health services. It has been advised in the past that if a government employee contacts those classes of persons as part of the employee's primary ongoing and routine duties, there may be grounds for withholding phone numbers listed on a bill. For instance, disclosure of numbers called by a caseworker who phones applicants for or recipients of public assistance might identify those who were contacted. In my view, the numbers could likely be deleted in that circumstance to protect against an unwarranted invasion of personal privacy due to the status of those contacted. Similarly, if a law enforcement official phones informants, disclosure of the numbers might endanger an individual's life or safety, and the numbers might justifiably be deleted pursuant to §87(2)(f) of the Freedom of Information Law.

In the case of calls made by a mayor, myself or others in similar positions, phone calls are made to great variety of persons in a broad variety of contexts. Unlike the caseworker who routinely phones a class of persons having a particular status (i.e., recipients of public assistance), our calls involve an assortment of issues and persons who do not fall within any special identifiable class or status. When that is so, disclosure of a phone number would not alone signify a personal detail involving the recipient of a call. Further, as suggested previously, disclosure of the number would not necessarily indicate who received the call, nor would it disclose anything about the nature of the call of a conversation.

If a public employee makes personal calls and reimburses the agency for the cost of those calls, the numbers called may, in my opinion, be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. However, I believe that the remaining entries must be disclosed. It is my view that the public has the right to know whether a public employee is making personal calls during his or her workday, as well as the duration of those calls. Those items in my opinion clearly bear upon the performance of one's official duties and would, if disclosed, result in a permissible, not an unwarranted invasion of personal privacy.

Next, with respect to delays in responding to requests, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

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)].

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.

Additionally, and I am not suggesting that it is applicable in the circumstance to which you referred, §240.65 of the Penal Law, states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to City officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. John J. Gosek, Mayor
Hon. Jeanne C. Berlin, City Clerk
Edward J. Iseki, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14889

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September 8, 2004

Ms. Mary Kelly 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 related material concerning your right to obtain resumes submitted by applicants for the position of administrator in the Village of Seneca Falls. Although I believe that I addressed the issue exhaustively during the forum that you attended in Village Hall last week, I will briefly reiterate my opinion concerning the matter.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) provides all records are available, except "records or portions thereof" that fall within the grounds for denial of access that follow. The phrase quoted in the preceding sentence indicates that situations may arise in which a single record includes both accessible and deniable information, and that an agency is obliged to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

Second, it is clear that the names and addresses of applicants for appointment to public employment need not be disclosed [see Freedom of Information Law, §89(7)], and that portions of a resume or an application for employment may be withheld under §§87(2))(b) and 89(2) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." The latter provision contains a series of examples of unwarranted invasions of personal privacy, the first of which makes specific reference to the disclosure of employment histories; another refers to information of a personal nature in some circumstances. However, in a manner similar to §87(2), that provision specifies that disclosure "shall not be construed to constitute an unwarranted invasion of personal privacy....when identifying details are deleted" [§89(2)(c)(I)]. Therefore, in my view, the records in question should be disclosed following the deletion of personally identifying details.

I note that in some instances, the deletion of a name and address alone may not be sufficient to ensure that a person's identity will not become known. In those situations, I believe that an agency may delete any details which, if disclosed, would permit the identity of the subject of the record to become known. I note that in a somewhat analogous request by a faculty member of a branch of the City University of New York for resumes of those promoted to full professor during a given period in order that he could compare his credentials to those of others, the court determined that the records must be disclosed following the deletion of personally identifying details [Harris v. City University of New York, Baruch College, 114 AD2d 805 (1985)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Diana Smith, Mayor
Connie Sowards, Village Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3866
FOIL-AO-14890

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September 10, 2004

Ms. Paulette Glasgow
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Glasgow:

As you are aware, I have received your letter in which you raised questions pertaining to the Open Meetings Law.

By way of background, you wrote as follows:

> "...three members of a town board, their legal counsel and the mayor of the incorporated village within the township were seen entering and existing [sic] the same building at the same time."

You asked whether the foregoing "consisted [of] a quorum for a meeting." You also wrote:

> "I have submitted questions to the town board seeking answers to questions. I wasn't seeking to access records but answers. I have been told by town counsel I must fill out a FOIL in order to receive my answers."

You questioned whether "this [is] a correct interpretation of FOIL."

In this regard, absent additional information, I cannot ascertain or advise whether the situation that you described involved a quorum or a meeting subject to the Open Meetings Law.

A quorum, according to §41 of the General Construction Law, is a majority of the total membership of a public body, such as a town board or village board of trustees. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". I point out 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, I do not believe that the Open Meetings Law would be applicable. In the same decision as that referenced above, the Court specified that "not every assembling of the members of a public body was intended to be included within the definition", indicating that social events or chance meetings do not fall within the Open Meetings Law (id., 416).

In the situation that you described, a gathering of three of five members of the Town Board would constitute a quorum. However, it is unclear whether the three gathered for the purpose of conducting public business as a body. If they did so, the gathering in my opinion would have been a "meeting" that fell within the Open Meetings Law. On the other hand, the members may have been in the same building for a different reason. One member might have been doing paperwork; another might have been reading mail; a third might have been reviewing plans for a new development. In short, if a majority of the Town Board did not convene for the purpose of conducting public business collectively, there would not have been a meeting, and the Open Meetings Law would not have applied. Again, without additional information, it is impossible to ascertain whether the presence of three members of a public body in the same building would have involved a meeting subject to the Open Meetings Law.

With respect to your second question, I note that the title of the Freedom of Information Law may be somewhat misleading. That statute does not deal with information per se; rather, it pertains to requests for and rights of access to existing records maintained by a government agency. Further, §89(3) provides in part that an agency is not required to create a record in response to a request. While the Freedom of Information Law requires an agency to grant or deny access to existing records in accordance with its provisions, it does not require that an agency provide information or answers in response to questions. An agency may choose to do so, but again, it is not required to do so. Rather than attempting to obtain information by raising questions, it is suggested that, in the future, you request existing records.

I hope that the foregoing serves to clarify your understanding of the Open Meetings and Freedom of Information Laws and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 10, 2004

Hon. Helen F. Kopke
Town of Niskayuna
One Niskayuna Circle
Niskayuna, NY 12309-4381

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Kopke:

As you are aware, I have received your letter in which you raised a series of questions involving public access to records.

You wrote that you received "a FOIL request...to review traffic tickets for 2003 and 2004." Although you expressed the belief that they are accessible to the public, you added that the Court Clerk stapled "drivers abstracts" to approximately half of those two thousand documents. The abstracts were obtained by the Town through the New York Statewide Police Information Network ("NYSPIN"). Court clerks, according to your letter, "believe that all records obtained from NYSPIN are confidential" based on "section 3.2H and 3.3E" of NYSPIN rules.

In consideration of the foregoing, you raised the following questions:

> "1. Are the abstracts deniable records because release would be in invasion of personal privacy or because they are inter-agency documents?
>
> 2. Do the policies of NYSPIN overshadow the policies of FOIL (NYSPIN does not appear to be statute, but policy)?
>
> 3. If the abstracts are deniable, what is your opinion about the Court clerk separating the tickets from the abstracts so that they are available for public review for THIS specific request (2,000 records); or that is considered beyond the call of duty?

> 4. Would you advise me to advise the Court in the future NOT to attach these documents because of their differing accessibility, if they are different?"

In this regard, I do not believe that records maintained by court or court clerks fall within the coverage of the Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts 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 the records in question are maintained by a justice court, I believe that the governing statute concerning access to the records at issue is §2019.a of the Uniform Justice Court Act. That statute provides in relevant part that: "The records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..." As I understand §2019-a, unless a different provision of law specifies that records maintained by a justice court are confidential, the records are accessible to the public. Examples of confidential records would involve instances in which criminal charges are dismissed in favor of an accessed, in which case records are typically sealed pursuant to §160.50 of the Criminal Procedure Law. Another would deal with proceedings relating to youthful offenders in which records are automatically sealed pursuant to §720.15 of the Criminal Procedure Law or sealed by order of the court pursuant to §720.35.

In the context of the facts that you presented, I know of no provision of law that would remove the records at issue from public rights of access. That being so, and because §2019-a of the Uniform Justice Court Act applies rather than the Freedom of Information Law, I believe that the records maintained by a court clerk, including the abstracts, are accessible.

I note that there are numerous instances in which records maintained by courts are accessible to the public, even though equivalent records maintained by agencies may be withheld in whole or in part pursuant to the Freedom of Information Law. Detailed personal financial information contained within court records is public; equivalent information maintained by an agency subject to the Freedom of Information Law may be deniable on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §§87(2)(b) and 89(2)(b)].

In short, since the Freedom of Information Law does not apply to a court, and if no law serves as a basis for enabling the court to withhold the abstracts, I believe that they are accessible to the public. Whether the abstracts should be maintained separately from other records is, in my view, within the discretionary authority of the court. While those records would remain accessible, it seems unlikely that there would be a significant number of requests for the abstracts.

Next, the NYSPIN rules do not, in my opinion, require that records acquired through NYSPIN be kept confidential. The first provision to which you referred, §3.2H, states that:

> "Criminal Justice information means all computer information or computer material processed by or though NYSPIN regardless of the source of the information or material, including material and information from noncriminal justice computer systems such as, but not limited to, the New York State Department of Motor Vehicles and the Truck Mileage Tax data base file."

The foregoing, is merely a definition; it does not refer to confidentiality. The other provision, §3.3E, states in relevant part that:

> "No printed material obtained vis NYSPIN (or copies thereof) may be delivered to persons or agencies outside criminal justice except as directed by an appropriate court or other proper legal authority. Requests for printed material (or copies thereof) pursuant to the Public Officer's Law, Article 6, titled: The Freedom of Information Law, need not be delivered to persons or agencies outside criminal justice if exemptions listed under Section 87, Subdivision 2, (a-i) apply."

A close reading of the provision quoted above indicates that printed material obtained via NYSPIN is public, unless an exception to rights of access listed in paragraphs (a) through (i) of the Freedom of Information Law may properly be asserted. Stated differently, those materials are treated in the same manner for purposes of the Freedom of Information Law as any other agency records.

Lastly, according to judicial decisions, an agency's regulations may not render records deniable or confidential, unless there is a basis for so doing pursuant to one or more of the grounds for denial appearing in the Freedom of Information Law. The first ground for denial in the Freedom of Information Law, §87 (2)(a), refers to records that may be characterized as confidential and enables an agency to withhold records that "are specifically exempted from disclosure by state or

federal statute." A statute, based upon judicial interpretations of the Freedom of Information Law, is an act of the State Legislature or congress [see Sheehan v. city of Syracuse, 521 NYS 2d 207 (1987)], and it has been found that agencies' regulations are not equivalent of statutes for purposes of §87 (2)(a) of the Freedom of Information Law [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. Therefore, insofar as an agency's regulations render records or portions of records deniable in a manner inconsistent with the Freedom of Information Law or some other statute, those regulations would, in my opinion, be invalid. Regulations cannot operate, in my view, in a manner that provides fewer rights of access than those granted by the Freedom of Information Law.

In this instance, the NYSPIN rules do not conflict with the Freedom of Information Law, for they merely state that materials obtained via NYSPIN "need not be delivered...if exemptions listed [in the Freedom of Information Law] apply."

I hope that the foregoing offers clarification 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-14892

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 13, 2004

E-Mail

TO: Concerned Person

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 Concerned Person:

As you are aware, I have received your letter in which you raised the following question:

> "Is it a violation of FOIL for a supervisor in a New York State agency to order a subordinate not to put a certain supervisory matter in writing (e.g., e-mail)."

In this regard, the Freedom of Information Law deals with access to existing records. In general, it does not provide direction concerning a failure to create records or to communicate in writing. The only instance in which that statute requires the preparation or maintenance of records involves §87(3). That provision 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;
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and
>
> (c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

In short, the Freedom of Information Law does not include direction concerning the specific issue that you raised.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 13, 2004

E-Mail

TO: Fran Roach

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./Ms. Roach:

As you are aware, I have received your letter in which you asked why you are "not entitled" to certain information maintained by the American Kennel Club (AKC).

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, 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."

Based on the foregoing, the Freedom of Information Law generally applies to governmental entities; it does not apply to private or non-governmental entities, such as the AKC. It is my understanding that private entities may choose to disclose their records, but that there is no general legal obligation to do so.

I hope that the foregoing serves to clarify your understanding of the scope of the Freedom of Information Law and that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 13, 2004

Mr. Bob Morris
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Morris:

As you are aware, I have received your letter in which you raised a series of questions relating to access to records of the Village of Wappingers.

If you request the "zoning file" pertaining to the Mayor and receive no response, you wrote that you "presume that [you] can appeal." However, if the appeal is made to the Mayor, you asked what your "options" might be.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

If the Mayor has been designated by the Board of Trustees to determine appeals, I believe that you would have the right to appeal to the Mayor. Irrespective of the nature or subject of the request, I believe that the Mayor would have an obligation to respond in a manner consistent with law.

Your remaining questions involve custody and control of records, as well as access to records by Village officers and employees. Here I note initially that the Freedom of Information Law does not deal directly the right of a mayor or other village officials to gain access to village records. I am unaware of any statute that deals specifically with requests by or disclosures to members of village boards of trustees or other village officials or any unique authority that those officials enjoy, individually, concerning their capacity to obtain copies of village records. However, in my opinion, the records are the property of the Village rather than a mayor, even though the mayor may be the chief executive officer.

For purposes of the Freedom of Information Law, the term "record" is defined in §86(4) of that statute 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."

Additionally, 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."

Based on both provisions quoted above, the records in question are the property of the Village; I do not believe that a mayor or other official may treat them as he or she see fit.

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..."

As such, a local officer must in my view "adequately protect" village records. Further, §57.19 of the Arts and Cultural Affairs Law specifies that the village clerk is the records management officer in a village.

Second, in my view, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. It has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a board rule or policy to the contrary, I believe that a mayor or member or other official should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

Viewing the matter from a more technical perspective, one of the functions of a public body, such as a village board of trustees, involves acting collectively, as an entity. A board of trustees, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board, including a mayor, member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of

law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

In short, village records are not the property of the mayor, and I do not believe that a mayor, when that person is not acting in the performance of his or her official duties, has the right to obtain or take custody or control of all village records. Particularly in the case of personnel files, there may be a variety of information which if disclosed would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. Social security numbers, medical information, names of beneficiaries for insurance purposes, unsubstantiated complaints and similar records could in my opinion be withheld from the public based on considerations of privacy. While some of those items might in some instances be properly reviewed by a mayor or the board of trustees, again, such disclosures would presumably be made in conjunction with the performance of their official duties, not based on personal interest or curiosity.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14895

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September 13, 2004

Mr. Jim Cavanaugh
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cavanaugh:

I have received your letter and the materials attached to it. You wrote that the Town of Eastchester conducted soil tests at a playing field and that on June 16, you requested copies of the tests "in the town's possession at that time." In response, you were informed that the records would be made available by July 26. On that day, you were informed that the materials would not be available until August 31.

You asked whether the Town engaged in "an unreasonable delay" and what your recourse might be.

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 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: Town Board
Hon. Linda Doherty

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-18896

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September 13, 2004

Dr. Dan Farcasiu
[redacted]

The staff of the Committee on 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. Farcasiu:

I have received your letter concerning a request made pursuant to the Freedom of Information Law to the Roslyn Union Free School District.

According to your letter, you delivered a written request to the District Clerk. Since you received no response, you phoned the Clerk, who informed you, in your words, "that no written acknowledgement of [your] request was necessary because she received it directly from [you] rather than through the mail." She also told you that she would notify you "at some future date" whether you would receive the information sought, but that she "could not even guess" what that date might be. Further, "[i]f it was then decided that [you] should receive copies of the documents requested, a new evaluation would be made, of the time needed to prepare those copies for [you] and [you] would be informed of that."

You contend that "[t]his description of the process seemed at odds" with guidance that was offered during a telephone conversation with you. Assuming that your description of the process is accurate, it is, in my view, "at odds" with the requirements imposed by 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, whether a request is made in person or by mail. 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 in writing 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 a written 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 sent to the District Clerk and the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ms. Zampino, District Clerk
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO-3869
FOIL-AO-14897

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September 13, 2004

Mrs. Rose Mary Warren
[redacted]

The staff of the Committee on 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. Warren:

I have received your letter and the materials relating to it. As I understand your comments, they involve the contents of minutes of meetings of the Lewiston Town Board and delays by the Town in responding to your requests for records.

In this regard, first, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during meetings, technically, I do not believe that minutes must be prepared.

Second, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting." I note, too, that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, 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, when records are requested pursuant to the Freedom of Information Law, that law provides direction concerning the time within which an agency musts respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Hon. Carol J. Brandon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-19898

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September 13, 2004

Ms. Carolyn Zolas
Sierra Club-Atlantic Chapter
Lower Hudson Watershed Committee
60 Knolls Crescent #1M
Bronx, NY 10468

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Zolas:

I have received your letter memorandum and the materials attached to it.

The matter involves a request made pursuant to the Freedom of Information Law to the New York City Department of Environmental Conservation (DEP) for:

> "1. Copies of all Malcolm Pirnie Engineers' reports with respect to the Delaware Leak in Newburgh and under the Hudson River, submitted to DEP since the year 2000.
>
> 2. Results of Malcolm Pirnie geological boring texts near the town of Roseton, New York, performed in 2003."

In response, DEP granted access to 2,100 pages of material. Portions of the records were withheld, in brief, on the basis of §87(2)(g), (f) and (b) of the Freedom of Information Law. The denial of access as it involved the assertion of §87(2)(b) concerned names and addresses of owners of real property, and you wrote that you have no objection to that aspect of the denial. Your "main concern", however, relates to the results of certain tests that were "highly publicized" by DEP and a statement by DEP's Commissioner that tests indicated that the "Delaware leaks" do not constitute, in you words, "a current danger." If that is so, you "do not see how releasing this information would jeopardize security."

In this regard, I am unaware of the contents or the effects of disclosing the materials that have been withheld. That being so, the following remarks will focus generally on the authority of the DEP to assert paragraphs (g) and (f) of §87(2) of 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 prepared by agency staff for internal agency use, or by a consultant for an agency, would constitute "intra-agency materials" that fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

It is my understanding that the reports prepared by Malcolm Pirnie Engineers were prepared in that firm's role as a consultant. In a discussion of the issue of records drafted 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.

A recommendation or opinion prepared by agency staff or by an agency's consultant may in my view be withheld unless it is expressly adopted by an agency's decision maker as his or her final determination; in that instance, I believe that it would serve as a final agency determination accessible under §87(2)(g)(iii) (see e.g., Miller v. Hewlett-Woodmere Union Free School District #14, Supreme Court, Nassau County, NYLJ, May 16, 1990). If no such declaration is made, the opinion or recommendation may be withheld.

As you suggested, portions of the materials to which access was denied that consist of statistical or factual information must be disclosed under §87(2)(g)(i), unless a different exception to rights of access may properly be asserted.

One such provision is §87(2)(f), which permits an agency to withhold records or portions thereof which if disclosed "could endanger the life or safety of any person." I note that that provision as it existed for some twenty-five years authorized an agency to deny access insofar as disclosure "would" endanger the life or safety of any person. For purposes of clarification and to reflect judicial findings, the law was amended by replacing "would" with "could." Prior to the amendment, in citing §87(2)(f), it had been found that:

> "This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner's assertion that respondents are required to prove that a danger to a person's life or safety will occur if the information is made public (see, *Matter of Nalo v. Sullivan*, 125 AD2d 311, 312, *lv* denied 69 NY2d 612). Rather, there need only be a possibility that such information would endanger the lives or safety of individuals...."[Stronza v. Hoke, 148 AD2d 900,901 (1989)].

It is noted that the principle enunciated in Stronza has appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Division of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994.] Additionally, it was determined in American Broadcasting Companies, Inc. v. Siebert that when disclosure could "expose applicants and their families to danger to life or safety", §87(2)(f) was properly asserted [442 NYS2d 855, 859 (1981)].

Again, I am unaware of the extent to which DEP has relied on §87(2)(f). However, the more extensive previous announcements or disclosures have been relative to the subject of your interest, the less, in my view, would be DEP's ability to properly assert that exception. Here I note that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals more than decade ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City,

62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was found that:

> "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).

To communicate my views on the matter, copies of this opinion will be forwarded to the DEP.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robin M. Levine
Joshua Fine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14699

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September 13, 2004

E-MAIL

TO: Joseph F. Riberdy [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. Riberdy:

I have received your letter in which you wrote that "30 days have expired since initiating a FOIL request to Cohoes city hall verifying a name and contracting agency as written on a building permit." Since you received a response indicating that "they don't know", you asked whether "this is acceptable."

Although I am not sure that I fully understand the situation, it is emphasized that the Freedom of Information Law requires that government agencies respond to and disclose existing records to the extent required by that law. The Freedom of Information Law does not require an agency to "verify" a name on a record. If that is what you sought to do, it suggested that you request a record directly, i.e., a building permit associated with a particular parcel.

When a proper request is made, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of assistance.

RJF:tt

cc: City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14900

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September 13, 2004

Ms. Cara L. Matthews
The Journal News
One 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 facts presented in your correspondence.

Dear Ms. Matthews:

As you are aware, I have received your letter and the correspondence attached to it. In brief, the materials state that on April 5, 2002 you requested invoices and other documentation indicating Putnam County's expenditures for "outside attorneys and law firms" from 1997 to the present. As of the date of your letter to this office, you had not received a response.

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)].

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, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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)].

Perhaps most pertinent 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 an attorney or law firm retained by a municipality may engage in a privileged relationship with a municipal client and that records prepared in

conjunction with such 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)]. 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. 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 sum, in accordance with the preceding commentary, I believe that the County is obliged to disclose invoices, bills and similar documentation indicating its expenditures for outside counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Carl Lodes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14901

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September 14, 2004

Mr. Antonio Wilson
02-A-0001
Five Points Correctional Facility
P.O. Box 119
Romulus, NY 14541

Dear Mr. Wilson:

I have received your letter in which you appealed a denial of a request for records made to Mr. Daniel Rudansky in Sag Harbor.

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 person or agency to grant or deny access to records. Further, this office does not have possession of the records of your interest.

For future reference, the provision in the Freedom of Information Law dealing with 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."

Lastly, it is unclear whether the Freedom of Information Law would apply. That statute pertains to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" as follows:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, if Mr. Rudansky is an official of an agency, such as a village, a town or a county, an appeal could be made pursuant to §89(4)(a) of the Freedom of Information Law to the head or governing body of the agency. However, if Mr. Rudansky is a court officer or perhaps a private attorney, the Freedom of Information Law would not apply. If he is a court officer, I note that other provisions of law often grant rights of access to court records (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a).

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-19902

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September 14, 2004

Mr. Pernell Wilson
#8950401349
Rikers Island Jail
18-18 Hazen Street
East Elmhurst, NY 11370

Dear Mr. Wilson:

I have received your letter in which you requested "copies of and all information pertaining to DRL Section 236, Part-B-Subds. 1 and Article 4 of the Family Court Act." You cited the federal Freedom of Information and Privacy Acts, as well as the New York Freedom of Information Law as the basis for the request, and you asked that fees for copies be waived.

In this regard, the Committee on Open Government is authorized to provide advice and opinions relating to the New York Freedom of Information Law. The Committee does not function as a library. Further, the federal acts that you cited apply only to federal agencies; they do not apply in this instance. I note, too, that although the federal Freedom of Information Act includes provisions concerning the waiver of fees, no similar provision is contained in the New York Freedom of Information Law, and it has been held that an agency subject to that statute may charge its established fee, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

Lastly, I have made inquiry of a law library on your behalf and learned that the materials of your interest encompass more than 500 pages. If you seek copies of that volume of material under the Freedom of Information Law, the fee would exceed one hundred dollars. It is suggested, therefore, that you attempt to review the materials of your interest through the services of your facility librarian.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-14903

From: Robert Freeman
To: townclk@warwick.net
Date: 9/14/2004 9:34:44 AM
Subject: Dear Ms. Lavinski:

Dear Ms. Lavinski:

I have received your note in which you asked how long you must "keep records available for someone to come in and review." You indicated that you would like to ask the individual to "finish his review so [you] could file these documents back."

In this regard, there is no provision of law that directly addresses the issue. However, in similar situations, it has been advised that the person should be contacted, preferably in writing, and informed that his or her request will be considered to have been withdrawn if he or she does not either pick up copies that have been requested or review records that have been retrieved for inspection by a certain date. In my view, that deadline date should be reasonable, i.e., a week or two from the time of receipt of the notification.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14904

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 14, 2004

Ms. Sharon D. 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 Ms. Collins:

I have received your letter and the correspondence attached to it. You referred to an appeal made under the Freedom of Information to the Allegany County Administrator that had not been answered, and you sought guidance on the matter.

In this regard, I offer the following comments.

First, based on your appeal to the County Administrator, the response to your initial request indicated that the records sought "are not maintained...in the form requested." Later in the appeal you referred to requests for "listings" of "trainings" mandated or offered to certain employees of particular County agencies and training dates. I would conjecture that your use of the term "listings" is at the root of the problem that you encountered. 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. In the context of your situation, if there are no "listings" that contain the information of your interest, the County would not be required to create listings or new records on your behalf. In the future, rather than seeking a "listing", unless it is clear that such a record exists, it is suggested that you seek existing records or portions of records, i.e., those that contain invitations or directives to employees to attend certain areas of training, and the dates that training sessions occurred, within a specified time period.

Second, and in a related vein, since the County did not deny access to existing records, but rather indicated that it does not maintain records in the form requested, your letter might not have been viewed as a valid appeal. Based on the language of §89(4)(a) of the Freedom of Information Law concerning the right to appeal, an appeal may be made when an agency maintains records and chooses to withhold them. That appears not to be so in this instance. That provision 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."

If a proper appeal is made following a denial of access to records and the agency fails to determine the appeal within the statutory time, it has been held that the appeal may be deemed to have been denied and that the person denied access may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)].

Lastly, a search of our files indicates that neither your appeal nor any determination thereon was sent to this office.

I hope that the foregoing serves to provide clarification and guidance and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Margeson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14905

41 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 15, 2004

Mr. Bill Freda
[redacted]

Dear Mr. Freda:

I have received your letter of September 11 concerning a request made under the Freedom of Information Law to the Village of Valley Stream and in which you requested from this office a copy of correspondence sent to this office relating to your appeal of March 22.

In this regard, having searched our files for the months of March, April and May, we were unable to locate any correspondence concerning your appeal.

It appears that the Village has not responded to either your request or your appeal in a timely fashion. As you are aware, 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. Although guidance was offered in previous correspondence with you, it is reiterated that §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal

> fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be sent to the 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-14906

41 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 15, 2004

Mr. William R. Werner
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Werner:

I have received your letter and the materials attached to it. In brief, you complained with respect to delays by the Orange County Sheriff's Office in responding to requests for records made under 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..."

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, since one of the responses to a request indicated that you would have one hour during a particular day to inspect records, I point out that it has been advised by this office and held judicially that an agency cannot limit the ability of the public to inspect records to a period less than its regular business hours. By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

Section 1401.2 of the regulations, provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so..."

Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Relevant to the matter is a decision rendered by the Appellate Division, Second Department. Among the issues was the validity of a limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating in part that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents

> can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Based on the foregoing, an agency, in my view, cannot limit your ability to inspect records to a period less than its regular business hours.

I do not believe, however, that a member of the public may designate the date or dates on which he or she seeks to review records. If, for instance, records will be in use by staff on a particular date or during a particular period of time, an agency would not, in my view, be required to alter its schedule or work plan. In that instance, the agency could offer a series of dates to the person seeking to inspect the records in order that he or she could choose a date suitable to both parties.

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 Sheriff's office.

I hope that have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Captain Dennis D. Barry

From: Teshanna Tefft
To: jwhong@stargazette.com
Date: 9/20/2004 4:38:26 PM
Subject: Dear Mr. Whong:

Dear Mr. Whong:

I have received your inquiry concerning National Guard units.

In this regard, first, while it is not my intent to be overly technical, I note that the Freedom of Information Law does not require that government agency officials answer questions. Similarly, §89(3) of the law provides in part that an agency is not required to create a record in response to a request. For instance, if no records exist indicating the average distance that members of a unit must drive in order to report in the event of an emergency, there would be no obligation on the part of the DMNA or any other agency to acquire information for the purpose of preparing a new record on your behalf. In short, the Freedom of Inforamtion Law pertains to existing records, and requests should be made for records that include the kinds of items of your interest.

Second, as a general matter, the Freedom of Information Law is based on a presumption of access. Stated differently, all agency records are accessible, except those records or portions thereof that fall within one or more of the exceptions to rights of access appearing in §87(2).

I believe that records indicating the number of enlisted persons or officers within a unit would clearly be available, for none of the exceptions to rights of access would apply. The extent to which records describing an agency's equipment must be disclosed would, in my view, be based on the nature of the equipment. A general hospital unit has equipment different from an artillery unit. In either instance, I believe that much of the content of records describing a unit's equipment would be public. Only to the extent that disclosure "could endanger the life or safety of any person" would portions of records be deniable [see §87(2)(f)]; other aspects of the records would be accessible. Lastly, if indeed there is a record indicating the average distance members must travel to report, I believe that it would be public. From my perspective, an agency could not meet the burden of proving that disclosure would in some way "endanger" life or safety.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518
Website: http://www.dos.state.ny.us/coog/coogwww.html

From: Robert Freeman
To: Maryjo@edenny.org
Date: 9/20/2004 3:56:07 PM
Subject: Dear Ms. Hultquist:

Dear Ms. Hultquist:

I have received your note in which you asked whether "salaries of non-elected officials (appointed) [must] be released under foil."

In this regard, the salaries of all public employees, whether elected, appointed or civil service, must be disclosed. Section 87(3)(b) of the Freedom of Information Law specifies that each agency "shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency."

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-14909

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 21, 2004

Mr. Kenneth Warren
[redacted]

The staff of the Committee 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. Warren:

As you are aware, I have received your letter, as well as other materials relating to your efforts in gaining access to materials of the State Education Department and the Executive Chamber.

Having discussed your requests with Paul Tighe, records access officer for the State Education Department, it appears, in short, that the Department has made available to you all of the records falling within the scope of your requests that could be located that are required to be disclosed pursuant to the Freedom of Information Law. In an effort to offer clarification, however, I offer the following comments.

First, a key issue involves the extent to which your requests "reasonably describe" the records as required by §89(3) of the Freedom of Information Law. The Court of Appeals, the state's highest court, 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 requests, as well as the nature of an agency's filing of record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the Education Department, to the extent that the records sought can be located with reasonable effort, I believe that the requests would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the requests would not in my opinion meet the standard reasonably describing the records. By means of example, elements of your requests include documents reviewed by certain persons, including "email, fax, letter or phone call..." Although I maintain a telephone log briefly identifying those who call this office and those that I contact by phone, the log is chronological, not alphabetical or retrievable by name, and it includes approximately seven thousand entries annually. If you had contacted this office and asked for entries pertaining to your calls, to locate them, I would have to review thousands of entries, one by one. In that kind of situation, a request would not "reasonably describe" the records, and I would conjecture that some aspects of your requests would not meet the standard of reasonably describing the records sought.

In a related vein, some aspects of your requests in my view involve an interpretation of law or a judgment, rather than a request for records. For instance, you sought rules, regulations or procedures "dealing with employees of the State of New York and the State Education Department in particular in submitting requests for payment for hours worked/time cards/pay vouchers/payroll records." While various records might readily be found that fall within the scope of the request, ascertaining which others might deal with such employee requests would likely involve subjective judgments, 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 deal with a certain activity would involve an attempt to render a judgment regarding the use, utility, accuracy or value of records. As in the case of locating "applicable law", equally reasonable people, even those within the same agency, may reach different conclusions regarding which records tend to deal with that activity.

Second, in the event of a denial of access, you asked that the Department "specify the exemptions claimed for each page or passage", as well as "the date and number of pages in each document." In short, the Department is not obliged to do so, for 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, the judicial construction of the Freedom of Information Law suggests that the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

Lastly, you requested various records prepared by Joseph Porter related to certain determinations made concerning allegations of misconduct. In this regard, although the Freedom of Information Law is based on a presumption of access, the initial ground for denial of access, §87(2)(a), is likely pertinent. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute." Mr. Porter is an attorney for the Department, and it appears that the records sought consist of his work product. If that is so, I believe that they would be exempted from disclosure under §3101(c) of the Civil Practice Law and Rules, which renders attorney work product exempt from disclosure.

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: Paul Tighe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1490

41 State Street, Albany, New York 12231
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September 22, 2004

Ms. Kristina Wells
Times Herald-Records
1170 Route 17M
Suite 2
Chester, NY 10918

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Wells:

I have received your note and the correspondence relating to it concerning a request made pursuant to the Freedom of Information Law on February 19 for records of the State Education Department. The records sought involve "summary reports" prepared on the basis of "Violent and Disruptive Incident Reports" (VADIR) since 2000 relative to named school districts in Orange, Ulster and Sullivan Counties.

In response to your request, you received two letters acknowledging its receipt, both of which are dated February 25. The first indicated that "you will hear from the Department by approximately March 10, 2004"; the second stated that additional time would be needed and that the Department "anticipate[d] providing you with the records requested within 30-60 days." Because you received no further response, you contacted the Department on three occasions in June. You received a call on July 5 in which you were informed that the Department's records access officer, Paul Tighe, would contact you. He did not, and you left a message for him. Mr. Tighe later called and informed you that he was "no longer in charge of this" and suggested that you direct your inquiries to Alan Ray. You did so and received a call from Jonathan Burman, who said that he would be dealing with the issue, and that the Department had "never done this before." Thereafter, you contacted Mr. Burman "at least once a week" during the month of August, and he informed you on September 2 that "they're still working on it." Considering that your request had been denied, you appealed the denial to Commissioner Mills on September 7. As of today, you have received no further response.

From my perspective, the delay in disclosure is unreasonable and inconsistent with law, particularly in consideration of provisions in the Education Law pertaining to the records of your interest. In this regard, I offer the following comments.

By way of background, §2802 of the Education Law, which was enacted and became effective in 2000, pertains to the "uniform violent incident reporting system." Subdivision (2) of §2802 requires the Commissioner of Education to establish such a system "which public school districts...shall follow", and subdivision (3) requires public school districts "to annually report to the commissioner in a form and by a date prescribed by the commissioner" several specified factual items "concerning violent and disruptive incidents that occurred in the prior school year...." Subdivision (4) states that:

> "The commissioner shall require a summary of such information to be included, in a form prescribed by the commissioner, in the school district report cards or board of cooperative educational services report cards required by this chapter."

Your request involves those summaries. As indicated above, the summaries must be transmitted to the Commissioner by every school district annually on a form prescribed by the Commissioner, and they must be included in school district report cards required by law to be prepared. In short, you have requested records that must exist to comply with law.

With respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The records sought do not include names or other personally identifying details. I believe however, that they fall within one of the exceptions, §87(2)(g). While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure, and, in my view, that is clearly so in this instance. Specifically, §87(2)(g) 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.

Based on the direction provided in §2802 of the Education Law, the records sought consist of factual information that must be made available to public pursuant to subparagraph (i) of §87(2)(g).

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)].

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."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if, as in this instance, 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, I point out that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the State Education Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Alan Ray
Paul Tighe
Kathy Ahearn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1491

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September 22, 2004

E-Mail

TO: Anthony Mancuso

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. Mancuso:

I have received your letter in which you indicated that your requests made to the Monroe County Department of Social Services have been ignored.

In this regard, I note at the outset that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency, such as a county, designate one or more person as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and a request should generally be made to that person. While I believe that the person or persons in receipt of your requests should have responded to you in a manner consistent with law or forwarded your requests to the records access officer, it is suggested that you resubmit your request to the records access officer.

I am unaware of the identity of the records access officer. Therefore, it is recommended that you contact the office of either the County Executive or the County Attorney in an effort to ascertain the identity of the records access officer designated to deal with requests for records of the Department of Social Services.

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.

RJF:jm

FOIL-AO-14912

From: Robert Freeman
To: LocalNet Email
Date: 9/23/2004 4:51:15 PM
Subject: Re: FOIL

The quick answer is that c of o's and inspection reports, including violations, are generally available. Blueprints usually will be as well, unless they are so unique that the fall within the "trade secret" exception. That provision authorizes a denial of access when disclosure would "cause substantial injury to the competitive position of a commercial enterprise." If it's my house, which is just like the one down the street, the plans would be public. Again, if it's a unique structure, the answer may be different. If it's the bank or the federal building and the plans show the security or alarm systems, a different exception authorizes a denial to the extent that disclosure "could endanger the life or safety of any person."

I hope that this helps.
Bob

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-14913

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 24, 2004

Ms. Carrie L. Pena
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Pena:

I have received your letter in which you referred to the acknowledgment of the receipt of a request made under the Freedom of Information Law and a delay in determining rights of access beyond the date indicated in the acknowledgment. If a month has passed beyond that day, you asked whether the agency has constructively denied access.

From my perspective, the agency's failure to grant or deny access in the situation that you described would constitute a constructive denial of a request.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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 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, as in this instance, 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-14914

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September 24, 2004

E-Mail

TO: Patty Smicinski

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. Smicinski:

I have received your inquiry in which you asked whether records maintained by a PTA must be disclosed.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, is applicable to agency records. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, an agency generally is a governmental entity.

While the PTA may be associated with a school district, it is not a governmental entity. Consequently, it would not be required by the Freedom of Information Law to disclose its records. It is suggested, however, that you review the bylaws or internal rules of the PTA to ascertain whether there may be some independent disclosure requirements.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 27, 2004

Ms. Catherine Marks
[redacted]

The staff of the Committee on 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. Marks:

I have received copies of your correspondence and other materials pertaining to your efforts in obtaining information from the Department of Housing Preservation and Development. 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 agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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, an element of your request involved a "rent history from the 1970's to 2004." Although you were provided with a rent history for the past four years, you apparently did not receive earlier records falling within the scope of the request. In this regard, it is possible that recent records may be relatively easy to locate, while those that are older may be stored differently or off site and may be difficult to locate and retrieve. In that instance, pertinent is the requirement in §89(3) of the Freedom of Information Law stating that an applicant must "reasonably describe" the records sought. Whether or the extent to which a request meets that standard often is dependent upon the nature of an agency's filing or recordkeeping systems. If records can be located and identified with reasonable effort, irrespective of their volume, I believe that a request would reasonably describe the records. On the other hand, if locating the records involves a search of hundreds or perhaps thousands of records individually, a request, in my view, would not meet the standard imposed by the law.

Lastly, in one aspect of your request, you asked that the agency "explain the legality" of destroying a certain record. In my opinion, that does not involve a request for a record. Although the agency could choose to provide an answer or explanation, I do not believe that the Freedom of Information Law would require that it must do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-14916

From: Robert Freeman
To: info@cancerresearchamerica.org
Date: 9/28/2004 8:56:05 AM
Subject: Dear Dr. Coleman:

Dear Dr. Coleman:

I have received your inquiry concerning the possibility that New York has enacted an "open records law covering non government agencies."

In short, there is no such statute. As a general matter, this state's Freedom of Information Law applies to governmental entities. However, that statute includes all government agency records within its scope, irrespective of their origin or function. When a not-for-profit or private entity has a relationship with government, i.e., through funding, grants or contracts, the government maintains records pertaining to that entity that are subject to rights of access conferred by the Freedom of Information Law. Similarly, correspondence between a private entity and a government agency fall within the coverage of that statute.

I hope that I have been of assistance. Should you have questions regarding the foregoing, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
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FOIL-AO-14917

From: Robert Freeman
To: Dan Martin CPA
Date: 9/28/2004 9:35:37 AM
Subject: Re: Dear Mr. Martin:

I apologize. We did receive the documents by fax from you yesterday, but I was out of the office for most of the day and did not know that they arrived.

In short, it is has long been held that communications between a municipal official or board and an attorney acting in his or her capacity as an attorney for the official or the board fall within the attorney-client privilege and may be withheld from an adversary or the public. Similarly, the work product of an attorney is exempt from disclosure pursuant to §3101(c) of the Civil Practice Law and Rules. A settlement agreement or similar document in which a government agency is a party, however, should ordinarily be accessible to the public under the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3872
FOIL-AO- 14918

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 28, 2004

Ms. Stephanie Bucalo
[redacted]

The staff of the Committee on 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. Bucalo:

I have received your letter in which you raised a series of issues relating to the means by which the Shelter Island Union Free School District and its Board of Education conducted meetings, took certain action, and filled a vacancy on the Board.

More specifically, you wrote that, citing "personnel" as the basis, the Board conducted an executive session during a meeting on July 6 and later announced that it would hire an interim superintendent. Later during the same meeting, a member announced her resignation, and the Board soon after began the process of seeking a new member to be appointed to the vacant position. As I understand your comments, those interested in the vacancy on the Board were interviewed during an executive session and a decision concerning the appointment was apparently made in private and announced later during an open meeting. You also wrote that the names of those interviewed were withheld by the District.

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 <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

When a discussion concerns matters of policy, such as the manner in which public money 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. In the context of your remarks, I believe that consideration of whether to retain an interim superintendent should have been discussed in public; only when the discussion focused on a particular individual or individuals who might be hired would an executive session have been proper.

It has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Second, with respect to the process of filling a vacancy in an elective office, the only provision that might justify the holding of an executive session would have been §105(1)(f), which was cited earlier. Under its terms, it would appear that a discussion focusing on individual candidates or interviews could validly have occurred in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. In determining that an executive session could not properly have been held, the court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994), modified on other grounds, 207 AD 2d 55 (1994)].

Based on the foregoing, notwithstanding its language, the court in Gordon held that §105(1)(f) could not be asserted to conduct an executive session. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above. Whether other courts would uniformly concur with the finding enunciated in that passage is conjectural. However,

since it is the only decision that has dealt squarely with the issue at hand, I believe that it is appropriate to consider Gordon as an influential precedent.

Third, although §89(7) of the Freedom of Information Law states that the name of an applicant for appointment to public employment need not be disclosed, a person interested in filling a vacancy in an elective office would not have applied for employment. That being so, I do not believe that provision could be asserted to withhold the names of those interviewed to fill the vacant position on the Board. On the contrary, in view of the direction offered by the court in Gordon, it is clear in my view that the names of those persons should have been disclosed by the District to comply with the Freedom of Information Law.

Lastly, based on judicial decisions, a board of education may not take action in any forum other than an open meeting. As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote.

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student. None of those circumstances would appear to relevant in the context of the information that you provided.

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-14919

41 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 29, 2004

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 letters of August 17 and August 18 concerning requests for records directed to the Village of Ossining. Although I believe that I have addressed the issues that you have raised in other contexts in previous responses to you, I will reiterate them here.

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, in brief, whether a request "reasonably describes" the record sought as required by §89(3) of the Freedom of Information Law is frequently dependent on an agency's filing or retrieval system. When records can be found with reasonable effort, despite their volume, I believe that a request would meet that standard. On the other hand, if records sought can be found only by means of a search of hundreds or thousands of records, one by one, the request in my view would not reasonably describe the records, despite what may be precision or specificity in seeking the record.

Lastly, 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 been disposed of or destroyed, the Freedom of Information Law would not apply. An exception to that rule relates to the "subject matter list." Specifically, §87(3) 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. 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 Village. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard A. Leins
Mary Ann Roberts

FOIL-AO-14920

From: Robert Freeman
To: [redacted]
Date: 9/29/2004 11:32:21 AM
Subject: Dear Mr. Adler:

Dear Mr. Adler:

I have received your inquiry.

The records access officer for the Long Island State Parks Water Safety Office is the records access officer for the Office of Parks, Recreation and Historic Preservation. A request may be made to Thomas McCarthy, Records Access Officer, Office of Parks, Recreation and Historic Preservation, Agency Building 1, Empire State Plaza, Albany, NY 12238.

Although an agency may require that request for records be made in writing pursuant to §89(3) of the Freedom of Information Law, that statute does not require that any particular form be used or submitted. In short, any request made in writing that "reasonably describes" the record sought should be sufficient. Therefore, when seeking records, the request should include detail sufficient to enable agency staff to locate and identify the record or records of interest.

A sample letter of request is included our basic guide to the Freedom of Information Law, "Your Right to Know", which is available on our website.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14921

41 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 29, 2004

E-Mail

TO: Mr. E. Bernstein

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. Bernstein:

As you are aware, I have received your inquiry concerning rights of access to both sides of checks "written by a municipality in payment of goods or services, or pursuant to court order..." You indicated that your municipality "claims that the account number on the reverse side is protected..."

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.

Insofar as a check includes a personal account number, I believe that §87(2)(b) is pertinent. That provision 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 to withhold a personal account number.

When the account number relates to a municipality or a commercial entity, for example, 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 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 electronic information or electronic information systems, I believe that it may justifiably be withheld.

Lastly when a check may be used or deposited by an individual, the back of the check indicating an endorsement could, based on a judicial decision, be withheld. In Minerva v. Village of Valley Stream (Sup. Ct., Nassau Cty., August 20, 1981), the issue involved a request for copies of both sides of cancelled checks made payable to a municipality's attorney. Although the court held that the front sides of the checks, those portions indicating the amount paid to the attorney, must be disclosed, it was found that the backs of the checks could be withheld, for disclosure might indicate how the attorney "spends his 'paychecks.'"

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14922

41 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 29, 2004

E-Mail

TO: Joseph Iacuzzi

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. Iacuzzi:

As you are aware, I have received your letter in which you asked whether certain kinds of records involving a school district would be accessible to the public under the Freedom of Information Law. In brief, the records of interest include a contract between a school district and a company retained to manage the district's "self insured medical health plan", any addenda that materially affect the contract, "any terms and conditions that influence the amount of money that the district pays" for services rendered, and the "actual amount of money paid to the administrative company for the services they perform."

In this regard, first, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no single record indicating the total amount paid by the district to the company, the district would not be required to prepare a new record containing a total in order to comply with the Freedom of Information Law. To avoid that kind of pitfall, it is suggested that a request be made for records or portions thereof that indicate payments made by the district to the company. If there is more than one such record, you, as the recipient, could review the records and prepare a total on your own.

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, a contract between a government agency, such as a school district, and a company providing goods or services is clearly accessible, for none of the grounds for denial of access would apply. The same conclusion would be reached, in my opinion, with respect to other records that you described, insofar as any such records exist.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14923

41 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 4, 2004

Mr. John Liere
[redacted]

Dear Mr. Liere:

I have received your letter in which you appealed a denial of access to records that you requested from the Town of Brookhaven.

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 to compel an agency, such as the Town, to grant or deny access to records. If you would like an advisory opinion, please so inform me.

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 note that the bottom of the Town's application for public access to records indicates that you have the right to appeal to the Town Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-14924

From: Robert Freeman
Date: 10/4/2004 9:28:07 AM
Subject: Dear Mr. DeStefano:

Dear Mr. DeStefano:

I have received your letter and offer the following suggestions.

First, the regulations promulgated by this office require that each agency, such as a town, designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records. In the great majority of towns, the town clerk is the records access officer. By law, the clerk is the custodian of all town records and the town's records management officer. I recommend that you contact the town clerk to ascertain whether he/she or a person other than the supervisor is the records access officer. If the clerk is the records access officer, requests for records should be made to him/her.

Second, when a request is denied in whole or in part, the applicant has the right to appeal the denial. In the case of a town, the appeal would be made to the town board or a person or body designated by the town board. The appeal must be determined within ten business days of its receipt and must either grant access to the records or fully explain in writing the reasons for further denial.

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-14925

From: Janet Mercer
To: Alicia M. Nemec
Subject: Re: FOIL request

Dear Ms. Nemec:

I have received your request in which you asked what recourse you might have when a Freedom of Information Law request has been ignored.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it 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.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14926

41 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 4, 2004

Mr. Thang Thanh Nguyen
98-B-1975
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. Nguyen:

I have received your letter and the attached appeal directed to the Irondequoit Police Department. The appeal indicates that your request "need not be honored" and that you should refer your request to the attorney who represented you.

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,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1927

41 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 6, 2004

Mr. Brandon Washington
04-B-1434
Wende Correctional Facility
P.O. Box 1187
Alden, NY 14004

Dear Mr. Washington:

I have received a copy of your request for an agency's "subject matter list" as it pertains to an investigation in which you were involved.

In this regard, it appears that you may misunderstand the nature of the subject matter list and its contents. The provision of the Freedom of Information Law relevant to the issue is §87(3)(c), which states that each agency shall maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

Based on the foregoing, a subject matter list should include reference, in reasonable detail, to the categories of record maintained by an agency. There is no requirement that a subject matter list be created with respect to records concerning a particular individual, incident or investigation.

In short, while an agency is required to maintain a subject matter list concerning the kinds of records that it maintains, it would not, in my opinion, be obligated to prepare a subject matter list pertaining solely to you or a particular investigation or arrest.

I hope that the foregoing has served to clarify the Freedom of Information Law regarding the content of a subject matter list 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-14928

41 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 6, 2004

Mr. Carl T. Morgan
03-R-5493
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-311

Dear Mr. Morgan:

I have received your letter in which you contended that the Division of Criminal Justice Services' reply to your request for records is "in excess of the time allowed by statute..." The response, which acknowledged receipt of your request, indicated that you could expect a "formal response...in approximately 45 days."

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

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: Valerie Friedlander

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14929

41 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 6, 2004

Mr. Chris Caesar
[redacted]

Dear Mr. Caesar:

I have received a copy of your request directed to the New York City Transit Authority and offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states that an agency is not required to create a record in response to a request. From my perspective, insofar as the records sought exist, they must be disclosed to you to comply with law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could be asserted to withhold existing records falling within the scope of your request.

Second, I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records. I am unaware of whether the person to whom you addressed your request is the records access officer. Nevertheless, I believe that he would obliged either to respond directly to you in a manner consistent with law or forward your request to the records access officer.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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: Kevin Hyland

FOIL-AO - 14930

From: Robert Freeman
To: info@medicallicensinggroup.com
Date: 10/6/2004 10:34:15 AM
Subject: Dear Ms. Williams:

Dear Ms. Williams:

I have received your request for a mailing list of physicians who are not licensed in New York, but who have sought applications for licenses or are in the "licensure process."

In this regard, first, this office, the Committee on Open Government, is authorized to provide advice and opinions concerning the state's Freedom of Information Law. The Committee does not have possession or control of records. As a general matter, requests should be made to the "records access officer" at the agency that maintains the records of interest. In this instance, the State Education Department is the licensing agency, and a request may be made to the records access officer at that agency.

Second, the Freedom of Information Law pertains to existing records. That being so, I do not believe that an agency is required to honor a request that is prospective in nature or ongoing. Further, if, for example, there is no list of applicants or those in the licensure process, the Education Department would not be required to prepare such a list on your behalf.

And third, the law contains a series of examples of unwarranted invasions of personal privacy that authorize agencies to deny access. One of the examples enables an agency to deny access to a list of names and addresses if the list would be used for commercial or fund-raising purposes.

I hope that the foregoing serves to clarify your understanding 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-14931

41 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 6, 2004

Mr. Richard Rivera
82-B-0892
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. Rivera:

I have received your letter in which you indicated that you are attempting to seek documents from the NYS Department of Correctional Services relating "dispensed tobacco products" from 1980 to 1986. You have asked "how [you] can get more information on the matter."

In this regard, it would appear that since the records are two decades old, they would have been destroyed in accordance with a schedule established by the Commissioner of Education that permitted the disposal of those kinds of records after they existed for a particular period of time. If my assumptions are accurate, the destruction of any records would have been legal and carried out in accordance with law.

I also point out that the Freedom of Information pertains to existing records. Section 89(3) of that statutes provides in part that an agency is not required to prepare a record that is not maintained by the agency in response to a request. In short, if the records in question do not exist, the Freedom of Information Law would not apply.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14932

41 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 6, 2004

Mr. Patrick Burns
Rensselaer County Jail
4000 Main Street
Troy, NY 12180

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Burns:

I have received your letter which you asked if you are "entitled to a list of all lawsuits filed against the North Greenbush Police Department and copies of police procedures for (1) providing medical care for an injured suspect, (2) police procedure for 'custodial interrogation' of an injured suspect while they are receiving medical care, (3) a list of officers who have been charged with procedural abuses."

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, there is no "list" of lawsuits, the Town would not be obliged to prepare a list to satisfy your request.

Second, to the extent that your request involves existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In consideration of your request, several of the grounds for denial may be pertinent to an analysis of rights of access, and 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.

There is no question but that police procedures and personnel records 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.

Also of potential significance is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations of judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Perhaps most relevant in the context of your request would be §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a

> specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the techniques or procedures contained in the records sought could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

The other provision of possible significance as a basis for denial is §87(2)(f). Again, that provision permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." As suggested with respect to the other exceptions, I believe that the Department is required to review the documentation at issue to determine which portions fall within this or the other exceptions.

Next, the first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)].

As such, I believe that the records of your interest pertaining to police officers would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

Lastly, if a list of lawsuits exists, I believe that it would be available, for none of the grounds for denial of access would apply. I note, too, that although the courts are not subject to the Freedom of Information Law, copies of court records in possession of the Town fall within the coverage of that statute and generally would be accessible.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 6, 2004

Mr. Julio Arce
92-A-9982
Clinton Correctional Facility
Box 2001
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Arce:

I have received your letters in which you sought assistance in obtaining records pertaining to your case from the New York City Police Department. You also indicated that your requests have not been answered.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated by the Department to determine appeals is Jonathan David.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of all of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records falling within the scope of your request, relevant is a decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or

determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been

> photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NY2d 54, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 6, 2004

Mr. Allen Valerio
03-A-0441
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. Valerio:

I have received your letter in which you complained that you did not receive a response to your request from the New York City Police Department in a timely manner. You also indicated that you were denied access to certain records because the request was duplicative of your previous request. However, you stated that the request was completely different from your earlier request, and you appealed the denial to Jonathan David. As of the date of your letter to this office, the appeal had not been answered.

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..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 is suggested that you resubmit your request to the Lt. Michael Pascucci explaining that the request is different from previous requests. In an effort to inform the Department of your contention, copies of this opinion will be forwarded to the Department.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Lt. Michael Pascucci
Jonathan David

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 6, 2004

Mr. William Sawyer
01-A-1325
Bare Hill Correctional Facility
Caller Box 20
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sawyer:

I have received your correspondence in which you indicated that you have submitted requests for records under the federal Freedom of Information Act to the Queens County District Attorney, the Clerk of the Supreme Court of Queens County and the U.S. Attorney for the Eastern District. You indicated that your requests have either been ignored or acknowledged and then ignored.

In this regard, I offer the following comments.

First, it is noted that the federal Freedom of Information Act pertains only to federal agencies, such as the Office of United States Attorney for the Eastern District. Since the Committee on Open Government is responsible for providing advice concerning access to government records of state and local agencies in New York, primarily under the state's Freedom of Information Law, this office cannot advise with respect to your request to a federal agency.

Second, with regard to your request to the Clerk of the Supreme Court, it is emphasized that 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., 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.

Lastly, with respect to your unanswered requests directed to the Queens County District Attorney's Office, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 6, 2004

[redacted]

Dear [redacted]

As you are aware, I have received a variety of material from your attorney, Michael Bobseine. The primary issue discussed with him and later with you involves the propriety of a police department maintaining a variety of information pertaining to you and others, even when incidents do not result in an arrest or perhaps any action taken at all. Specifically, Mr. Bobseine wrote that:

> "What interests me about this information is that it provides a record of nearly every interaction [redacted] has had with the Village of Fredonia Police. The 'interactions' include incidents wherein Mr. [redacted] was charged with a violation or a crime (as I might have expected), but also more. The information includes times wherein [redacted] is termed a 'suspect' as well as time when [redacted] made a call to the department to report a problem or concern. These entries appear to go back to 1994 and 1995. I would assume that they could go back further in other people's cases depending on the age of the system and when the person had an 'interaction' with the police. Chief Myers indicated such in a telephone conversation that I had with him. When I asked him to check my records, for example, he asked me who [redacted] is. [redacted] is my youngest son (now 16) who is in the police record system because I reported his bike stolen several years ago.
>
> "I know that the police are given leeway respecting information about people and events, but I find this system and the information maintained therein disturbing. While [redacted] for example, has some criminal history, the fact that he is maintained in the system for such things as telephone calls to the police department to complain or report an incident or as a 'suspect' in a now closed case or cases raises concerns."

Following the receipt of his letter, I telephoned Mr. Bobseine. Later, I expressed essentially the same points in my conversation with you. You asked that I confirm those remarks in writing, and in this regard, I offer the following comments.

First, the statute with which this office deals is the New York Freedom of Information Law. The Committee was created as part of that law, and our function involves providing advice and opinions relating to the law to any person. In brief, the Freedom of Information Law provides public rights of access to records maintained by or for government agencies in New York. It is based on a presumption of access and states that all agency records are accessible to the public, except those records or portions or records that may justifiably be withheld pursuant to paragraphs (a) through (i) of §87(2) of the law.

Second, neither the Freedom of Information Law nor any other law of which I am aware, with certain exceptions, focuses on the ability of municipal law enforcement agencies to collect, acquire or share information. The exceptions in which that may not be so would involve instances in which a statute other than the Freedom of Information Law specifies that certain records cannot be disclosed. For instance, when a person is charged with a criminal offense and the charge is dismissed in his or her favor, the records typically are sealed pursuant to §160.50 of the Criminal Procedure Law. If a juvenile is arrested, police records concerning the arrest and disposition are confidential under §784 of the Family Court Act. In most other instances, again, there is no law that deals with the ability of an agency to collect, acquire or share records.

In a related vein, the Freedom of Information Law is permissive. Stated differently, the Freedom of Information Law authorizes an agency to disclose records, even though the records *may* be withheld in accordance with an exception to rights of access. Again, the only situations in which agencies *must* withhold records would involve the application of other statutes that forbid disclosure.

Third, lawsuits were initiated years ago that resulted in the issuance of orders by courts to end certain agencies' practice of maintaining what some called "non-criminal intelligence files" (see e.g., Handschu v. Special Services Division, 787 F.2d 828). In most instances, those files related to protesters, i.e., in relation to Viet Nam, the civil rights movement, etc. Those orders, however, pertained to particular agencies and their practices; they were not applicable to all police departments or law enforcement agencies.

Lastly, if you believe that the practices of police departments in your area are improper or unjustified, it is suggested that contact your state legislators. Since there is no law that generally deals with the practices described, you might express the belief that consideration should be given to the enactment of such provisions.

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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October 6, 2004

E-MAIL

TO: John Springer

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. Springer:

As you are aware, I have received your letter concerning the practices of the Board of Trustees of the Village of Port Jefferson. Specifically, you questioned the propriety of motions for entry into executive session describing the subjects as "litigation", "personnel" or "contracts". Additionally, you asked whether minutes of meetings must indicate "how each member of the public body voted."

In this regard, the Open Meetings Law, §105(1), 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.

The provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner

consistent with the description of the general intent of the grounds for entry into executive session suggested in my remarks in the preceding paragraph, i.e., that they are intended to enable public bodies to avoid some sort of identifiable harm. For instance, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public 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 the Board discusses its litigation strategy may an executive session be properly held under §105(1)(d).

With respect to the adequacy 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, 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 <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. 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 and held judicially that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

The Appellate Division has confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

Finally in relation to the Open Meetings Law, the only direct reference in the Open Meetings Law to "contracts" 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.

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 police union."

Lastly, with regard to votes by members of the Board, I direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3)], such as a municipal board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually 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)].

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be sent to the Board of Trustees.

I hope that I have been of assistance.

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14938

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October 6, 2004

Mr. Wayne Smith
00-A-3369
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. Smith:

I have received your letter in which you asked for assistance with respect to the acquisition of a variety of records relating to your case from the 79th Precinct in Brooklyn.

In this regard, I offer the following comments.

First, it is noted that a request for records of the 79th Precinct should be directed to Lt. Michael Pascucci, Records Access Officer, New York City Police Department, FOIL Unit, One Police Plaza, New York, NY 10038. The records access officer has the duty of coordinating an agency's response to requests.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of all of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records falling within the scope of your request, relevant is a decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested

material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 653 NY2d 54, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14939

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October 6, 2004

Mr. Richard White
93-A-8498
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. White:

I have received your letter in which you asked for assistance in obtaining statements made by witnesses to the Nassau County District Attorney's Office and the Nassau County Police Department.

In this regard, I offer the following comments.

First, the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], which involved a request made to the office of a district attorney, may be pertinent to the matter. In Moore, it was found that:

> "while statements of the petitioner, his codefendants and witnesses obtained by the respondent in the course of preparing a criminal case for trial are generally exempt from disclosure under FOIL (see *Matter of Knight v. Gold*, 53 AD2d 694, *appeal dismissed* 43 NY2d 841), once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" (id., 679).

Based on the foregoing, insofar as witnesses' statements are submitted into evidence or disclosed by means of a public judicial proceeding, I believe that they must be disclosed.

On the other hand, if witness statements have not been previously disclosed, two grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As a general

matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes may be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO - 14940

From: Robert Freeman
To: April Mitzman
Date: 10/7/2004 9:41:25 AM
Subject: Re: He's baaaaaaaaaaack

Hi - -

What we receive in the nature of FOIL requests is beyond our control. Clearly they reflect the sanity of the senders, and, for better or worse, they may affect the sanity of the recipients.

With respect to the District's response, as you are likely aware, FOIL pertains to existing records, and §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. Therefore, if, for example, there is no record that contains the information sought, the District would not be required to prepare a new record containing the information sought.

Insofar as records exist that may fall within the scope of the request, of likely relevance is §87(2)(g) concerning internal communications between and among government officers and employees, so-called "inter-agency" or "intra-agency" materials. In brief, those kinds of communications may be withheld to the extent that they consist of advice, opinion, recommendation, suggestion and the like. The intent of that exception, according to the Court of Appeals, is to enable government officers and employees to engage in a deliberative process without an obligation to disclose. However, §87(2)(g) also requires that final agency policies or determinations must be disclosed. If, for instance, the decision maker clearly adopts a recommendation, the recommendation would become the determination and would be accessible.

I hope that this helps. If you'd like to discuss the matter further, please feel free to call.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 7, 2004

Mr. Richard Atkins
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Atkins:

I have received your letter and the materials attached to it. You have sought an opinion concerning the deletion of portions of a bill indicating expenses incurred by an official of the City of Oswego during a stay at a hotel. Specifically, telephone numbers called were deleted, and it is you view that the numbers called should be accessible, and that the cost of those calls should be reimbursed to the City. The City Attorney cited §89(2)(b)(iv) and (v) of the Freedom of Information Law to justify the denial of access to the phone numbers. Those provisions indicate that an agency may withhold records or portions of records when disclosure would constitute "an unwarranted invasion of personal privacy" and that such unwarranted invasions of privacy 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 this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The pertinent provisions under the circumstances are, as suggested by the City Attorney, §§87(2)(b) and 89(2)(b), both of which pertain to the ability to deny access when disclosure would constitute an unwarranted invasion of personal privacy. Based on the judicial interpretation of the

Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

With regard to telephone bills, based on the decisions cited above, when a public officer or employee uses a telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's 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 officer or employee.

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended by some that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call. Nevertheless, when phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call. Therefore, an indication of the phone number would ordinarily disclose 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.

Significant in my opinion is the direction provided in the State Comptroller's travel manual, which states that "Only telephone charges for official state business may be reimbursed." That rule is, in my opinion, consistent with the preceding commentary. When a public officer or employee is in travel status and he or she uses a telephone, in order to be reimbursed for a telephone call, the call must be made in performance of that person's duties. In that circumstance, the record relating to the call, including the phone number, is in my view relevant to the performance of that person's duties, and in addition, it would relevant to the work of the agency that he or she serves, for the agency would bear the cost only when the call involves government business. That being so, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal

privacy. On the other hand, when a public officer or employee reimburses an agency for the cost of telephone calls because those calls are personal and irrelevant to that person's work or the work of the agency, the phone numbers called may, in my opinion, be justifiably deleted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Edward J. Izyk
Hon. John J. Gosek
Hon. Jeanne Berlin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14942

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October 7, 2004

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 if you "can obtain copies of correctional employee disciplinary records."

In this regard, I offer the following comments.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners'

Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered earlier this year reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady , 93 NY2d 145, 156- 157 (1999)].

If the person in question is a correction officer, I believe that the records of your interest would be exempt from disclosure pursuant to §50-a of the Civil Rights Law.

If the employee is not a correction officer, I believe that the Freedom of Information Law would be the governing statute, and that final determinations reflective of findings of misconduct would be available. Pertinent to an analysis of rights of access would be two of the grounds for denial.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138

AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Insofar as a request involves final agency determinations, I believe that those determinations must be disclosed, again, unless a different ground for denial could be asserted.

In terms of the judicial interpretation of the Freedom of Information Law, in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In contrast, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

In sum, if the person who is the subject of your inquiry is a correction officer, I believe that §50-a of the Civil Rights Law would govern, and that a court order would be needed to obtain the

records. If, however, that person is not a correction officer, the Freedom of Information Law would govern, and the records would be accessible to the extent described above.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO-14943

From: Robert Freeman
To: dpozin@wkgj.com
Date: 10/7/2004 3:21:35 PM
Subject: Dear Mr. Pozin:

Dear Mr. Pozin:

I have received your inquiry and do not recall having prepared any advisory opinion concerning "disclosure of transcripts of a 50-h hearing under the General Municipal Law." However, having reviewed that statute, I note that subdivision (3) states in part that: "The transcript of the record of an examination shall not be subject to or available for public inspection, except upon court order upon good cause shown, but shall be furnished to the claimant or his attorney upon request."

In consideration of the foregoing, I believe that a transcript of a "50-h hearing" would be exempt from disclosure under the Freedom of Information Law, §87(2)(a).

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
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FOIL-AO-14944

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 13, 2004

Mr. Sean Rourke
02-A-1018
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. Rourke:

I have received your letter in which it appears that you contend that you did not receive a response to your request from the New York City Police Department in a timely manner. You also indicated that you were denied access to certain records because the request was duplicative of a previous request. However, you stated that the request was completely different from your earlier request, and you appealed the denial to Jonathan David.

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..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 is suggested that you resubmit your request to the Lt. Michael Pascucci, the Department's records access officer, explaining that the request involves records different from those sought in previous requests. In an effort to inform the Department of your contention, copies of this opinion will be forwarded to Department officials.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Lt. Michael Pascucci
Jonathan David

STATE OF NEW YORK
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October 13, 2004

Mr. Jeremy Boyer
Managing Editor
The Citizen
25 Dill 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. Boyer:

I have received your letter and the materials attached to it. You have sought an advisory opinion relating to a request made under the Freedom of Information Law to the City of Auburn. The request involved "any written agreements between the city and Eileen Iannone." The City Manager denied access on the ground that disclosure would constitute "an unwarranted invasion of privacy relative to a former employee."

Although both you and the City Manager referred to an advisory opinion prepared in relation to a similar matter and reached different conclusions, I believe that the thrust of judicial decisions is clear and that any such agreements, like other contracts between government agencies and persons or entities, are accessible under the Freedom of Information Law. In this regard, I offer the following comments.

First and significantly, the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the state's highest court, the Court of Appeals, twenty-five years ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have carte blanche to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for in camera inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material

> requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In another decision, 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,67 NY2d 562, 565-566 (1986)].

Second, as the judicial decisions cited above make clear, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While it appears that two of the grounds for denial of access are pertinent to an analysis of rights of access, neither, in my view, would appear to justify withholding the records.

Assuming that any such agreements were reached while the former employee was still an employee of the City, I believe that they would constitute "intra-agency" materials that fall within §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. Specifically, it 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.

An agreement, by its nature, is final and serves as a final agency determination reflective of the terms and conditions of a relationship between an individual in this instance and the City. That being so, it would be accessible under subparagraph (iii) of §87(2)(g), unless a different exception to rights of access can properly be asserted.

If the individual was not an agency employee when the agreements were reached, §87(2)(g) would not apply, for she would not have been part of or associated with an "agency" [see definition of "agency" §86(3)].

The remaining exception that is relevant in ascertaining rights of access was referenced by the City Manager. Sections 87(2)(b) and 89(2)(b) authorize agencies to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

I note that instances have arisen in which agreements or settlements have included provisions requiring confidentiality. Those kinds of agreements have uniformly been struck down and found to be inconsistent with the Freedom of Information Law. In short, it has been held that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In 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 benefitted by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education' s right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

Moreover, it is clear that those who serve or who have served as 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 employee'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); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

In two relatively recent decisions rendered by the Appellate Division, the facts appear to have been similar to those that you presented, for they involved persons who left their employment with municipalities in accordance with the terms of agreements with those municipalities. In both instances, it was determined that the agreements were accessible under the Freedom of Information Law. One case involved an agreement concerning a separation from employment that contained a "confidentiality clause" [Village of Brockport v. Calandra 745 NYS2d 662 (2002); affirmed, 305 AD2d 1030 (2003)], and it was determined that the agreement was accessible, and that the confidentiality clause "offends public policy" and "cannot stand" (id., 668). The other dealt with a situation in which a municipality disclosed a settlement agreement with a public employee that included provisions regarding confidentiality and was sued for breach of contract as a result of the disclosure. The municipality contended that disclosure was required by the Freedom of Information Law, and the court agreed, stating that none of the exceptions to rights of access applied [Hansen v. Town of Wallkill, 270 AD2d 390 (2000)].

Based on the direction and weight of the judicial decisions cited and described in the preceding commentary, I believe that the records sought must be disclosed to comply with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Timothy C. Lattimore
John L. Salamone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14946

41 State Street, Albany, New York 12231
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October 13, 2004

Mr. Thomas McRae
03-R-1654
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. McRae:

I have received your letter in which you complained that you did not receive a response to your request for records made to your correctional facility. You indicated that you appealed to Counsel at the Department of Correctional Services, but that as of the date of your letter to this office, the appeal had not been answered.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14947

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 13, 2004

Mr. Robert C. Paul
93-B-1210
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. Paul:

I have received your letter in which you complained that you did not receive responses to your requests for records directed to the Inmate Record Coordinator at Great Meadow Correctional Facility.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14948

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 14, 2004

Mr. Ramzan Ali
97-A-1989
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

Dear Mr. Ali:

I have received your request for certain legal material that was, according to your letter, "created and used by the NYS Division of Parole."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning rights of access to government records, primarily under the Freedom of Information Law. The Committee does not maintain possession of records generally or acquire records on behalf of applicants. In short, I cannot make the material of your interest available because this office does not have it.

When seeking records, a request should be made to the "records access officer" at the agency that maintains the records of interest. The records access officer has the duty of coordinating an agency's response to requests. Assuming that the records in question are maintained by the Division of Parole, a request should be made to the records access officer at the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-14949

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 14, 2004

Mr. Joseph M. Jones
02-B-1183
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. Jones:

I have received your letter in which you complained that you have encountered difficulty in obtaining various records from the Irondequoit Police Department. You indicated that you were denied access because all of the records had previously been disclosed 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 hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Captain Mark Bonsignore

FOIL-AO - 14950

From: Robert Freeman
To: Fina Del Principio
Date: 10/15/2004 1:44:22 PM
Subject: Sorry for the phone tag - had a question: if someone isseeking information re: accident

Hi - -

I spoke to one of your colleagues yesterday and advised that accident reports have been available since the early 1940's under §66-a of the Public Officers Law, and that the Court of Appeals has held that they're available to anyone. The only portions of accident reports that may be withheld would involve instances in which disclosure would interfere with a criminal proceeding.

If you need more information, don't hesitate to contact me.

Enjoy the weekend.
Roberto

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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October 18, 2004

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 referred to "a list of outstanding foil requests..."

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Marc Prentice
Peter Loomis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14952

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October 18, 2004

Ms. Frances Genovese, President
Association of South Hampton Neighborhoods
P.O. Box 724
Southampton, NY 11969

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Genovese:

I have received your letter and apologize for the delay in response.

You referred to a new policy adopted by the Building Inspector of the Town of Southampton under which those seeking to inspect records must show their drivers' licenses as a condition precedent to viewing Building Department records. Following my criticism of the policy, you were apparently told that neither myself nor the Committee on Open Government has "statutory authority over the Town..."

While it is true that the advice and opinions offered by this office are not binding on an agency, the Committee is designated by statute to perform that function [see Freedom of Information Law, Public Officers Law, §89(1)], and it is our hope that so doing enhances compliance with and understanding of the Freedom of Information Law.

In an effort to achieve that goal, I note initially that it was held soon after its enactment that when records are accessible under the Freedom of Information Law, they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or

need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records is, in my opinion, irrelevant.

In short, I do not believe that a town official may condition disclosure on furnishing proof of identity, for one's identity ordinarily has no bearing on rights of access.

From my perspective, the only instance in which an agency may require proof of one's identity would involve a situation in which only the person seeking records would have rights of access to the records sought. If, for example, a record includes intimate or personal information the disclosure of which would constitute "an unwarranted invasion of personal privacy", that information may be withheld from the general public [see §89(2)(b)]. However, when it is requested by the subject of the record, that person can not invade his or her own privacy and ordinarily would enjoy rights of access, "upon presenting reasonable prof of identity" [see §89(2)(c)].

Lastly, I do not believe that the head of the Building Department has the authority, on his own initiative, to establish the policy at issue. The Town Board, as the governing body of a municipality, has overall responsibility for ensuring compliance with and implementation of the Freedom of Information Law. Further, pursuant to the regulations promulgated by the Committee, which have the force and effect of law, the Town's designated records access officer has the duty of coordinating the Town's response to requests for records [see 21 NYCRR §1401.2]. I believe that the Town Clerk is the records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. Marietta Seaman, Town Clerk
Michael Benincasa
Kathleen Murray

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1953

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October 18, 2004

Ms. Lynn A. Eckardt
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Ms. Eckhardt:

I have received your letter in which you questioned the propriety of the inclusion of the following addendum that appeared on a form created by the Town of Southeast to be signed by those seeking records pursuant to the Freedom of Information Law:

> "I also guarantee that the information received will not be used for commercial, political or fund-raising purposes."

In this regard, it is noted at the outset that I spoke with Ruth Mazzei, the Town Clerk, concerning the matter and that she assured me that the form would be revised so that it is fully consistent with the Freedom of Information Law. Nevertheless, to provide clarity, 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, as a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not

> confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

The provision quoted above represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. However, due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, 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.

Lastly, although §89(3) of the Freedom of Information Law authorizes an agency to require that a request be made in writing, it makes no reference to a form that must be used. That being so, it has been advised that any written request that reasonably describes the record sought should suffice.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Ruth Mazzei

STATE OF NEW YORK
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October 18, 2004

Ms. Dorothy M. Borgus
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

The staff of the Committee on 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. Borgus:

I have received your letter in which you sought an advisory opinion concerning a denial of access by the Town of Chili to bills relating to cell phones owned by the Town and used by its officers or employees. The Town Clerk wrote that you are "not legally entitled to personal records of calls made by cell phone #'s."

In my view, the denial of access may be inconsistent with law. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The pertinent provisions under the circumstances are §§87(2)(b) and 89(2)(b), both of which involve the ability to deny access when disclosure would constitute an unwarranted invasion of personal privacy. Based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v.

NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

With regard to telephone bills, based on the decisions cited above, when a public officer or employee uses a telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's duties. The amount of time that a public employee spends on the phone, whether for official business or otherwise, clearly relates to that person's duties and the expenditure of public monies. That being so, 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 officer or employee.

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended by some that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call. Nevertheless, when phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call. Therefore, an indication of the phone number would ordinarily disclose 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.

Significant in my opinion is the direction provided in the State Comptroller's travel manual, which states that "Only telephone charges for official state business may be reimbursed." That rule is, in my opinion, consistent with the preceding commentary. When a public officer or employee is in travel status and he or she uses a telephone, in order to be reimbursed for a telephone call, the call must be made in performance of that person's duties. In that circumstance, the record relating to the call, including the phone number, is in my view relevant to the performance of that person's duties, and in addition, it would be relevant to the work of the agency that he or she serves, for the agency would bear the cost only when the call involves government business. That being so, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. On the other hand, when a public officer or employee reimburses an agency for the cost of telephone calls because those calls are personal and irrelevant to that person's work or the work of the agency, the phone numbers called may, in my opinion, be justifiably deleted.

The foregoing is not intended to suggest that the numbers appearing on a phone bill relating to one's duties must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to contact recipients of public assistance or persons seeking certain health services. It has been advised in the past that if a government employee contacts those classes of persons as part of the employee's ongoing and routine duties, there may be grounds for withholding phone numbers listed on a bill. For instance, disclosure of numbers called by a caseworker who phones applicants for or recipients of public assistance might identify those who were

contacted. In my view, the numbers could likely be deleted in that circumstance to protect against an unwarranted invasion of personal privacy due to the status of those contacted, i.e., as recipients of public assistance or persons having particular health problems or issues.

Similarly, in the case of phone bills reflective of calls made by law enforcement officials, depending upon an official's function and how an official uses a phone, there may be grounds for withholding the numbers on a bill. If a phone is frequently or routinely used in connection with criminal investigations, disclosure of numbers called could permit an applicant for the bills to ascertain the course of an investigation, identify witnesses or even confidential informants. When that is so, I believe that appropriate deletions (i.e., the numbers called) could be made on the ground that disclosure would constitute an unwarranted invasion of personal privacy and/or endanger the lives or safety of law enforcement personnel and perhaps others who might be identified by means of a phone number appearing on a bill. In that latter situation involving the possibility of endangerment, §87(2)(f) of the Freedom of Information Law would serve as a basis for denial.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Richard Brongo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 20, 2004

Mr. Matt LaFera
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. LaFera:

As you are aware, I have received your letter in which you raised a series of questions concerning your ability to obtain records from the Glens Falls Police Department that relate to complaints to which the police responded at a particular address during the past two years. In consideration of your questions, I offer the following comments.

First, as you may know, the regulations promulgated by the Committee on Open Government require that each agency, such as a City, designate one or more persons as "records access officer" (21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests. I believe that the records access officer for the City of Glens Falls is the City Clerk. It is suggested that you contact his office to ascertain whether he serves as records officer for each unit within City government, or whether the Police Department has its own records access officer.

Second, there is no requirement that a person seeking records under the Freedom of Information Law indicate the reason for the request. 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.

Third, an issue of potential significance involves the manner in which the Police Department maintains and retrieves its records and, therefore, your ability to "reasonably describe" the records of your interest as required by §89(3) of the Freedom of Information Law. It has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the City, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. If the records of your interest can be retrieved by means of a street address, they might be easily found. If, however, they are kept chronologically and locating them would involve a record by record search covering a period of two years, the Department in my view would not be required

to engage in that degree of effort, for a request, in that instance, absent reference to certain dates, would not likely meet the standard of reasonably describing the records.

Lastly, assuming that the records can be found with reasonable effort, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 consider 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. Further, when there is a complaint and

to engage in that degree of effort, for a request, in that circumstance, absent reference to certain dates, would not likely meet the standard of reasonably describing the records.

Lastly, assuming that the records can be found with reasonable effort, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 consider the provisions that may be significant in determining rights of access to the records in question.

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It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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. Further, when there is a complaint and

a police officer arrives at the scene and makes no arrest, as in the case of a domestic dispute in which no action is taken, the record regarding the incident may in most instances, in my opinion, be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

I note, too, that when a person is charged with a criminal offense and the charge is later dismissed in favor of that person, the records relating to the matter ordinarily become sealed pursuant to §160.50 of the Criminal Procedure Law. When that occurs the records are exempted from disclosure under the Freedom of Information Law, §87(2)(a).

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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COMMITTEE ON OPEN GOVERNMENT

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October 20, 2004

Mr. Aaron Pino
8750401211
A.R.D.C. C.74
11-11 Hazen Street
East Elmhurst, NY 11370

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pino:

I have received your letter in which you complained that your attempts to acquire a memorandum regarding the interview of a witness from the Queens County District Attorney's Office have been unsuccessful.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, relevant under the circumstances is §87(2)(g). That provision enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Based on the foregoing, when internal memoranda include expressions of opinion, recommendations and the like expressed by agency staff, those portions clearly can be withheld. Reference to comments by others, however, would not, according to the decision, be protected by §87(2)(g). It is emphasized, however, that other grounds for denial of access might apply. For instance, §87(2)(b) would appear to be pertinent. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy" and may be relevant in relation to the identity of a witness or other personal information concerning that person.

Additionally, §87(2)(f) authorizes an agency to deny access to records insofar as disclosure could "endanger the life or safety of any person."

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14957

41 State Street, Albany, New York 12231
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October 20, 2004

Ms. Chloe Wasserman
Brooklyn Public Library
Grand Army Plaza
Brooklyn, NY 11238

The staff of the Committee on 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. Wasserman:

I have received your letter of August 4 in which you sought an advisory opinion concerning the status of the Brooklyn Public Library ("BPL") under the Freedom of Information Law. As you are aware, your letter as originally sent did not reach this office, and I hope that you will accept my apologies for the delay.

According to your letter, "BPL was incorporated pursuant to Chapter 606 of the Laws of 1902...and is a private not-for-profit corporation registered as a 501(c)(3) corporation by the Internal Revenue Service." You added, however, that "[w]hile the Library is a private corporation, by law its Board of Trustees consists entirely of 25 government appointees, including the Mayor of the City of New York, the Brooklyn Borough President and the Comptroller of the City of New York as *ex officio* members" and that the Mayor and the Borough President each appoint eleven members.

Based on judicial decisions that have consistently construed the Freedom of Information Law expansively, I believe that the BPL, despite its corporate status, is subject to the requirements of that statute. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agencies and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In consideration of the foregoing, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York.

Although not-for-profit corporations typically are not governmental entities and, therefore, fall beyond the scope of the Freedom of Information Law, the courts have found that the incorporation status of those entities is, alone, not determinative of their coverage under that law. Rather, they have considered the extent to which there is governmental control over those corporations, as well as their functions, in determining whether they fall within the scope of the Freedom of Information Law.

In the first such decision, Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the issue involved access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In another decision rendered by the Court of Appeals, Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court found that a not-for-profit corporation, based on its relationship with an agency, the City of Buffalo 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.
>
> "...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).

More recently, in a case involving the City of Canandaigua and a not-for-profit corporation, the "CRDC", the court found that:'

> "...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.
>
> "...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...[Canandaigua Messenger, Inc. v. Wharmby, Supreme Court, Ontario County, May 11, 2001, affirmed 292 AD2d 835 (2002)].

I note that the Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing.

In this instance, because New York City government officials have complete control over the membership of the BPL's Board of Directors, and since ninety percent of its budget is obtained

from the City and State, I believe that the BPL constitutes an "agency" required to comply with the Freedom of Information Law.

By way of contrast, I point out that the Metropolitan Museum of Art was recently found to be outside the coverage of the Freedom of Information Law. In considering its statute in relation to that status, the court found that:

> "....the City does not control the Museum's Board or management...While five City officials serve as ex officio trustees on the Museum's Board of Trustees, the Board consists of up to 40 trustees who are self-elected, and the City has no authority to hire or fire the Museum's Director or President. (Id.) The City's operating and capital budgets are now largely privately funded (see id. at ¶23), and are not subject to government approval. Nor, however important its cultural purpose, does the Museum perform services that have been recognized as a governmental function.
>
> "On these facts, the Museum does not qualify as an 'agency' for FOIL purposes. (Compare Matter of Buffalo News, Inc. V. Buffalo Enterp. Dev. Corp., 84 NY2d 488, 490 [1994][holding FOIL applicable to local development corporation which was defined by N-PCL 1411 [a] as not-for-profit corporation 'performing an essential governmental function', and which had budget subject to public review and significant representation by City officials on its Board of Directors] with Lugo v. Scenic Hudson, Inc., 258 Ad2d 626 [2d Dept 1999][holding FOIL inapplicable to not-for-profit corporation which had self-governed Board of Directors, operating budget not subject to government approval, and primarily private funding].)
>
> "Finally, as the Museum is not controlled by elected or other public officials, there is no danger that they may act through the Museum as means of shielding their actions from public scrutiny. Thus, FOIL's important purpose of promoting open government and providing the public with access to governmental records (see Matter of Buffalo News, 84 NY2d at 492) is not implicated (Metropolitan Museum Historic District Corporation v. Philippe De Montebello, Supreme Court, New York County, May 14, 2004)."

In short, in view of the absence of those attributes found by the court in Metropolitan Museum to be necessary to conclude that an entity is subject to the Freedom of Information Law, and the presence of those attributes in the case of the BPL, it is clear in my opinion that a court would find that the BPL is required to give effect to that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14958

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October 21, 2004

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 facts presented in your correspondence.

Dear Mr. Reiter:

I have received your letter and the correspondence attached to it. You have asked whether Trans Union, a credit reporting agency, must disclose certain records to you. You requested the records on the basis of the federal Freedom of Information and Privacy Acts.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government is the New York Freedom of Information Law, which applies to agency records. Section 86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law of New York is generally applicable to state and local government entities; it does not apply to a private entity, such as Trans Union.

While I am not an expert with respect to the federal laws to which you referred in your requests, I am familiar with them, and it is my understanding that they apply only to federal government agencies. If that is so, Trans Union would not be subject to either the federal Freedom of Information or Privacy Acts. There is, however, a federal law dealing with credit reporting agencies, the Fair Credit Reporting Act. It is suggested that you review that statute and obtain related explanatory material to aid you in ascertaining your rights.

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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October 21, 2004

Mr. Robert Zafonte
East Meadow Civic &
Community Service Association
P.O. Box 49
East Meadow, NY 11554

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Zafonte:

I have received your letter and the materials attached to it.

You have raised three questions, the first two of which are as follows:

> "1. Can the East Meadow School District prepare a new document summarizing in their own words from the official documents?
>
> 2. Must the East Meadow School District provide the official documents redacted to an appropriate legal extent?"

From my perspective, the answer to the second can essentially serve as a response to the first. That is that the Freedom of Information Law pertains to rights of access to existing records. When a request is made for existing records, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language in §87(2) refers to an agency's authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. The phrase quoted in the preceding sentence indicates that the Legislature recognized that a single record or report may contain information available to the public, as well as information that may justifiably be withheld. It also imposes an obligation on an agency to review records sought, in their entirety, to determine the extent, if any, to which they may be withheld, and to disclose the remainder of the records.

In consideration of the direction provided in the law, I do not believe that an agency may substitute a new record summarizing the contents of the actual records requested in lieu of providing the actual records "or portions thereof", unless the person seeking the records consents to such an arrangement.

Your third question is whether a certain request is sufficiently "definitive" to meet the requirements of the Freedom of Information Law. I believe that I considered that issue in my response to you of August 19. To reiterate, the law does not require that records be requested with specificity; rather, §89(3) requires that an applicant "reasonably describe" the records sought. It was also advised that whether or the extent to which a request meets that standard may be dependent on the nature of an agency's filing or recordkeeping system. When records can be located and retrieved with reasonable effort based on the terms of the request and consideration of an agency's filing system, a request would, in my opinion, reasonably describe the records as required by law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Leon J. Campo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1419(60

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October 21, 2004

Mr. Anthony Bennett
96-B-1530
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bennett:

I have received your correspondence in which you complained that you have been unsuccessful in your efforts to obtain your deceased mother's medical records. You indicated that your father has signed a release which authorizes you to obtain the medical records.

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, with respect to medical records, 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 subject's estate."

If your father is a "qualified person" and has passed his rights of access on to you, I believe that the medical records of your interest should be made available to you. To obtain additional information regarding access to patient information, it is suggested that you contact Mr. Peter Farr, NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

Enclosed is a copy of §18 of the Public Health Law.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

Janet M. Mercer

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

Enc.

FOIL-AO-1479(01

From: Robert Freeman
To: MULLEN, VICTORIA
Date: 10/25/2004 8:26:37 AM
Subject: RE:

Very simply, a union contract, like any other contract in which the Town is a party, would be accessible under the Freedom of Information Law because none of the grounds for denial of access would apply. Not only is it "ok" for you to provide a copy of contract; the law requires that you do so.

Hope that this helps.
Bob

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14962

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 25, 2004

Ms. Edith Pashley
County of Fulton
1 East Montgomery Street
Johnstown, NY 12095-2534

The staff of the Committee on 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. Pashley:

I have received your letter concerning rights of access to certain records under the Freedom of Information Law. The matter involves access to "disqualification letters that [you] sent to an eligible on a civil service list and the material that [you] relied upon to disqualify that person..."

According to your letter, you "disqualified an eligible from a civil service list for a public safety position based on the person's documented and admitted unauthorized intrusions into an adjacent county's 911 system." You provided the eligible "with a written notice that outlined the reasons that [you] proposed to disqualify him from further certification from the civil service list, provided him with an opportunity to object", and "used a detailed investigative report prepared by administrative staff from the Sheriff's Department as well as the eligible's own signed Miranda statement as substantiation/documentation for the disqualification." Despite having received an opportunity to object to his disqualification or the reasons for seeking to do so, the eligible "failed to respond with any objection" and his name was "removed...from further certification from the eligible list."

Although an opinion was given to you by phone that the records in question would be accessible "because [you] had substantiation of the allegations against the eligible", you asked that I confirm that opinion in writing. 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 appears that three of the grounds for denial of access are pertinent to an analysis of the matter. None of them, however, would appear to justify such a denial.

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 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].

A second ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Insofar as a request involves a final agency determination, I believe that such a determination must be disclosed, again, unless a different ground for denial could be asserted.

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in a public employee is the subject of a written reprimand, disciplinary action, findings or admission that a public employee has engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those employees [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In a decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

> "...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

The court also referred to contentions involving privacy as follows:

> "Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

> "This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted

> invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (*Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

As the foregoing relates to the facts that you presented, the acceptance by eligible to the reasons for his disqualification by virtue of his silence, his failure to object, in my view would constitute an admission of misconduct. That being so, I believe that the disqualification constitutes a final agency determination accessible under paragraph (iii) of §87(2)(g), and that disclosure of such admission would result in a permissible rather than an unwarranted invasion of personal privacy.

The remaining exception of possible significance, §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 my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e). If my understanding of the situation is accurate, there will be no prosecution or other judicial proceeding. If that is so, §87(2)(e) would not serve as a basis for a denial of access.

Lastly, it is emphasized that the Freedom of Information Law is permissive. In other words, while that statute authorizes an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are not mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

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-14963

41 State Street, Albany, New York 12231
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October 25, 2004

Mr. Leon F. Henry
Reg. No. 11456-052
F.C.I. Elkton
P.O. Box 10
Lisbon, OH 44432

Dear Mr. Henry:

I have received your letter in which you requested from this office "information relating to Notice of Acceptance of Jurisdiction relating to land located in Oneida and Jefferson County owned by the United States."

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 over records generally, and it is not empowered to obtain records on behalf of individuals. In short, I cannot provide the information of your interest, because this office does not maintain it.

When seeking records under the Freedom of Information Law, a request should be directed to the "records access officer" at the agency that maintains the records sought. The records access officer has the duty of coordinating an agency's response to requests for records. Additionally, since you raised a question in an attempt to obtain information, I note that the Freedom of Information Law pertains to requests for records; it does not require that agencies supply information in response to questions.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and the functions of this office.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14964

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 26, 2004

Mr. Darwin J. Fifield, Sr.
04-B-0814
Groveland Correctional Facility
7000 Sonyea Road
Sonyea, NY 14556-0001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fifield:

I have received your letter in which you complained that you have not received responses to requests or appeals directed to the Lockport City Court Clerk, the Lockport Police Department, the Niagara County Jail or the Niagara County District Attorney's Office.

In this regard, with respect to your request directed to the Lockport City Court Clerk, 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.

With respect to your other requests, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14965

41 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 26, 2004

Mr. T. Loper
99-A-0853
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. Loper:

I have received your letter in which you stated that you are encountering difficulty in obtaining copies of "gallery audio/video" tapes of a particular incident that occurred at your correctional facility. Having reviewed the correspondence attached to your letter, it appears that you were informed that "there was no incident on the date in question, therefore, no audio, no tape was preserved."

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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14906

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 26, 2004

Mr. Samuel S. Yasgur
Sullivan County Attorney
100 North Street, P.O. Box 5012
Monticello, NY 12701

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Yasgur:

As you are aware, I have received your letter in which you raised a series of issues and sought an advisory opinion concerning the propriety of certain elements of a proposed agreement between Sullivan County and Pictometry International Corporation. In brief, under the agreement, Pictometry would generate and provide the County with aerial photographs in "a proprietary digital format." Pictometry would "own the images and the software and would license the County to use them."

You raised questions concerning Schedule B of the proposed agreement as its terms relate to the Freedom of Information Law. Schedule B would provide as follows:

> "'1. All Licensed Images provided pursuant to this License Agreement are and shall remain the property of Pictometry International Corp.
>
> '2. Any reproductions of the Licensed Images using the Licensed Software, or reproduction of the Licensed Images in any form by any other means by Licensee or an Authorized Subdivision thereof, shall be for internal use or use by a consultant to the Licensee or an Authorized Subdivision thereof, unless a fee is collected as follows:
>
> > 'A. All hard copy(printed) copies of Images shall be sold for a minimum of $40 per Image, 50% of the fee charged shall be remitted by the Licensee or the Authorized Subdivision thereof to Pictometry International Corp. In accordance with the License Agreement. However, any fees for additional

> Licensee work on the Images, e.g. annotations, measurements, etc., shall be retained in full by Licensee.
>
> 'B. All digital or electronic copies of the Images shall be sold for a minimum fee of $50 per Image for professional or commercial uses and for a minimum fee of $20 per Image for private or personal uses, 50% of the fee charged shall be remitted by the Licensee or the Authorized Subdivision thereof to Pictometry International Corp. in accordance with the License Agreement. However, any fees for additional Licensee work on the Images shall be retained in full by the Licensee. The digital or electronic images sold by the Licensee under this License shall be Electronic Photo Images without Pictometry data.'"

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 of an agency, such as a county, and §86(4) defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, it is clear in my opinion that photographs generated for and provided to the County would constitute agency records that fall within the coverage of the Freedom of Information Law. As soon as those records are prepared for or in possession of the County, I believe that the County, not Pictometry, would "own" them and that they would be County "property."

I note as an aside that Article 57-A of the Arts and Cultural Affairs Law, the "Local Government Records Law", deals with records management and the custody, retention and disposal of local government records. Section 57.17(4) also defines the term "record" expansively, for it states that:

> "'Record' means any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents

> created only for convenience of reference, and stocks of publications."

As I understand §57.17, the photographs at issue would constitute "records" subject to the requirements of Article 57-A.

It is emphasized that the Court of Appeals has construed the definition of "record" for the purposes of the Freedom of Information Law 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). I believe that to be so in the context of the situation that you described, that photographs produced for the County constitute "records" within the custody of the County that are subject to the provisions of the Freedom of Information Law.

Second, the introductory language in §2 of Schedule B states that reproduction of licensed images "shall be for internal use or use by a consultant to the Licensee [the County] or an Authorized Subdivision thereof, unless a fee is collected...." From my perspective, once a record is maintained by or for an agency, there can be no restriction on its use. As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they must be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant.

Next, the remaining provisions in Schedule B pertain to fees for copies, and they include minimum fees, depending on the nature or use of the copy (i.e., printed "hardcopy" images or digital or electronic copies made available for personal use, as opposed to commercial or professional use), of $20, $40 or $50, with 50% of the monies obtained remitted to Pictometry. Again, the law makes no distinction concerning the intended use or status of an applicant for records. Moreover, as you suggested, I do not believe that the County may charge a fee based on a contractual agreement that exceeds the fee authorized by the Freedom of Information Law.

Based on the legislative history of the Freedom of Information Law, an agency may charge in excess of twenty-five cents per photocopy up to nine by fourteen inches or greater than the actual cost of reproducing any other records only when a statute, an act of the State Legislature, so permits. By way of background, §87(1)(b)(iii) 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, 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.

Most significantly, 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 state statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. In another 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.

While the situation at issue does not involve a local enactment, the principle and precedent are clear, that fees for copies are fixed by the Freedom of Information Law. In this instance, an agreement between an agency and a private entity to assess fees in excess of those authorized by that statute would, in my view, be invalid. I concur with your contention that merely because Pictometry's software may be used to "send the electronic image to the [County] printer is irrelevant." That kind of situation is common; agencies routinely use commercial software to carry out any number of functions relating to transfer, preparation or reproduction of records. The use of the software is itself relevant only as a factor in determining the actual cost of reproducing records; that use does not authorize the establishment of a fee above the actual cost of reproduction.

I note, too, 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) 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 ordinarily 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)].

Lastly, you referred to Pictometry's concern that:

> "...if the County was free to sell digital copies for the amount allowed under FOIL, i.e., actual cost to the County for reproduction, such sales by the County would deprive Pictometry of its direct sale market. In other words, if a real estate broker or land use planner could acquire images of the entire county on CD from the County for only the cost of reproduction they would not purchase those images from Pictometry. (You will also note that in the above set forth provision from Schedule B of the proposed agreement, as it applies to digital and electronic copies, the pricing is based on a **per image** basis, not on a per CD basis. Thus, assuming we copied 30 images on a single CD, the proposed clause would require that we charge a commercial user $1,500.00 for that single CD, and then remit $750.00 to Pictometry.)" (emphasis yours).

In response to that concern, you asked whether, "in generating copies of the Pictometry images for sale on a CD, the images were in [a] standard format, or whether the copy would have to include embedded Pictometry software." You were told that the Pictometry software would have to be used, but that Pictometry "could have designed its product so that it could be electronically copied and used as a...standard protocol, file, without their proprietary software." You were also informed that "that they had intentionally designed the product so that it required the use of their software...expressly for marketing and pricing purposes." You concluded that, "[i]n other words, they had designed the product in such a way that they could argue that the sale of a copy involved the sale of trademarked/copyrighted, proprietary software and, therefore, that they had the right to set the fee schedule." You wrote that you expressed concern to Pictometry that:

> "...by entering into an agreement to charge $20 to $50 per image, under circumstances where we knew that such images could, in fact, have been made available without the need to embed Pictometry software, had Pictometry used a commercially available format, the County might, in effect, be viewed as conspiring with Pictometry to evade the requirements of FOIL. Moreover, since, as a result of what Mr. Kaplan told me, we now knew the copying charges were deliberately set at a level high enough to discourage FOIL requests and encourage people to purchase directly from Pictometry, that too, I believed, would render the clause unlawful."

In consideration of the foregoing, you raised the following question:

> "Where a FOIL request is made of the County for a digital copy of date stored in digital format, but where the vendor who initially provided that data deliberately provided the data to the County in such a way that digital copies could not be made and utilized without employing the vendor's proprietary software, may the County agree with the vendor to charge fees set by the vendor for such copies, and may the County remit a portion of such copying fees to the vendor?"

My response must be the same as that offered earlier in this opinion, that the Freedom of Information Law authorizes an agency to charge only for the reproduction of records. Just as an agency cannot charge a fee for photocopies based in part on the cost of purchasing a photocopy machine, I do not believe that it could properly charge for the cost of software. I do not believe the "sale" or production of a copy can be equated with the sale of proprietary software. Again, in my view, any agreement that authorizes the assessment of a fee greater than the actual cost of reproduction would be inconsistent with law and, therefore, invalid. I note, too, that §84 of the Freedom of Information Law, the statement of legislative intent, indicates that state and local government agencies are required to make records available "wherever and whenever feasible." From my perspective, if unnecessarily increasing a fee results in a lesser opportunity for members of the public to gain access to records, such an action would tend to defeat the intent of the law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Paul Burkhard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14967

41 State Street, Albany, New York 12231
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October 26, 2004

Mr. Lawrence N. Squittieri
03-R-0995
Bare Hill Correctional Facility
Caller Box 20
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. Squittieri:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from the NYS Division of Parole. You stated that your request was acknowledged, but that as of the date of your letter to this office, you had not received any response. You indicated that you lodged a complaint with Mr. Anthony Annucci, Counsel to the Department of Correctional Services, who stated that his office is not responsible for such complaints.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The person designated by the Division of Parole to determine appeals is Terrence X. Tracy, Counsel to the Division. I note, too, that the Department of Correctional Services does not have custody or control of records of the Division of Parole.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1968

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 27, 2004

Mr. Floyd Wright
03-B-1425
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wright:

I have received your letter in which you asked for assistance in obtaining records from the Division of State Police. You indicated that you requested dispatch records relating to a particular employee, but that you were informed that there were no records responsive to your request. You stated that you appealed the denial and, as of the date of your letter to this office, you had not received a response.

In this regard, I offer the following comments.

First and perhaps most important, the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute provide in part that an agency need not create a record in response to a request. If indeed the Division of State Police does not maintain the records sought, the Freedom of Information Law would not apply. For instance, if there is no dispatch record, there is nothing to be disclosed under the Freedom of Information Law, and the agency would not be obliged to prepare a record containing the information sought on your behalf.

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.

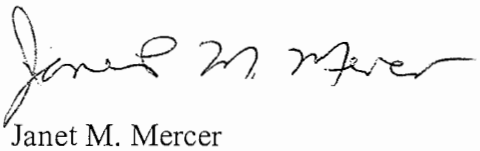
Lastly, I point out that an appeal may be made when an agency denies access by informing an applicant that it has a record, but the applicant does not have the right to inspect or copy that record based on one or more of the grounds for withholding the record appearing in §87(2) of the

Freedom of Information Law. By means of example, if you requested your income tax records from this office, the response would be that this office does not maintain records of that nature. I do not believe that a response to that effect constitutes a denial of access to records, or that it would make legal or logical sense to appeal.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director



BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

FOIL-AO - 14969

From: Robert Freeman
To: Pauline.DeVita@banking.state.ny.us
Date: 10/27/2004 8:54:50 AM
Subject: Re: FOIL Question

Hi Pauline - -

Yes, time sheets pertaining to public employees are clearly accessible under FOIL. In a case involving access to records indicating the days and dates of sick leave claimed by a particular public employee, the Court of Appeals unanimously determined that the records must be disclosed [see **Capital Newspapers v. Burns**,109 AD2d 92, affirmed 67 NY2d 562 (1986)]. If there is a notation or similar entry indicating the nature of person's illness or medical condition or perhaps an employee's social security number appearing on a time sheet, those aspects of the record may be deleted as an unwarranted invasion of personal privacy prior to the disclosure of the remainder.

I hope that this helps.

Bob

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14970

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October 27, 2004

E-MAIL

TO: Colleen O'Brien

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. O'Brien:

As you know, I have received your letter in which you referred to a failure on the part of the Town of Riverhead to comply with the Freedom of Information Law. You asked whether there is "any way to get the State to intervene and perhaps audit their procedures and/or provide guidance to them on the administration of the law."

In this regard, there is no state agency that intervenes or conducts audits of local governments in relation to the Freedom of Information Law. However, this office, the Committee on Open Government, is authorized by statute to provide advice and opinions concerning that law. While the opinions rendered by the Committee are not binding, it is our hope that they are educational and persuasive, and that they encourage compliance with law. Whenever possible, as an attempt to achieve those ends, copies of opinions are forwarded to the agencies involved, and I will send a copy of this response to officials in the Town of Riverhead as well.

The issue, in brief, involves delays in responding to requests for records, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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 in the Town's response to you, 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. Nevertheless, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, it must provide an approximate date indicating when the request will be granted or denied. When 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, as in the situation that you described, 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)].

If you still have not received a response, it is suggested that you contact the Town Clerk in order to ascertain the identity of the person or body to whom an appeal may be made.

As indicated earlier, in an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to Town officials. I hope that I have been of assistance.

RJF:tt

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14971

41 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, 2004

Mr. Kevin A. Seaman
Attorney at Law
Box 580
Stony Brook, NY 11790

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Seaman:

I have received your letter in which you questioned whether the resume of a public officer or employee is accessible under the Freedom of Information Law.

In this regard, based on judicial decisions, portions of a resume must 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. Most relevant is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) contains a series of examples of unwarranted invasions of personal privacy.

In consideration of a variety of decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of 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 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.

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-14972

41 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, 2004

Mr. Willis Morris
02-A-2108
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. Morris:

I have received your letter in which you wrote that you are attempting to obtain records indicating payment made to an attorney by the assigned counsel program. You indicated that the assigned counsel program of the Nassau County Bar Association has refused to honor your request.

In this regard, it is noted at the outset that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally applies to records maintained by state and local government; it would not apply to a private organization.

The program to which you referred involves assignments under "Article 18-B", which encompasses §§722 to 722-f of the County Law. Under §722, the governing body of a county and the City Council in New York City are required to adopt plans for providing counsel to persons "who are financially unable to obtain counsel." Those plans may involve providing representation by a public defender, by a legal aid organization, through a bar association, or by means of a combination of the foregoing.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney or private organization performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

The Nassau County Bar Association is not, in my opinion, an "agency" subject to the Freedom of Information Law. However, if the County maintains the records of your interest, those records would fall within the scope of that statute.

Further, if a bar association, for example, maintains records for a county, I believe that they would constitute county records. The Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a

view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In sum, insofar as the records sought are maintained for the County, I believe that the County would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law. Rather than seeking the records from the Bar Association, it suggested that you direct a request to Onondaga County and its records access officer.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14973

41 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, 2004

Mr. David Donaldson
02-B-1351
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. Donaldson:

I have received your letter in which you asked that this office review your Freedom of Information Law request and appeal relating to your inability to gain access to copies of portions of a visitors log book that shows the signatures of two attorneys who visited you. Having reviewed the correspondence attached to your letter, it appears that you were given portions of the log book indicating that attorneys visited you, but it did not show their signatures. You indicated that you asked for a certification that a diligent search had been made or that the records do not exist.

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, I offer the following comments.

As you are aware, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. 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 also point out that an appeal may be made when an agency denies access by informing an applicant that it has a record, but the applicant does not have the right to inspect or copy that record based on one or more of the grounds for withholding the record appearing in §87(2) of the Freedom of Information Law. By means of example, if you requested your income tax records from this

office, the response would be that this office does not maintain records of that nature. I do not believe that a response to that effect constitutes a denial of access to records, or that it would make legal or logical sense to appeal.

I regret that I cannot be of greater assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14974

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 27, 2004

Mr. Steven A. Williams
03-R-1973
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. Williams:

I have received your letter in which you sought assistance in obtaining audio/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 an audio/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,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14975

41 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, 2004

Mr. Michael Thomas
03-B-2134
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Thomas:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from the Erie County District Attorney's Office and the Buffalo Police Department. You stated that you had not received any response to your requests and indicated that you appealed and asked if the entities in question had forwarded a copies of your appeals to this office. You also asked when you would be able to proceed with an Article 78 proceeding and whether you might be able to recover attorney's fees.

In this regard, having researched our files, it does not appear that either the District Attorney's Office or the Buffalo Police Department have forwarded copies of your appeals to this office. However, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, if the entities in question determine to deny access, I believe that you would have the right to initiate a proceeding under Article 78 of the Civil Practice Law and Rules. As I understand Article 78, you may initiate a proceeding within four months of an agency's final determination. This office does not maintain materials pertaining to the means by which Article 78 proceedings may be initiated. It is suggested that your facility librarian might be able to acquire the information from other sources on your behalf.

Lastly, with respect to your question regarding the award of attorney's fees, a court may award attorney's fees, payable by an agency, in certain circumstances. Specifically, §89(4)(c) of the Freedom of Information Law states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public: and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

I point out that there is a decision in which the issue was whether a person representing himself who was not an attorney was eligible for an award of attorney's fees. In Leeds v. Burns (Supreme Court, Queens County, NYLJ, July 27, 1992), the petitioner was a law student who brought a proceeding against the Dean of the City University of New York Law School at Queens

College pro se under the Freedom of Information Law. He prevailed and requested attorney's fees. The court found that he met all of the conditions prescribed in §89(4)(c), except one. In short, the court found that he was an "aspiring attorney" but not yet a licensed attorney, and that, therefore, attorney's fees would not be awarded. On the basis of that decision, I believe that one must be or represented by a licensed attorney in order to be eligible for an award of attorney's fees under §89(4)(c).

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1419 76

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 27, 2004

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, having paid for documents, the Division of Parole has not sent them to you. You also requested a "Vaughn Index" of the documents contained in your parole file to which you have been denied access.

In this regard, I offer the following comments.

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)].

With respect to not receiving documents that you have paid for, a copy of this opinion will be sent to Mr. Anthony Molik as a reminder of your payment.

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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Anthony Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14977

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 27, 2004

Mr. Norman Booth
03-A-6438
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. Booth:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from the Schenectady County Clerk's Office and the Schenectady County District Attorney's Office. You stated that your request to the Schenectady County Clerk's Office was acknowledged, but as of the date of your letter to this office, you had not received any further response. You also indicated that you had not received any response to your request from the District Attorney's Office.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 the Freedom of Information Law, I will forward copies of this response to the Schenectady County Clerk and the District Attorney.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Hon. John J. Woodward, County Clerk
Hon. Robert M. Carney, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14978

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 28, 2004

E-MAIL

TO: Richard C. Healy

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. Healy:

As you know, I have received your letter concerning a request made under the Freedom of Information Law to Montgomery County. You wrote that you asked that the County certify the copies of records made available to you but that County officials refused to do so.

In this regard, §89(3) of the Freedom of Information Law refers to the certification of records. When a request for a record is approved, that provision states in relevant part that:

> "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested..."

In my view, based upon the language quoted above, a certification made under the Freedom of Information Law does not pertain to the accuracy of the contents of a record, but rather would involve an assertion that a copy is a true copy. In other words, a certification prepared pursuant to §89(3) would not indicate that the contents of a record are complete, accurate or "legal"; it would merely indicate that the copy of the record is a true copy.

I note, too, that it has been consistently advised, particularly when certification is requested with respect to a voluminous number of records, that a single certification, given by means of a written assertion, statement or affidavit, for example, describing or identifying the records that were copied, would be sufficient. I do not believe that each copy of records made available under the Freedom of Information Law must be stamped or "certified" separately.

In short, pursuant to your request, I believe that the County must certify in writing that copies of records made available are indeed true copies.

I hope that I have been of assistance.

RJF:tt

cc: Clerk, Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14929

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October 28, 2004

Mr. John Monroe
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Monroe:

I have received your letter in which you asked for an advisory opinion concerning a request for records directed to the Metropolitan Transportation Authority. You are seeking a variety records relating to a robbery that occurred on a certain date, such as incident reports, surveillance tapes, statements of witnesses and policy and procedure manuals used in relation to the incident. It also appears that you have also raised a series of questions concerning the incident.

In this regard, I offer the following comments.

First, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information responsive to a request, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. In short, while Authority officials could provide the information sought by answering questions, they would not be required to do so by the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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, for example, 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).

Perhaps most relevant in the context of your request for policies and procedure manuals would be §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing

> home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the techniques or procedures contained in the records sought could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

The other provision of possible significance as a basis for denial is §87(2)(f). Again, that provision permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." As suggested with respect to the other exceptions, I believe that the Authority 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Denise Fraser

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14980

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October 28, 2004

Mr. Joe Louis Coleman
03-B-1996
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601-0168

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Coleman:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from the Social Security Administration, the Buffalo Police Department, the Erie County District Attorney's Office and the Erie County Court Clerk. It appears from your correspondence that the Buffalo Police Department has acknowledged receipt of your request, but that as of the date of your letter to this office, you had not received any further response. You also indicated that the District Attorney's Office is charging you "$2.00 for two pieces of paper", and you believe that you should not have to pay because you are indigent.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning the New York Freedom of Information Law. As such, this office does not have the authority or the jurisdiction to advise with respect to records maintained by federal agencies, such as the Social Security Administration.

Second, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts 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.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, 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 assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 28, 2004

Mr. David L. Scott
03-A-0127
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Scott:

I have received your letter in which you indicated that you have been attempting to obtain a copy of your "fingerprint analysis/'report of findings'." You stated that you wrote to the person who conducted the analysis and, as of the date of your letter to this office, had not received a response.

In this regard, I offer the following comments.

First, it is unclear from your correspondence whether the person performing the analysis works for a governmental entity or for a private company. However, it would appear that if the person was employed by a private company, that company may have been hired by a governmental entity to do fingerprint analyses. If that is so, I believe that the materials in question would fall within the coverage of the Freedom of Information Law.

That statute pertains to agency records, and the term"record" is defined in §86(4) of the Freedom of Information Law to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

As such, records prepared for an agency by a private entity constitute agency records subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Perhaps the provision of primary significance in the context of your inquiry is §87(2)(g). Although that provision serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Third, the initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations (21 NYCRR Part 1401) 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."

Based on the foregoing, 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. In my view, if a private company receives a request for agency records, the request should immediately be forwarded to the agency's records access officer. Again, since the records at issue are agency records, the agency has the duty to deal with a request in a manner consistent with law. Upon receipt of a request for agency records in possession of a private company, the records access officer should either obtain the records for the purpose of reviewing them and determining rights of access or instruct the company to disclose the records as required by law.

In consideration of the preceding commentary, it is suggested that you resubmit your request for your fingerprint analysis to the records access officer at the agency that you believe maintains the records or for which the records were prepared. I would conjecture that the police department involved in your arrest or the district attorney's office would have possession of the records.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14982

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October 29, 2004

Mr. Daniel Dublino
02-B-2269
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Dublino:

I have received your letter in which you complained that you have encountered difficulty in obtaining "records from Alcohol and Substance Abuse Treatment."

In this regard, while the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, pertains generally to government records in New York, a different provision of law, §33.16 of the Mental Hygiene Law, deals specifically with the records in question.

As I understand §33.16 of the Mental Hygiene Law, it provides rights of access to clinical mental health records, with certain exceptions, to "qualified persons," and paragraph 7 of subdivision (a) of that section defines that phrase to include "any properly identified patient or client." It appears that you are a "qualified person" and that you may assert rights of access under that statute.

I note that §33.16(b) states in relevant part that a facility must respond to a request within ten days, and subdivision (d) of §33.13 pertains to the right to appeal a denial of access and states that:

> "(d) Clinical records access review committees. The commissioner of mental health the commissioner of mental retardation and developmental disabilities and the commissioner of alcoholism and substance abuse services shall appoint clinical record access review committees to hear appeals of the denial of access to patient or client records as provided in paragraph four of subdivision (c) of this

section. Members of such committee shall be appointed by the 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,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 29, 2004

Mr. Panagiotis Theodorou
03-A-0191
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. Theodorou:

I have received your letter in which you complained that you requested records from the New York City Taxi and Limousine Commission but that the Commission sent only some of the records that you requested. The Commission indicated, however, that it's response involved all of the records falling within the scope of your request.

In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

As requested, the name and address of the current Commissioner for the Taxi and Limousine Commission is Commissioner Matthew W. Daus, 40 Rector Street, New York, NY 10006.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 29, 2004

Mr. Rafael Rosado
91-A-5725
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118-1186

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rosado:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from your correctional facility. As of the date of your letter to this office, you had not received any response to your request.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14985

41 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 29, 2004

Mr. Michael Morgan
89-A-8927
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. Morgan:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from your correctional facility. You indicated that you submitted a request to the Department of Correctional Services central office. The Department informed you that the records are maintained at the facility and forwarded your request to the Superintendent of the facility. As of the date of your letter to this office, you had not received a response to your request.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 29, 2004

Mr. Daniel Burkwit
03-B-2145
Butler Correctional Facility
P.O. Box 400
Red Creek, NY 13143

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Burkwit:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from the Wayne County Attorney's office. You stated that, as of the date of your letter to this office, no response to your request had been received.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: 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

November 1, 2004

Hon. Carolina M. Lazzari
[redacted]

The staff of the Committee on 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. Lazzari:

As you are aware, I have received your letter in which you sought an advisory opinion concerning your right to obtain certain records maintained by Schenectady County. Specifically, in your capacity as a County Legislator, you requested:

> "Total cost of health care premiums paid by the county for all elected officials past and present broken down as follows:
>
> a. Amt paid for legislators currently in office
> b. Amt paid for former legislators."

You specified that you are "not asking for anyone's name or personal information – only the total amount paid by the county." In a response by the County Attorney, the request was denied based on the Health Insurance Portability and Accountability Act, also known as HIPAA, which prohibits the disclosure of information by a health care provider or plan when there is a reasonable basis for concluding that an individual can be identified.

While his interest in complying with HIPAA is appreciated, I do not believe that the information sought, to the extent that it exists in the form of a record or records, is exempt from disclosure. In this regard, I offer the following comments.

First, since you specified that you do not want any personally identifying details, I do not believe that HIPAA is applicable or implicated in any way. Without those personally identifying details, the record or records sought would consist of statistical or factual information which, in my view, is clearly available. In short, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. None of the grounds for denial of access could, in my view, justifiably be asserted to

withhold the information sought, and §87(2)(g)(i) specifies that "statistical or factual tabulations or data" found within intra-agency materials must be disclosed.

Second, 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. The County Attorney in denying your request did not indicate whether records exist containing a "total" that reflects the cost of health care premiums broken down to specify premiums paid for current and former County legislators. However, if no "total" or breakdown exists, the County would not be required to prepare a total or breakdown on your behalf. If no totals exist, but if there are lists of current or former legislators receiving health care insurance, those lists must in my opinion be disclosed following the deletion of personally identifying details. In a case in which lists included names appearing alphabetically, it was contended that the deletion of names would nonetheless allow the recipient to ascertain, at the least, the identity of those at the beginning and end of the alphabet. That being so, the court required that the agency delete the names and then "scramble" the list [see Kryston v. Board of Education, 77 AD2d 896 (1980)].

If totals have been prepared, the deletion of identifying details would not be an issue, and I believe that those portions of existing records containing any such totals would clearly be accessible under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Christopher H. Gardner
Kevin D. DeFebbo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14988

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 1, 2004

E-MAIL

TO: Gary French

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. French:

I have received your letter in which asked whether "certain private 501(c)(3) agencies authorized and funded by the OMRDD" that receive funding from OMRDD and through Medicaid are subject 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, as a general matter, the Freedom of Information Law is applicable to governmental entities; the receipt of government funding does not bring an entity within the coverage of the definition quoted above or the requirements of the Freedom of Information Law.

I note, however, that government agencies that have funding or other relationships with private entities typically maintain records pertaining to or involving their relationships with those private entities. Any such records maintained by an agency, such as OMRDD, would constitute agency records subject to rights of access conferred by the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14989

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 2, 2004

Mr. James P. Lamb
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Lamb:

I have received a copy of your letter addressed to Ms. April Mitzman of the Hauppauge Public Schools concerning your request made under the Freedom of Information Law for records pertaining to a sex offender living in your community. By sending a copy of your letter to this office, you wrote that you "are asking the state for an advisory opinion as to the issue of whether you may require a personal appearance" as a condition precedent to disclosure of the records sought.

In this regard, when the Freedom of Information Law is the governing statute, I do not believe that an agency may require that a person seeking records make a "personal appearance" at the agency's premises in order to gain access to records. Under that statute, §87(2), any person has the right to inspect and copy records for which there is no basis for a denial of access, and §89(3) requires that an agency provide copies of any such records upon payment of the requisite fee. Further, to be consistent with the intent of the Freedom of Information Law, it has consistently been advised that an agency must mail records to an applicant on request, and that the agency may charge for postage. It appears, however, that the Freedom of Information Law is not the governing statute with respect to some or perhaps all of the records of your interest. To the extent that the Freedom of Information Law is inapplicable, it is likely that the Hauppauge Schools may impose the condition to which you referred.

Most pertinent to the matter in my opinion is an analysis of the "Sex Offender Registration Act" (hereafter "the Act"), Article 6-C of the Correction Law, also known as "Megan's Law." Prior to the enactment of the Act, it was my view that the Freedom of Information Law governed public rights of access and the obligations of agencies, including school districts. Based on discussions with the assistant attorney general involved in the implementation of and litigation commenced under the Act, as well as the opinion of the former director of the Division of Criminal Justice Services, the Freedom of Information Law does not govern with respect to records generated pursuant to the Act; rather, issues involving the disclosure of those records are governed by the Act itself.

By way of brief background, subdivision (1) of §168-b of the Act directs the Division of Criminal Justice Services to "establish and maintain a file of individuals required to register" under the Act and includes guidelines concerning the content of what is characterized as the "registry." Subdivision (2) states that:

> "The division is authorized to make the registry available to any regional or national registry of sex offenders for the purpose of sharing information. The division shall accept files from any regional or national registry of sex offenders and shall make such available when requested pursuant to the provisions of this article. *The division shall require that no information included in the registry shall be made available except in the furtherance of the provisions of this article*" (emphasis added).

Based on the sentence highlighted above, it is the position of both the Department of Law and the Division of Criminal Justice Services, and I concur, that information contained in the registry is to be disclosed only pursuant to the provisions of the Act, "only in the furtherance of the provisions of this article", which, again, is Article 6-C of the Correction Law.

While the Freedom of Information Law deals generally with access to records, agencies' obligations to disclose records, and their ability to deny access, according to the rules of statutory construction (see McKinney's Statutes, §32), the different or "special" statute prevails when such a statute pertains to particular records. Since information contained in the registry may be disclosed only in furtherance of the Act, the Freedom of Information Law, in my view, does not apply to that information.

Certain aspects of the contents of the registry are forwarded to local government agencies in conjunction with notification requirements imposed upon the "Board of Examiners of Sex Offenders" pursuant to §168-l of the Act. In subdivision (6) of that provision, reference is made to "three levels of notification...depending upon the degree of the risk of re-offense by the sex offender."

Paragraph (a) of §168-l(6) provides that "[i]f the risk of repeat offense is low, a level one designation shall be given to such sex offender." In that instance, certain law enforcement agencies are notified. Since there is no statement in that provision regarding the further dissemination of information concerning the level one offender, it is assumed that school districts will not receive that category of information within the registry.

Paragraph (b) states that "[i]f the risk of repeat offense is moderate, a level two designation shall be given..." Pursuant to paragraph (c), "[i]f the risk of repeat offense is high and there exists a threat to the public safety, such sex offender shall be deemed a 'sexually violent predator' and a level three designation shall be given..." In both of those instances, local law enforcement agencies are authorized to disclose various kinds of information pertaining to sex offenders to entities, such as school districts. Those entities "may disclose or further disseminate such information at their discretion." Therefore, a school district in receipt of information derived from the registry that has

been supplied by a law enforcement agency has the discretionary authority to disseminate any or all of the information.

It is emphasized that if a school district acquires records regarding a sex offender (or any other person convicted of a crime) from a source other than the registry, it is my view and that of Assistant Attorney General that those records are subject to the Freedom of Information Law. For example, if a school district obtained a copy of a mugshot from a local police department or a court that is maintained independent of the requirements of the Act, such a record would be available from the District under the Freedom of Information Law [see Planned Parenthood of Westchester, Inc. v Town Board of Town of Greenburgh, 587 NYS2d 461 (1992)].

In sum, information contained within the registry that is disseminated pursuant to the Act to a school district may be disclosed by the district in its discretion. Records acquired by a district from a source other than the registry are subject to rights conferred by the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: April Mitzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14990

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 2, 2004

Mr. William H. Hill, President
West Babylon Taxpayers Association, Inc.
756 Carlton Road
West Babylon, NY 11704

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hill:

I have received your letter and the materials attached to it. You referred to a delay by the Town of Babylon in responding to a request made under the Freedom of Information Law.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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)].

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 contract or agreement to which a government agency is a party typically must be disclosed, for none of the grounds for denial of access would apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Janice E. Tinsley-Colbert
Chelley Gordon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14991

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November 2, 2004

Ms. Ann Carvill
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Carvill:

As you are aware, I have received your letter and the materials attached to it. You have sought suggestions in relation to your efforts in obtaining information pertaining to the credentials of the new principal at the high school in the Potsdam Central School District.

In this regard, first, your letter addressed to the Board of Education and the Superintendent was not specified as a request made pursuant to the Freedom of Information Law. If that had been so, I believe that it would have been deficient, for you sought to obtain information by attempting to elicit answers to questions and asking for clarification of certain facts. In short, the title of the Freedom of Information Law is somewhat misleading. That statute does not require the disclosure of information *per se or* serve as a vehicle that requires government agency officials or bodies to supply information in response to questions. Similarly, §89(3) of that law generally does not require that an agency create a record in response to a request. If you choose to gain access via the Freedom of Information Law, it is suggested that you do so by requesting existing records or portions of records. For instance, rather than asking whether the principal has a certain degree, you might request portions of records indicating the degrees that have been awarded to the principal.

Second, with respect to the substance of the matter and assuming that a request for records is made, based on the thrust of the Freedom of Information Law and its judicial interpretation, those aspects of an application for employment or resume that are pertinent to a public employee's duties are generally accessible, as are other items; conversely, those items that are irrelevant to one's duties generally may be withheld.

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. Most relevant in considering 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." Additionally, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy.

Based on judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 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 application or resume that are irrelevant to the performance of one's duties may generally be withheld. However, based on judicial decisions, those portions of such a record or its equivalent detailing one's prior public employment and other items that are matters of public record, general educational background, licenses and certifications, and items that indicate that an individual has met the requisite criteria to serve in the position, must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Sylvia A. Root

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14992

41 State Street, Albany, New York 12231
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November 2, 2004

Mr. Derrick R. Omaro
92-A-0608
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14901-0500

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. Omaro:

I have received your letters addressed to the Lieutenant Governor. Please be advised that the staff of the Committee is authorized to respond to requests on behalf of the members of the Committee.

Your first letter deals with your request for all information pertaining to you from the mental health unit at your facility. You received a response that your request is under consideration, but as of the date of your letter to this office, you had not received any further response.

Although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If the Elmira Correctional Facility maintains the records as a facility, I believe that it would be required to disclose the records to you to the extent required by §33.16 of the Mental Hygiene Law. 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.

Your second letter deals with your request submitted to the Guidance and Counseling Unit at your correctional facility for various records pertaining to you. As of the date of your letter to this office, you had not received any response to your request.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

The person designated by the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 2, 2004

Mr. Michael J. Barton, 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. Barton:

I have received your letter in which you sought an advisory opinion concerning a denial of your request made to the Village of Horseheads pursuant to the Freedom of Information Law.

According to your letter, you were notified by the Chief of Police that a complaint had been filed against you, a member of the Horseheads Police Department, that the matter was being investigated, and that it would likely lead to discipline. You requested any such complaint on July 13, and indicated that you did not receive a response within "the 5-day time period allotted." However, on July 20, you received a letter from the Chief advising you that your request had been forwarded to the Village Attorney for review; the Chief did not indicate when your request might be granted or denied. Following an exchange between your attorney and the Village attorney, the Chief wrote to you and stated the "he did not wish to conduct a disciplinary interview with [you] at this time." Because you received no further response to your request, you delivered an appeal to the Mayor on July 27, but you had received no further response as of the date of your letter to this office. Following a conversation with me and a call to the Village attorney, he advised you that the matter remains under investigation and that you were not entitled to obtain the records.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

> acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if an agency fails to include an approximate date when a request would be granted or denied, as in this instance, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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.

Another exception may be pertinent, depending on factual circumstances. Section 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."

From my perspective, the extent to which §87(2)(e) may properly be asserted must be based on the extent to which the harmful effects described in subparagraphs (i) through (iv) would arise as a result of disclosure.

In the context of the matter as you presented it, it is unclear whether the Chief's letter to you indicating that he did not want to conduct a disciplinary interview with you was intended to mean that the investigation was closed and that there would be no disciplinary proceeding, or whether he did not want to do so at that time, but that the investigation remained open. If the matter is closed, it does not appear that §87(2)(e) would serve as a basis for a denial of access. On the other hand, if it remains open and an investigation is ongoing, the question would likely involve how or the extent to which disclosure would interfere with a law enforcement investigation or judicial proceeding in relation to subparagraph (i). Even if an investigation is ongoing, that would not necessarily result in a conclusion that a complaint, following the deletion of personally identifying details, would if disclosed result in a harmful effect of disclosure described in §87(2)(e).

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Patricia Gross, Mayor
David Cole, Chief of Police
John Groff, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 3, 2004

E-Mail

TO: Joseph F. Riberdy

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. Riberdy:

As you are aware, I have received your inquiry in which you raised the following questions:

> "What constitutes a legal document under FOIL?? Does a code enforcement agency supplying duplicate copy of a building permit improperly filled out as to conceal the identity of a building contractor constitute a legal document under the definition of FOIL??? What is the city of Cohoes obligation in maintaining records in an orderly format as not to conceal essential information for public use???"

In this regard, the Freedom of Information Law makes no reference to documents as "legal" or otherwise, or as draft or final. Rather it pertains to all government agency documents. Specifically, that statute pertains to agency records, and §86(4) defines the term "record" to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, original and duplicate documents constitute agency records that fall within the coverage of the Freedom of Information Law. Again, that statute does not refer to records that may be characterized as "legal documents", as opposed to any others. All such records are subject to that law.

I know of no statute that directly addresses your last question concerning the obligation to maintain records "in an orderly format" other than a general statement appearing in §57.19 of the Arts and Cultural Affairs Law. That statute, which is entitled "Local government records management program", provides in relevant part that "[t]he governing body, and the chief executive official where one exists, shall promote and support a program for the orderly and efficient management of records..."

I hope that I have been of assistance.

RJF:jm

cc: City Clerk

STATE OF NEW YORK
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November 3, 2004

Hon. Peter J. Schmitt
Minority Leader
Nassau County Legislature
One West Street
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 information presented in your correspondence.

Dear Legislator Schmitt:

I have received your letter and the correspondence attached to it. By way of background, you wrote that former Deputy County Executive Peter Sylver recently pleaded guilty to charges associated with harassing his assistant, who has alleged in a lawsuit that she was sexually assaulted by Mr. Sylver. You wrote that another woman, through her attorney in a letter labeled as a "confidential communication", "put the county on notice that she was also harassed or sexually assaulted by Mr. Sylver."

In consideration of those matters, you wrote to the County Attorney as follows:

> "Kindly supply my office with any claims of sexual assault, harassment, abuse, maltreatment, assault or battery by Peter Sylver. By 'claims,' I mean any allegation reported to provided to your office by an alleged victim, friend or acquaintance of an alleged victim, report for an unknown person or an attorney representing an alleged victim. This request does not include the claim in the lawsuit of Employee 'L' v. Nassau County. Please consider this request as a demand pursuant to the Freedom of Information Law."

In an initial response, the County Attorney wrote that the letter containing the allegations was withheld from the press "[i]n line with our EEO policy and the legal privilege asserted by the complainants' attorneys". You later asked why the records that you requested were withheld from you "as the minority leader of the legislature" and questioned the legal basis for the denial of access. The County Attorney responded, stating that:

> "...the determination that the communication at issue is not subject to disclosure under FOIL was made based upon the nature of the allegations contained in the letter and the nature of the communication itself; the determination was not based on who made the request. Accordingly, the document was not disclosed to you (or to [redacted]) for the same reasons that it was not disclosed to the press.
>
> "The Nassau County EEO policy is to encourage persons to raise issues of discrimination or harassment without fear of reprisal and to treat complaints and other information provided confidentially. This is true regardless of the specific employment status of either the accuser or the accused.
>
> "The release of this communication would constitute 'an unwarranted invasion of personal privacy' on the part of both the person making the allegation and the part of other individual identified in the communication (regardless of their current or prior employment). Therefore the communication is not subject to disclosure under FOIL. N.Y. Public Officers Law §87(2)(b) and §89(2)(b)(iv)."

In this regard, I offer the following comments.

First, in my view, 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, a request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, there may be little reason for requiring a public official to request records under 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, such as the County Legislature, 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 board member or legislator acting unilaterally, without the consent or approval of a majority of the total membership of the body 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 the member by means of law or rule. In the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

Second, the Freedom of Information Law, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It is noted that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

As suggested by the County Attorney, the provision in the Freedom of Information Law of most significance concerning the records in question 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". In the situation that you described, I believe that considerations involving privacy relate not only to the complainant, but also to the subject of the complaint.

Insofar as the records identify the complainant, it has been advised in a variety of contexts that portions of a complaint or other record which identify a complainant may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of a member of the person who made the complaint is often irrelevant to the work of the agency, and in most circumstances, I believe that identifying details may be deleted. In this instance, since the complaint appears to involve harassment that may have been sexual in nature, it would involve intimate, personal information. That being so, identifying details pertaining to the complainant could, in my opinion, be deleted prior to any disclosure.

When an allegation or complaint is made against a person, whether that person is a member of the public or a public official, and the complaint or allegation has neither been proven nor

admitted, it has been advised that identifying details pertaining to the subject of the complaint may also be withheld.

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)].

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 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)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

The subject of the complaint may no longer be a public employee. However, the principle would be the same, that an unsubstantiated complaint or allegation against an individual may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

In some situations, the deletion of identifying details pertaining to the subject of a complaint may be adequate to protect his or her privacy. In the instant situation, however, the request focuses on a named individual, and the deletion of those aspects of the records would serve no purpose. When that is so, it has been advised that a complaint may be withheld in its entirety.

Lastly, that the attorney for the complainant labeled a letter as a "confidential communication" is, in my opinion, meaningless.

In general, whether the subject of a record prefers to authorize or preclude disclosure is, in my opinion, irrelevant in terms of an analysis of rights conferred by the Freedom of Information Law. 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 their records to the news media, the

Appellate Division found that, as a matter of law, the agency could not withhold a record based upon the "preference" of the person who reported the offense. Specifically, in Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985), it was found that:

> "There is no question that the 'releasable copies' of reports of offenses prepared and maintained by the Genesee County Sheriff's office on the forms currently in use are governmental records under the provisions of the Freedom of Information Law (Public Officers Law art 6) subject, however, to the provisions establishing exemptions (see, Public Officers Law section 87[2]). We reject the contrary contention of respondents and declare that disclosure of a 'releasable copy' of an offense report may not be denied, as a matter of law, pursuant to Public Officers Law section 87(2)(b) as constituting an 'unwarranted invasion of personal privacy' solely because the person reporting the offense initials a box on the form indicating his preference that 'the incident not be released to the media, except for police investigative purposes or following arrest'."

Moreover, the Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available [see Washington Post v. New York State Insurance Department, 61 NY 2d 557, 567 (1984)]. This is not to suggest that records or portions of records might not justifiably be withheld, but rather that a claim or promise of confidentiality in my opinion is irrelevant to an analysis of rights of access to records.

While there may be an attorney-client relationship between the complainant and her attorney, neither was obliged by any provision of law to submit the letter to the County. In a situation in which a person or entity is required to submit records to a government agency, and the records are privileged, it has been held that disclosure to the agency does not constitute a waiver of the attorney-client privilege (see e.g., North Star Contracting Corp. v. Department of Public Service, Supreme Court, Albany County, April 24, 1985). However, when analogous records are voluntarily disclosed to an agency or any third party, I do not believe that the agency in receipt of the records may validly contend that it is barred from disclosing the records based on an assertion of the attorney-client privilege, for the privilege would have been waived. In short, the agency would be acting neither as the client, as the client's attorney, nor as an entity having a "community of interest" with the client [see People v. Calandra, 120 Misc.2d 1059, 1061 (1993)].

In sum, unless there is a rule or law to the contrary, I do not believe that you, as County legislator, enjoy rights in excess of those conferred upon the public by the Freedom of Information Law. Further, in consideration of the facts as you described them, the records sought, which consist of unproven or unsubstantiated allegations, may in my opinion be withheld on the ground that the ground that disclosure would result in an unwarranted invasion of privacy relative to both the complainant and the subject of the complaint. And finally, notwithstanding the foregoing, I do not believe that the characterization of the letter sent to the County by the attorney for the complainant as a confidential communication bears on rights of access.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lorna Goodman
Hon. Thomas Suozzi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3889
FOIL-AO-14996

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November 3, 2004

Ms. Pamela A. Moore
Attorney and Counselor at Law
25 East Main Street, Suite 500
Rochester, NY 14614-1874

The staff of the Committee on 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 raised a series of questions relating to the Open Meetings Law and, in some respects, to the Freedom of Information Law. An attempt will be made to address them, but not necessarily in the order in which they are presented.

Your initial question involves "the purpose of the Open Meetings Law." In brief, I believe that the law is intended to enable the public to witness the performance of members of public bodies and to open the deliberative process leading to the making of decisions to public view. As stated in §100, the legislative declaration:

> "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."

Second, soon after the enactment of the Open Meetings Law, the courts dealt with and rejected contentions that "workshops" and similar gatherings fell beyond the coverage of that law. In considering that issue, it is emphasized that the definition of "meeting" [§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 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 workshop 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 requirements of openness and ability to enter into executive sessions.

If no quorum has convened, the Open Meetings Law does not apply. If, for example, two of the five members of a town board meet, the Open Meetings Law would have no application, and I know of no requirement that those two members inform the other members of the fact their meeting or the nature of their discussion. They may choose to do so, but again, I know of no obligation to do so.

Third, the Open Meetings Law requires that notice be given prior to every meeting. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week 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.

Next, a public body cannot conduct an executive session to discuss the subject of its choice. By way of background, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

The ensuing provisions, paragraphs (a) through (i), specify and limit the subjects that may properly be considered in executive session.

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.

Certainly a member of the Board may transmit a memo to other Board members suggesting that executive session be held at an upcoming meeting. Nevertheless, the procedure described in §105(1) must be followed to comply with law, and again, an executive session may only be held to discuss one or more of the subjects enumerated in paragraphs (a) through (i) of that provision. That the majority believes that compliance "does not make sense" would not, in my opinion, constitute a valid reason for failing to comply with law.

You focused on a particular ground for entry into executive session and asked, "[w]hat criteria must be met to qualify under the real estate exception." That provision, §§105(1)(h), permits a public body to enter into executive session to discuss:

> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

In my opinion, the language quoted above, like the other grounds for entry into executive session, is based on the principle that public business must be discussed in public unless public discussion would in some way be damaging, either to an individual, for example, or to a government in terms of its capacity to perform its functions appropriately and in the best interest of the public. It is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

A key question, in my view, involves the extent to which information relating to possible real property transactions has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or in some way damage the interests of taxpayers. I note that the language of §105(1)(h) does not refer to negotiations *per se* or the impact of publicity upon negotiations relating to a parcel; rather its proper assertion is limited to situations in which publicity would have a *substantial* effect on the *value* of the property. It has been advised, for example, that when a municipality is seeking to purchase a parcel and the public is unaware of the location or locations under consideration, it is possible if not likely that premature disclosure or publicity would indeed substantially affect the value of the property. In that kind of situation, publicity might result in speculation or offers from others, thereby precluding the municipality from reaching an optimal price on behalf of the taxpayers. However, when details concerning a potential real property transaction, such as the location and potential uses of the property, are known to the public, publicity would have a lesser effect or impact on the value of the parcel. Again, the more that is known to the public, the less likely it is that publicity would affect the value of a parcel.

Next, you referred to a memorandum being marked "confidential" and asked whether it should be placed in the Town Clerk's "official file" and whether it is subject to the Freedom of Information Law. In this regard, the Freedom of Information Law includes all government agency records within its coverage, 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."

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.

Stamping, marking or asserting that record is "confidential" is all but meaningless. The Court of Appeals held years ago that rights of access and the ability to deny access to records is fixed by the Freedom of Information Law. Only to the extent that records or portions of records fall within the exceptions listed in §87(2) would a denial of access be proper, irrespective of a claim of confidentiality [see e.g., Doolan v. Boces, 48 NY 2d 341, 347 (1979)].

One of the grounds for denial would be pertinent in the context of the situation that you described. Section 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.

As for the Town Clerk's "official file", I do not know the meaning of that phrase. All records are subject to the Freedom of Information Law, whether they are characterized as "official" or otherwise. I note, too, that §30 of the Town Law indicates that a town clerk is the custodian of all town records. In my view, the memorandum to which you referred would be in the legal custody of the clerk, regardless of its physical location.

Lastly, and in a somewhat related vein, you raised the following question:

> "May either the Chair of an advisory board (that operated under the auspices of the Town and whose stenographer is paid by the Town) or the Town Supervisor refuse to provide a Town Board member with meeting minutes and/or correspondence (by e-mail or otherwise) produced by the advisory board?"

In my view, the records prepared by the chair of the board to which you referred are not the property of that person; on the contrary, I believe that they would be in the legal custody of the Town Clerk and would constitute records subject to rights conferred by the Freedom of Information Law. Further, in my opinion, the Town Supervisor would have no greater right of access or control over those records than any other member of the Town Board.

I hope that I have been of assistance. If you would like to discuss the issues considered here or others pertaining to the Open Meetings or Freedom of Information Laws, 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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November 4, 2004

Mr. Alberto Rodriguez
95-A-8295
Five Points Correctional Facility
P.O. Box 119
Romulus, NY 14541

Dear Mr. Rodriguez:

I have received your letter in which you appealed a denial of a request directed to the Court of Claims pursuant to the Freedom of Information Law.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records. For future reference, the provision dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, 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."

Second, I point out 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. Further, even if a proper request is made, I am unaware of whether the Court of Claims maintains the kind of record in which you are interested.

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

STATE OF NEW YORK
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November 4, 2004

Mr. Richard L. Atkins
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Atkins:

I have received your letter concerning problems encountered in relation to requests for records of the City of Oswego. In consideration of the issues that you raised, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, you referred to a request for a "property folder" that was granted by the City Clerk. However, when you arrived at City Hall to view the folder, you were informed that the request was being denied on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." Although that phrase represents one of the exceptions to rights of access, its proper assertion in relation to assessment or other records relating to real property is limited and rare.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (I) of the Law.

Long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969). For instance, index cards containing a variety of information concerning specific parcels of real property have long been accessible to the public.

In the case of a request for an assessment roll, §89(6)is pertinent, for that provision states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

In limited circumstances, I believe that certain records or portions of records used in determining assessments may be withheld. For instance, for senior citizens to apply for STAR exemptions, they must submit records that include personal financial details. Having discussed the issue with representatives of the Office of the Office of Real Property Services, we agree that income tax forms or other personal financial information submitted by senior citizens seeking STAR exemptions may be withheld from the public based on §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." Similarly, insofar as other records submitted by property owners, such as military discharge and separation papers, include intimate personal information (i.e., social security numbers, descriptions of disabilities, etc.), those details may in my view be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

The other exception that might be pertinent relates to commercial property. Section 87(2)(d) authorizes an agency to withhold records that:

> "...are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

If, for example, a folder concerning commercial property includes an income and expense statement or similar material, it is possible that disclosure could be damaging to the competitive position of the owner of the parcel. To the extent that disclosure would cause "substantial injury" to the competitive position of that entity, I believe that records or portions thereof may be withheld.

In my view, the situations and records referenced in the preceding commentary represent the relatively rare instances in which portions of a property folder might justifiably be withheld. To the extent that the exceptions described in that analysis are not relevant, I believe that the contents of the folder must be disclosed to comply with law.

Lastly, you referred to a request for a copy of a resolution that had been disclosed to the local news media. From my perspective, a disclosure to the news media is equivalent to disclosure to the public at large. That being so, I do not believe that there would be any basis for withholding that record from you or any other person.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to City officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Clerk
City Assessor
Edward Izyk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 8, 2004

E-MAIL

TO: Adelaide Camillo

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. Camillo:

I have received your letter in which you questioned the "appropriateness of a closed door session conducted by 6 out of 7 members of the Planning Board of the Town of Washington." Also present were the Town's planning consultant and his business partner, an engineer.

The meeting was preceded by notice given to the local newspaper indicating that it would begin at 7:30. However, "in a last minute shuffle", the meeting was rescheduled to begin fifteen minutes earlier, but when you and others arrived at 7:15, you learned that the Board began its meeting in private before the newly scheduled time for convening and kept those in attendance waiting until 7:50 for the meeting to be open. When you asked later what was discussed, you were told by a member that "they were consulting with their 'technical experts.'"

Nevertheless, you were informed by two other members that the meeting was "held mostly to discuss issues surrounding the safety of a driveway adjacent to [your] property line in [a] proposed subdivision." According to your letter, safety issues relating to the driveway have been a matter of significant public concern for approximately a year, and a variety of deficiencies in the proposal have been discovered. You indicated that at a recent prior meeting, the Board's consultant and engineer stated, for the first time, that they had concerns regarding safety, and that you and others were looking forward to discussions on the matter at the meeting in question. However, following the unannounced closed session, the Town's engineer "had completely reversed his position on the driveway safety in favor of the developer", and you were "confused by this outcome."

Upon further questioning concerning the rationale for conducting the discussion in private and expressing your belief that "closed-door sessions were only held for personnel or litigation matters", you were told that they may also be held for "administrative matters." Following the

closed session, you wrote that the Board was "polled" for members' views concerning the driveway, and that it was stated that action would be taken at a separate meeting on November 10.

From my perspective, based on the assumption that you have accurately described the situation, the Board failed to comply with the Open Meetings Law in several respects. In this regard, I offer the following comments.

First, as suggested in previous correspondence, judicial decisions indicate that any gathering of a public body, such as a planning board, for the purpose of conducting public business constitutes a "meeting" that falls within the requirements of the Open Meetings Law. To reiterate, § 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. In the situation that you described, a gathering of six of the seven members of the Planning Board, for any of the reasons that were related to you, would in my opinion clearly have constituted a " meeting" subject to the Open Meetings Law.

Second, every meeting of a public body must be preceded by notice given in accordance with §104 of the Open Meetings Law, which provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations. If the Board intended to convene at 6:30, for example, I believe that it should have given notice to that effect to comply with law.

Further, the judicial interpretation of the Open Meetings Law suggests that the propriety of scheduling a meeting on short notice 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...
>
> "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:
>
> "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)].

In this instance, it is apparent that there was no need that the Board take action immediately or that there was any urgency that would have necessitated starting the meeting earlier than its scheduled time.

Third, in my view, none of the reasons to which you referred would have justified holding an executive session. It is emphasized that a public body cannot conduct an executive session prior to a meeting. Every meeting must be convened as an open meeting, for §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. That being so, 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. Therefore, a public body may not conduct an executive session to discuss the subject of its choice. Issues involving the safety of a driveway or "administrative matters" would not, in my opinion, fall within any of the grounds for entry into executive session.

Next, while the facts are not entirely clear, it appears that the Board might have reached a decision that will merely be ratified at its next meeting. If that is so, if a consensus was reached, it

would constitute a decision of the Board essentially reached in private. In Previdi, supra, the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

Therefore, if the Board reached a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. I note, too, that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes."

Lastly, with respect to the enforcement of the Open Meetings Law, §107(1) of the Law states in part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

However, the same provision states further that:

> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

As such, when a legal challenge is initiated relating to a failure to provide notice, an issue may be whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional". I cannot conjecture as to the motivation of the Board. However if a decision was essentially made in private that should have been made in public, a court has discretionary authority to invalidate the action should a judicial proceeding be commenced.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.

RJF:tt

cc: Hon. Florence Prisco, Supervisor
Michelle West, Chairperson
John Gifford, Town Attorney
James Bacon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 9, 2004

Mr. Michael Campanelli
Supervising Attorney
State of New York
Insurance Department
25 Beaver Street
New York, NY 10004

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Campanelli:

I have received your letter in which you requested an advisory opinion concerning the ability of the Department of Insurance to withhold from the public under the Freedom of Information Law annual reports filed with the Department by group captive insurance companies.

According to paragraph (1) of §7003(a) of the Insurance Law, "a pure captive insurance company shall insure, on a primary basis, only risks of its parent and affiliated companies", and paragraph (2) states that a "group captive insurance company shall insure, on a primary basis, only risks of the industrial insureds that comprise the industrial insured group." A "group captive insurance company" is, according to subdivision (f) of §7002 of the Insurance Law, a domestic insurance company licensed "for the primary purpose of providing insurance or reinsurance covering the risks of the industrial insureds that comprise the industrial insured group", and subdivision (g) states that an "industrial insured group" is a "group of unaffiliated industrial insureds that are engaged in similar or related businesses or activities..." Subdivision (c) defines "captive insurance company" to mean "any pure captive insurance company or any group captive insurance company licensed to do a captive insurance business under the provisions of this article."

If I correctly recall our conversation, you indicated that legislation enacted in 1997 authorized the establishment of captive insurance companies, which are wholly owned by an insured or insureds and serve essentially as self-insurers. As self-insurance vehicles, these insurers are exempt from various sections of the Insurance Law. They are required, however, to maintain financial solvency and toward that end they are regulated and examined by the Department. The legislation authorized the creation of group captive insurance companies, which involve a consortium of entities, "parents", within the same industry. Those entities must have a value of at least one hundred million dollars. To date, there are thirty captive insurance companies, and one

group captive, which includes as insureds the fifteen largest financial institutions doing business in New York.

Although the records filed with the Department when is a license is sought to engage in a captive insurance business are confidential and exempt from the coverage of the Freedom of Information Law pursuant to §7003 (c)(3) of the Insurance Law, there is no similar provision that pertains to annual reports filed by captive insurance companies pursuant to §7006. Any such report filed by a captive insurance company must include "a statement of its financial condition" and amendments to its plan of operation.

In this regard, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the only exception to rights of access that would be pertinent in the context of your inquiry is §87(2)(d), which permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Further, when a commercial entity is required to submit records to a state agency, pursuant to §89(5), at the time of submission it may request that the records or portions thereof be kept confidential in accordance with §87(2)(d).

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, in which it 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 case, 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), 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", (id., 419-420).

It is my understanding that comprehensive financial and operational information relating to the management of the risk of the parent companies comprising a captive group insurance company is included in an annual report. If that is so, if the information is not available from any source other than the Department and differs from information contained in other filings that are accessible to the public (i.e., through the Securities and Exchange Commission, annual corporate reports, etc.), and if that information would be of such interest and value to the competitors of parent companies within the group that disclosure would result in competitive harm to those parent companies, I believe that §87(2)(d) could justifiably be asserted to deny access.

Another consideration relates to the practices of other jurisdictions that protect against disclosure of information equivalent to that found in an annual report. In short, it has been suggested that if the reports cannot be withheld, group captive insurance companies will not be formed in New York but will instead be domiciled either offshore or in other states. In this regard, the Court of Appeals in Encore referred to "the policy behind subdivision (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., 420). The capacity to prevent injury to large companies' competitive position in this instance apparently involves keeping the operation of a captive group insurance company in New York and perhaps attracting others do business in the state. If that is so, shielding the reports would appear to be consistent with the direction provided by the state's highest court.

Notwithstanding the foregoing, it is emphasized that the effects of disclosure may change due to the occurrence of events or the passage of time. Disclosure of a report containing detailed current financial or operational information could be devastating to a company's competitive position. However, the effect of disclosing the same report three years from now would likely not be as significant. Often the harmful effects of disclosing commercial information will diminish or even disappear over the course of time. When that is so, the ability to assert §87(2)(d) also diminishes.

I note, too, that when an agency's denial of access is challenged in court, the agency bears the burden of proving that an exception was justifiably asserted [see §89(4)(b)]. 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, emphasizing 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15001

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 12, 2004

Mr. Ronnie Reese
02-B-1197
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Reese:

I have received your letter in which you requested a variety of records from this office relating to your arrest and conviction in Monroe County.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have custody or control of records generally. In short, I cannot grant or deny access to the records of your interest because this office does not possess them.

When seeking records, a request should be made to the "records access officer" at the agency or agencies that you believe would maintain the records in which you are interested. The records access officer has the duty of coordinating an agency's response to requests for records. In this instance, it appears that a police department and/or Office of the Monroe County District Attorney would likely possess some or all of the records in question. I note that the records that were previously disclosed either to you or to your attorney need not be disclosed by an agency again, unless it can be demonstrated that neither you nor your attorney any longer have possession of the records [see Moore v. Santucci, 543 NYS2d 103, 151 AD2d 677, 1989; Lebron v. Morales, 706 NYS2d 329, 271 AD2d 241 (2000) Mot lv to app den, 714 NYS2d 710, 95 NY2d 760].

I hope that the foregoing enhances 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- 15002

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 12, 2004

Mr. Befe Reid
94-A-4418
Franklin Correctional Facility
P.O. Box 10
Malone, NY 12953

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Reid:

Your letter addressed to the Secretary of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the Freedom of Information Law. Further, as indicated above, the staff is authorized to prepared opinions on behalf of the Committee.

You indicated that you have made several requests for records concerning yourself from the correction counselor at your facility, apparently without success. 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 I have no knowledge of the contents of the records of your interest, of possible significance 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.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated to determine appeals by the Department of Correctional Service 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-15003

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 12, 2004

Ms. Tracy L. Blakey
[redacted]

Dear Ms. Blakey:

I have received your appeal concerning a denial of access to records.

Please 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 a government agency to grant or deny access to records.

For your information, 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."

It is suggested that you contact the person who denied your request to ascertain the identity of the person or body to whom an appeal may be made.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15004

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 15, 2004

Mr. Richard D. 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 letters and the materials relating to them concerning requests made under the Freedom of Information Law to the Westchester County Department of Social Services.

In this regard, first, in the latter letter, you asked "whether FOIL requests are interpreted as a 'protected activity' under Federal Civil Rights Title VII laws." I know of no judicial decision considering your question and cannot answer. The functions of Committee on Open Government involve offering advice and opinions concerning rights of access to government information, primarily under the New York Freedom of Information Law. That being so, neither the Committee nor its staff has the expertise or the jurisdiction to provide advice pertaining to the scope or application of federal civil rights laws.

Second, having reviewed your request made to the County, it is emphasized 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. Each element of your request involves "listings", i.e., "A listing of all authorized Out-of Title positions approved during 2003 indicating name of the individual, title, salary and time served in the out-of-title position." If there is no "listing" that includes each of the items to which you referred, the County, in my view, would not be obliged to prepare a list or any new record that includes those items. In short, to the extent that the "listings" that you requested exist, I believe that the County would be required to disclose them as required by the Freedom of Information Law. However, to the extent that no such records have been prepared, the County, in my opinion, would not be required to create new records on your behalf.

Third, 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 to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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)].

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: Charlene Indelicato
Barbara Sabater

FOIL-AO-1505

From: Robert Freeman
To: [redacted]
Date: 11/24/2004 9:16:36 AM
Subject: Dear Ms. Pink:

Dear Ms. Pink:

I have received your inquiry in which asked whether town board minutes can be "kept on disc in the vault rather than on paper."

In this regard, section 57.29 of the Arts and Cultural Affairs Law provides that:

"Any local officer may reproduce any record in his custody by microphotography or other means that accurately and completely reproduces all the information in the record. Such official may then dispose of the original record even though it not met the prescribed minimum legal retention period, provided that the process for reproduction and the provisions made for preserving and examining the copy meet requirements established by the commissioner of education. Such copy shall be deemed to be an original record for all purposes, including introduction as evidence in proceedings before all courts and administrative agencies."

From my perspective, the foregoing enables you do as you suggested, but only if it is clear that the minutes will be preserved and subject to reproduction. There may be potential problems, however. The disc may not last as long as paper, and perhaps just as significant, the technology may change and become obsolete. I recommend that you might discuss the matter with a representative of the State Archives.

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-15006

From: Robert Freeman
To: [redacted]
Date: 11/24/2004 9:24:07 AM
Subject: I have received your inquiry and believe that the facts relating to the "tow report" would be pertin

I have received your inquiry and believe that the facts relating to the "tow report" would be pertinent in determining rights of access.

For instance, if a vehicle was towed due to an accident, because accident reports are accessible to the public, including drivers' names and addresses, I believe that the same information would be available in the tow report. If a vehicle was towed due to a violation of law (i.e., a parking violation), again, records indicating violations of law are accessible, and the name and address in the tow report would be available in my view in that instance as well. If, however, the tow report relates to situation in which a driver pulled his or vehicle off the road due to a mechanical problem, and there was no accident, violation or similar event, it is likely that the name and address of the driver could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

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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FOIL-AO-15007

From: Robert Freeman
To: [redacted]
Date: 11/24/2004 9:30:03 AM
Subject: Dear Ms. Green:

Dear Ms. Green:

I have received your letter in which you asked whether the "budget submissions" sent by department heads to a town supervisor are accessible to the public.

In this regard, the records at issue would constitute "intra-agency materials" that fall with in the scope of section 87(2)(g) of the Freedom of Information Law. In brief, under that provision, those portions of the budget submissions consisting of narrative expressions of opinion, advice, recommendations and the like may be withheld. Other portions consisting of "statistical or factual tabulations or data" must be disclosed, including estimates, projections, etc. In addition, to the extent that the content of those records are effectively disclosed via discussion during open meetings, including recommendations, I believe that they would be accessible to the public.

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- 15008

From: Robert Freeman
To: [redacted]
Date: 11/24/2004 9:38:01 AM
Subject: Good morning - -

Good morning - -

Assuming that the police officer has signed a release authorizing his attorney to gain access to records pertaining to the officer, I believe that would be sufficient. The signed release is especially important in this instance, because many of the records would likely fall within the coverage of section 50-a of the Civil Rights Law. That statute provides that personnel records pertaining to police officers that are "used to evaluate performance toward continued employment or promotion" are confidential and cannot be disclosed without the consent of the officer or a court order.

I would recommend that the records be reviewed prior to disclosure due to the possibility that they may include items that the officer may not have the right to obtain. For instance, if a complaint was made against him, those portions of the complaint that identify the complainant may ordinarily be withheld on the ground that disclosure would result in an unwarranted invasion of the complainant's privacy. In that kind of situation, the officer would not have a right of access to pass on to his attorney.

If you would like to discuss the matter, please feel free to call. I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 15009

41 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 24, 2004

E-Mail

TO: Hon. Mary Jo Hultquist

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. Hultquist:

I have received your letter in which you indicated that a member of the Town Board "would like our Town Attorney to review all FOIL requests before [you, the Town Clerk] release any information." You believe that would be unnecessary and sought my views.

First, in my opinion, an individual member of the Town Board does not have the authority to make policy or direct you to follow his "guidelines." Under the Freedom of Information Law, §87(1), the Town Board is responsible for implementation of the Freedom of Information Law.

Second, as you are aware, the regulations promulgated by the Committee on Open Government (21 NYCRR §1401.2) require that the Town Board designate at least one person as "records access officer." In the great majority of towns, the town clerk is the records access officer, and it is assumed that you have been designated as records access officer in the Town that you serve. If that is so, it is within your authority and responsibility to coordinate the Town's response to requests for records. If you believe that it would be appropriate for the Town Attorney to review a request, or if you feel that it would be beneficial to consult with others before determining to grant or deny access to records, I believe that it would be within your authority to do so. However, I do not believe that you must seek review of all requests by the Town Attorney based upon the inclination of one member of the Town Board.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15010

41 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 24, 2004

Mr. Gerald B. Barnes
Falls Earth Station, Inc.
P.O. Box 128
Madison, NY 13402

Dear Mr. Barnes:

I have received your letter in which you appealed to this office in relation to a request made to the State University at Albany.

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 determine appeals or 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."

For you information, the person designated to determine appeals in this instance is Ms. Stacey Hengsterman, State University of New York, Central Office, State University Plaza, Albany, NY 12246.

In consideration of your comments, 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.

If you would like to discuss the matter, please feel free to contact me. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Robert Freeman
To: [redacted]
Date: 11/24/2004 4:52:26 PM
Subject: Dear Ms. Schifferle:

Dear Ms. Schifferle:

I have received your letter concerning access to "a transcript from a 50-H hearing."

In this regard, subdivision (3) of section 50-h of the General Municipal Law states in part that "The transcript of the record of an examination shall not be subject to or available for public inspection, except upon order the court upon good cause shown, but shall be furnished to the claimant or his attorney upon request."

Based on the foregoing, the record of your interest is not subject to public access and would be "specifically exempted from disclosure by...statute" and, therefore, beyond the scope of rights of access conferred by the Freedom of Information Law [see Freedom of Information Law, section 87(2)(a)].

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

From: Robert Freeman
To: brendan.mcevoy@asu.edu
Date: 11/24/2004 5:02:36 PM
Subject: Dear Mr. McEvoy:

Dear Mr. McEvoy:

I have received your correspondence in which you asked whether "education management organizations" are subject to the FOIL.

In this regard, the receipt or use of public funds is not determinative of whether an entity falls within the coverage of that statute. FOIL is applicable to agencies, and section 86(3) defines the term "agency" to mean: "any state or municipal department, board, bureau, division, commission, public authority, public corporation, council or other governmental 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, FOIL is generally applicable to entities of state and local govenment in New York; it does not apply to private entities that use public funds.

You also asked what penalty might be imposed when an agency denies access to records that are found to be public by a court. There is no penalty other than the possibility of an award of attorney's fees payable by the agency to a person who has "substantially prevailed." To award attorney's fees, a court must also find that the agency lacked a reasonable basis for denying access and that the records are of clearly significant interest to the general public.

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-15013

From: Robert Freeman
To: Village of Schuylerville
Date: 11/29/2004 10:38:26 AM
Subject: Re: Good Morning!

Hi - -

Hope your holiday was pleasant.

When you cannot locate a record, you should so indicate in writing. I note, too, that section 89(3) of the FOIL states in part that when a request is made for a record that cannot be found, the person seeking the record may request a certification in writing in which you or other Village official asserts that a diligent search was made but that the record could not be found.

I hope that this will be helpful.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
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Website - www.dos.state.ny.us/coog/coogwww.html

15014

From: Robert Freeman
To: Phil Zegarelli
Date: 11/30/2004 10:53:01 AM
Subject: Re: FW: Suffolk County- new proposed legislation. : new issue

Hi - -

Thanks for your kind words, and I hope that you had an enjoyable Thanksgiving.

Having reviewed the resolution apparently adopted by the Suffolk County Legislature, I do not believe that it conflicts with the Freedom of Information Law.

While many agencies make records available via the Internet, there is no requirement in the Freedom of Information Law that they must do so. When they choose to do, in my opinion, they would be exceeding their legal obligations. When an agency does more than it is required to do under the Freedom of Information Law, i.e., when it offers records available online to subscribers, I do not believe that it would be restricted to the fees envisioned by that statute.

I hope that the foregoing will be useful to you.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-15015

From: Robert Freeman
To: [redacted]
Date: 11/29/2004 3:38:26 PM
Subject: http://www.dos.state.ny.us/coog/ftext/f12321.htm

http://www.dos.state.ny.us/coog/ftext/f12321.htm

Hi - -

Hope all is well and that the holiday was enjoyable.

In consideration of the situation that you described, it is likely that portions of the records must be disclosed. That records do not represent or relate to any finaly determination is not conclusive in ascertaining rights of access. As you review section 87(2)(g), any one of four categories of information within inter-agency or intra-agency materials must be disclosed, unless a different exception may be invoked.

In the context of your question, I would conjecture that the reports consist in part of factual information that must be disclosed. However, some of the factual information could apparently be withheld, i.e., items in the nature of medical information, including names of those injured, as an unwarranted invasion of privacy.

If you would like to discuss the issue, please feel free to call.
Bob

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15016

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 30, 2004

Mr. David G. Reynolds
[redacted]

Dear Mr. Reynolds:

I have received your letter in which you sought a variety of information from this office under the Freedom of Information Law.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have custody or control of records generally, and we do not possess the information that you are seeking.

Second, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency is not required to create a record in response to a request. To the extent that records exist that contain the information sought, I believe that they would be available. However, if no such records exist, an agency would not be obligated to prepare a new record containing the information of your interest. Similarly, the Freedom of Information Law does not require that agency officials answer questions. They may choose to do so, but they are not required to do so to comply with that statute.

Lastly, I would conjecture that there are no figures or statistics that contain the information that you requested. In your first question, you asked: "How many times per year have children been threatened with prosecution based upon actions taken, or not taken, by their family members?" Based on my contacts over the course of years with many associated with the law enforcement community, it would be doubtful at best that the kind of information your are seeking exists in the form of a record or 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15017

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 30, 2004

Mr. Kenneth Warren
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Warren:

I have received your letter in which you raised three questions that were overlooked in my earlier response to you.

In this regard, first, the State Education Department sent a copy of your appeal to this office. It was received on April 15. Second, we were unable to locate any appeal that you directed to the Executive Chamber. And third, you asked whether a person has the right "to request the same information on more than one occasion." From my perspective, if a request has been made and denied, and if an applicant's appeal has also been denied, I do not believe that an agency would be obliged to respond to a second request for the same records if circumstances have not changed.

In a recent decision involving a similar question, the court found that:

> "The material sought by the petitioner in his 2003 FOIL request is identical to the material previously sought in his 2001 FOIL request. After exhausting administrative remedies with respect to the 2001 request the petitioner, as noted previously, commenced a proceeding for judgment pursuant to Article 78 of the CPLR challenging the denial of the request. Petitioner's Article 78 proceeding, however, was dismissed as time-barred. Under these circumstances, the Court finds that this proceeding challenging the denial of an identical 2003 FOIL request represents a belated attempt to obtain judicial review of the denial of petitioner's 2001 FOIL request. *See VanSteenburg v. Thomas*, 242 AD2d 802 *lv den* 91 NY2d 803. This proceeding, therefore, must be also dismissed as time-barred" (Martin v. Travis, Supreme Court, Franklin County, August 23, 2004).

In an earlier decision, it was held by the Appellate Division that a proceeding was barred by the statute of limitations in a situation in which a request involved a challenge to a second denial of access on the basis of the same grounds as the first, and in which there was no apparent change in circumstances [Corbin v. Ward, 153 AD2d 515, leave to appeal denied by Court of Appeals, 72 NY2d 707 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15018

41 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 1, 2004

E-MAIL

TO: Hon. David Messineo, Town Supervisor

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 Supervisor Messineo:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You wrote that the Town of Otselic maintains a collection of historical items, including photographs that date from the late 1800's and early 1900's that serve as a "source of information of our past." One large collection has been put on a computer disk, and you indicated that you have the capability of copying the content of the disk. The Town Clerk, who also serves as archivist, "has expressed concern that making copies of the CD disk for the public would allow individuals to make photos and possibly make money on our photos after we have spent the money to acquire them" and "feels that this would violate our copyright." You have asked whether the Town has "copyright on old photos that we have purchased", whether "existing CDs of photographs [are] considered public records", and if you "have CD copying capability", whether you must comply with requests for CD copies."

I know of no judicial decision that focuses on the relationship between the Freedom of Information Law and the Copyright Act in this kind of situation or any similar series of facts. An attempt will be made, however, to respond to your questions. In this regard, I offer the following comments.

First, the CD's in my opinion clearly 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, since the CD's store information and are in possession of the Town, I believe that they constitute Town 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. In consideration of the age and nature of the photographs, none of the exceptions to rights of access could, in my view, be asserted to deny access.

Third, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use or the status of the applicant, is in my opinion irrelevant. In short, once records are made available under the Freedom of Information Law, I believe that the recipient may do with the records as he or she sees fit.

I note that in a decision rendered in 2001, the Life Insurance Council of New York attempted to support a denial of access to certain records maintained by the State Department of Insurance that had long been available to the public because the recipient of the records placed the records on the internet. The court rejected the argument and determined that the records remained accessible and that there was no justifiable reason for prohibiting their placement on the internet [Belth v. New York State Department of Insurance, 733 NYS2d 833].

Next, that the Town might have expended public monies to purchase the photographs does not, in my opinion, affect the public's right of access to them. There are numerous instances in which government agencies expend significant amounts to acquire or perhaps develop records. For instance, municipalities often pay consultants thousands of dollars to prepare reports of various kinds. Despite the amount spent, an agency may charge only the fees permitted by the Freedom of Information Law when copies are requested. The photographs, like all other records maintained by or for the Town, are subject to rights of access, and the fee for copies is restricted by §87(1)(b)(iii) of the Freedom of Information Law to twenty-five cents per photocopy up to nine by fourteen inches, or, in the case of records that cannot be photocopied, such as computer tapes or disks, the actual cost of reproduction. I note, too, that the Court of Appeals, the state's highest court, determined years ago that "Meeting the public's legitimate right of access to information...is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" and that access cannot be conferred "on a cost-accounting basis" [Doolan v. BOCES, 48 NY2d 341, 347 (1979)].

Lastly, while I am not an expert with respect to the Copyright Act (17 U.S.C §101 *et seq.*), it is important in my opinion to consider the history and intent of copyright protection. The basis of copyright is Article I, §8 of the United States Constitution, which indicates the framers' intent: "To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In construing the 'copyright clause', the United States Supreme Court has stated that its purpose is as follows: 'The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'' [Mazer v. Stein, 347 U.S. 201, 219 (1954)].

The only decision of which I am aware concerning the relationship between the Freedom of Information Law and a claim of copyright protection by an agency involved tax maps prepared by Suffolk County that were used by a private company in its commercial products [County of Suffolk v. First American Real Estate Solutions, U.S. Court of Appeals, 2nd Circuit, 261 F.3rd 179 (2001)]. The court in that case reviewed the elements necessary to claim copyright protection and found that:

> "To allege a claim of copyright infringement, Suffolk County must claim that substantial similarity exists between the defendant's work and the protectible elements of its work. To be 'protectible', these elements must be original. *See Feist Publ'ns v. Rural Tel. Serv., Co.*, 499 U.S. 340, 345-49 (1991) (holding that a compilation of facts does not qualify for copyright protection unless it possesses sufficient originality, that is, 'it possesses at least some minimal degree of creativity')..."

As I understand the situation, the Town did not take or prepare the photographs; it acquired them from other sources. Further, the disks apparently contain only photographs. If that is so, and there is no originality or creativity on the part of the Town, it does not appear that the photographs would be subject to copyright protection. If the photographs were included in a work with original text, description or interpretation, for example, those additions involving originality and creativity

might bring the work within the coverage of copyright protection. However, again, the photographs alone would not appear to qualify for protection under the Copyright Act. Moreover, even if a work does qualify for protection under the Copyright Act, according to the decision cited above, the "protectible elements" of the work must be used by another person in a manner involving "substantial similarity" that would infringe upon the copyright. No such use has apparently occurred.

In sum, I believe that the disks and their contents constitute "records" that fall within the scope of the Freedom of Information Law. Further, it does not appear that the photographs would qualify for protection under the Copyright Act.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

RJF:tt

FOIL-AO- 15019

From: Robert Freeman
To: LocalNet Email
Date: 12/9/2004 8:51:26 AM
Subject: Re: Foil

Hi - -

Thanks for your kind words, and I wish you and yours a wonderful holiday season.

Down to business - - If the report came from outside of government, there would likely be no basis for denial, notwithstanding the confidentiality notice. If it was produced by or for the Town, for example, it would be intra-agency material, and those portions consisting of advice, opinion or recommendations could be withheld; other portions consisting of statistical or factual information would be accessible.

If you need additional explanation or information, I'll be in after 3 this afternoon.

All the best.
Bob

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-15020

From: Robert Freeman
To: Ann Leber
Date: 12/9/2004 12:10:19 PM
Subject: Re: Privacy

Hi - -

You would likely have the addresses even if HIPAA had not been enacted, and I do not believe that HIPAA is the controlling provision. Rather, the Freedom of Information Law provides guidance, and §89(7) states in relevant part that an agency, such as a town, is not required to disclose the home address of either a present or former employee. Additionally, I believe that home addresses of public employees may be withheld on the ground that disclosure would constitute an "unwarranted invasion of personal privacy" under §87(2)(b).

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15021

41 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, 2004

E-Mail

TO: Anonymous

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 Anonymous:

As you are aware, I have received your letter in which you wrote as follows:

> "The Town of Hempstead recently charged me $25.00 to get a copy of the certificate of occupancy for my property. When I told them that it should cost $0.25, they indicated that it was a 'certified copy' and that was the reason for the fee. I told them that I wanted a regular copy for $.25, to which they responded that I could not get a copy for $0.25."

You asked whether the Town's response is "legal."

From my perspective, the Town does not have the authority to charge a fee in excess of twenty-five cents for a photocopy of a certificate of occupancy, nor can it require that you seek a "certified" copy. In this regard, I offer the following comments.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy or the actual cost of reproduction unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> 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 statute, an enactment of the State Legislature, authorizes an agency, such as the Town, to assess a fee in excess of twenty-five cents for a photocopy of a record up to nine by fourteen inches, I do not believe that it may do so.

Lastly, I note that §89(3) of the Freedom of Information Law includes a provision relating to a certification. In short, the certification envisioned by that statute does not deal with the accuracy of the content of a record; rather, it involves an assertion by an agency that a copy of a record is a true copy. As indicated above, no fees can be imposed for a certification of that nature.

I hope that I have been of assistance.

RJF:jm

cc: Hon. Mark A. Bonilla, Town Clerk
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15022

41 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, 2004

Mr. Jerry Brixner
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brixner:

I have received your letter in which you raised issues relating to the Open Meetings Law.

You referred initially to a "public information meeting" or a "Town Board Workshop" and asked whether there is "any requirement in the Open Meetings Law that there should be some documentation placed somewhere that such a Meeting or a Town Board Workshop took place."

In this regard, first, any gathering of a quorum of a town board or other public body for the purpose of conducting public business constitutes a "meeting" that falls within the coverage of the Open Meetings Law, even if there is no intent to take action, and irrespective of the manner in which the gathering is characterized [see Orange County Publication v. Council of the City of Newburgh, 60 AD2d 409, 45 NY2d 947 (1978)].

Second, the only aspect of the Open Meetings Law requiring that a record of a meeting be prepared involves minutes, and that statute contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon;

> provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during workshops, technically, I do not believe that minutes must be prepared.

Since the Open Meetings Law does not require the preparation of detailed or expansive minutes, I point out that it has been held that a member of the public may use a tape recorder at open meetings.

The other issue to which you referred involved the ability of a person to speak during a Town Board meeting. 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, whether they are residents or otherwise, to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Richard Brongo, Town clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15023

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 9, 2004

Mr. Patrick Hanley
Martinelli Publications
40 Larkin Plaza
Yonkers, NY 10701

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Hanley:

As you are aware, I have received a letter and related materials sent by Ralph R. Martinelli. Once again, I offer my condolences concerning Mr. Martinelli's death.

In brief, as I understand the situation, Mr. Martinelli requested records from the Office of the Nassau County Attorney concerning two cases, one of which is closed, and another that may be pending. The focus of your interest involves the closed case, and Mr. Martinelli requested three items relating to that case: certified copies of the verdict sheet, "any Confession(s)/Defendant Satement(s), that exist", and "the Sentencing Documents." In response to that request, Assistant District Attorney Douglas Noll wrote that he would make the file pertaining to the case available "for you (or your representatives) inspection during our ordinary business hours...or whatever business day is convenient for you", and that he would make copies "of whatever documents you desire."

You indicated by phone that it is inconvenient to travel to Nassau County to review the file and asked whether copies of the records sought must be mailed to you.

In this regard, §87(2) of the Freedom of Information Law requires that agencies make records available for inspection and copying, and §89(3) requires that they prepare copies of records upon payment of the proper fee. Therefore, insofar as the records sought exist, I believe that the Office of the District Attorney is required to prepare copies pursuant to a request to do so.

I note that §87(1)(b)(iii) of the Freedom of Information Law authorizes agencies to charge no more than twenty-five cents per photocopy up to nine by fourteen inches. Since that statute is silent concerning the ability of an agency to charge for postage, it has been advised that it may choose to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Douglas Noll, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15024

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 9, 2004

Mr. John 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 facts presented in your correspondence.

Dear Mr. Fitzgerald:

I have received your letter in which you complained with respect to a delay by the Valhalla Union Free School District in responding to your request for records.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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)].

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 consideration of the nature of the records sought, "Documents evidencing the proposal, contract and invoices for field work being done by Gannett Fleming Engineers and Architects, P.C.", it does not appear that any of the exceptions to rights of access may properly be asserted by the District.

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:tt

cc: Board of Education
District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15025

41 State Street, Albany, New York 12231
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December 9, 2004

Mr. Azem Albra
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Albra:

I have received your letter and the materials attached to it. You have contended that "the Town of Fishkill intentionally violates FOIL" and suggested that this office conduct an investigation relating to your contention.

In this regard, the staff of the Committee on Open Government consists of three persons, and neither the staff nor the Committee has the resources or authority to conduct an investigation. The Committee's primary function involves providing advice and opinions pertaining to the Freedom of Information Law. That being so, and in consideration of the materials, 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. You referred several times to a police report from which a "narrative was missing." It is unclear whether the missing information was never included in the report, or whether a portion of a report was withheld from you. If the former was the case, that the information was never included within a record, the Freedom of Information Law would not apply. In short, that law does not provide direction concerning what the contents of records should be.

On the other hand, if a portion of an existing record was withheld, §89(3)of the Freedom of Information Law and the regulations promulgated by the Committee require that an agency inform the applicant that the request was denied in whole or in part and of the right to appeal the denial (see 21 NYCRR §1401.7). As indicated in my letter to you of August 4, the right to appeal is conferred by §89(4)(a) of the Freedom of Information Law, which provides in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Lastly, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Ron Blass

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15026

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December 9, 2004

Hon. Eugene E. Scarpato
Mayor
Village of Lynbrook
Village Hall
1 Columbus Drive
Lynbrook, NY 11563

The staff of the Committee on 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 Scarpato:

I have received your letter in which you sought an opinion concerning the obligation of the Village of Lynbrook to disclose a portion of a memorandum prepared by a member of the Board of Trustees and distribute it to you and other Board members.

As I understand the passage that you highlighted, the Trustee who authored the memorandum was asked to meet with representatives of the Marriott hotel chain to discuss the possibility of constructing a hotel in Lynbrook. The memorandum consists in part of a factual description of events (i.e., "I traveled and met with the Marriott people in Hauppauge a few days ago..."). It also includes the Trustee's description of statements or concerns expressed by the Marriott people. Additionally, there are aspects of the memorandum that reflect the opinions of the Trustee.

In consideration of the foregoing, 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, for purposes of the Freedom of Information Law, the term "agency" is defined 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 term "agency" was reviewed because it is integral to the exception to rights of access that appears to be most significant. Specifically, §87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In Gould et al. v. New York City Police Department [87 NY2d 267, 276 (1996)], the Court of Appeals, the state's highest court, discussed 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).

Gould focused on reports prepared by police officers which, in some instances, included the statements or opinions of members of the public. The Court found that those aspects of the reports did not fall within §87(2)(g), for they did not involve advice, recommendations or opinions expressed by government officers or employees to other government officers or employees. The decisions states that:

> "...the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277).

Based on the foregoing, insofar as the memorandum include expressions of opinion, recommendations and the like expressed by the Trustee, those portions clearly can be withheld (i.e., "He was frank and honest", "it concerns me....", "I still have my doubts...", etc.). Reference to comments by others, however, would not, according to the decision, be protected by §87(2)(g).

I note that the Court in Gould was careful to point out that other grounds for denial of access might apply. Since I do not know of the status of discussions or negotiations between the Village and Marriott, I am unaware of whether a second exception to rights of access may be pertinent. Section 87(2)(c) authorizes an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards..." If the village may be a party to a contract with Marriott, to the extent that disclosure would impair its ability to reach an agreement optimal to the taxpayers, I believe that the memorandum or other records may 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-15027

41 State Street, Albany, New York 12231
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December 9, 2004

Mr. Gary Berman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Berman:

I have received your letter in which you raised a series of issues relating to your efforts in gaining access to records of the Valley Stream Central High School District.

In consideration of your remarks, 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 generally is not required to create a record in response to a request. Therefore, an attorney would not be required, for example, to prepare a record to explain his or her opinion relative to an issue to comply with the Freedom of Information Law. Nevertheless, the scope of that statute is expansive, for it pertains to all agency records, and §86(4) defines the term "record" to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Second, when a request for records 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..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

The provision dealing with the right to appeal a denial of access to records is found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

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 point out 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.

One decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." Should you consider it worthwhile to do so, you could seek such a certification.

Third, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent

that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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.

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, a social security number and the like may be deleted; 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.

In short, even though an item or items found within a record may properly be withheld, it does not follow that an agency may withhold the record in its entirety. On the contrary, the law requires that records be reviewed to determine which portions, if any, may properly be withheld and to disclose the remainder.

You referred to notes taken by the Superintendent. Of likely significance concerning rights of access 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.

Lastly, you contend that the District has disclosed false and misleading information. In this regard, the Freedom of Information Law deals with disclosure of records and the ability to deny access in limited and specified circumstances. It does not deal with the accuracy of the contents of records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Dr. Marc Bernstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15028

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December 9, 2004

Mr. Robert Liere
Mr. Alan Liere
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Messrs. Liere:

I have received your letter and the materials attached to it. You have asked that I review and advise with respect to a denial of access to records by the Town of Brookhaven. The records sought relate "to any investigations and/or audits by the Town of Brookhaven and/or its contractor Kroll Associates, Inc., which led to a determination regarding Robert Liere..." Following an initial denial of access, you appealed, and in response to the appeal, the Town Clerk wrote that he was advised by the office of the Town Attorney that "Investigations and the subsequent reports that follow within the agencies of a municipality are inter-agency material and are thereby protected against disclosure by Public Officers Law §87(2)(g)."

While I agree that the records at issue fall within the coverage of §87(2)(g), it is likely that the Town's response is inconsistent with law and that portions of the records should have been disclosed.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that an agency, such as the Town, is required to review requested records in their entirety to determine which portions, if any, may justifiably be withheld while providing access to the remainder.

The structure of the provision cited by the Town clearly indicates that the content of "inter-agency or intra-agency materials" is the key factor in ascertaining the extent to which those materials may be withheld. Specifically, §87(2)(g) authorizes an agency to deny access:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I point out, too, that the State's highest court, the Court of Appeals, has determined that records prepared for an agency by a consultant retained by the agency should be considered as if they were prepared by agency staff, and that those records may be treated as "intra-agency materials" [see Xerox Corp. v. Town of Webster, 65 NY2d 131 (1985)]. When records are prepared for an agency by a consultant, it constitutes intra-agency material falling within the coverage of §87(2)(g).

The Court of Appeals in Gould v. New York City Police Department [87 NY 2d 267 (1996)] 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 short, that the records may consist of inter-agency or intra-agency materials would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their 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, to comply with the Freedom of Information Law, I believe that the Town must review the records in their entirety to determine which portions consist of statistical or factual or other information accessible under subparagraphs (i) through (iv) of §87(2)(g).

To enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Stanley Allan
Thomas Ventura

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15029

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December 9, 2004

Mr. Anthony R. Gray
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gray:

I have received your letter in which you seek an advisory opinion concerning the Freedom of Information Law.

In brief, having asked to review the "crime blotter" maintained at the State Police barracks in Granville, you were asked to identify yourself. In response, you informed the officer that you are "a citizen of New York State." He then said that you could not gain access to the records unless you provided your name and date of birth, and that future requests would be granted only if you could "specifically identify" the record or entry of your interest and, in your words, "only if he weren't busy."

In this regard, I offer the following comments.

First, it was held soon after its enactment that when records are accessible under the Freedom of Information Law, they are equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a

> public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records is, in my opinion, irrelevant.

In short, I do not believe that an agency official may condition disclosure on furnishing proof of identity or date of birth, for one's identity ordinarily has no bearing on rights of access.

Second, the Freedom of Information Law does not require that an applicant "specifically identify" the records of his or her interest. When that statute was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a)(3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing

or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

From my perspective, a request to gain access to a police blotter relative to a narrowly defined period, i.e., a weekend as in the situation to which you referred, I believe that such a request would meet the requirement of reasonably describing the records sought.

Lastly while an agency is not required to respond instantly to a request, I note that §84 of the Freedom of Information Law, its statement of legislative intent, indicates that agencies should make records available "wherever and whenever feasible." Therefore, if a police blotter or other record is clearly public and readily retrievable, there may be no reason of substance for delaying disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Symer
Captain Laurie Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 9, 2004

Mr. Michael Quaglino, President
Wyandanch Volunteer Fire Co., Inc.
1528 Straight Path
Wyandanch, L.I., NY 11798

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Quaglino:

I have received a copy of your response to a request made under the Freedom of Information Law by Elizabeth Moore, a reporter for *Newsday*. You denied her request for records identifying the members of the Wyandanch Volunteer Fire Company on the ground that disclosure would result in "an unwarranted invasion of personal privacy."

In short, I disagree with your conclusion. The identities of members of a volunteer fire company would hardly represent intimate, highly personal or secret information. That being so, I do not believe that disclosure of the names of members of the company would constitute an unwarranted invasion of personal privacy as that phrase has been considered by the courts, including the state's highest court [see Hanig v. State Department of Motor Vehicles, 79 NY2d 106 (1992)].

The identities of those persons are, as in the case of government employees, are frequently made known to the public. Further, as you are aware, volunteer firefighters partake in benefit programs analogous to those available to public employees (see Volunteer Firefighters' Benefit Law). It is clear that the names of public employees who receive retirement and other benefits are accessible to the public, for disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. I believe that the same would be so in the case of disclosure of the names of members of a volunteer fire company.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and ask that you reconsider your decision.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Elizabeth Moore

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 9, 2004

Mr. Bill Consentini
383 Bread & Cheese Hollow Road
Fort Salonga, NY 11768

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated.

Dear Mr. Consentini:

As you are aware, I have received your correspondence and related materials concerning your efforts in obtaining records "pertaining to the installation of a new road (burying the existing road with fill and covering this with blacktop) to considerably raise the grade." The materials focus on your attempts to obtain records from the Town of Smithtown.

Based on the correspondence and our conversations, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Since the events that you described occurred approximately fifteen years ago, it is possible that records relating to those events might legally have been destroyed. In short, insofar as records no longer exist, the Freedom of Information Law would not apply.

Second, when an agency receives a request for existing records, the Freedom of Information Law provides direction concerning the time and manner in which it must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, §89(3) requires that an applicant "reasonably describe" the records sought. In considering that standard, it has been held that a request has reasonably described the records insofar as an agency can locate and identify the records insofar as an agency can locate and identify the records requested [Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. Your correspondence specifies the location of the work performed, and you were informed by the State Department of Transportation that it began in October of 1988 and continued in 1989. I would conjecture that the inclusion of those facts would have enabled you to meet the requirement of reasonably describing the records.

Next, to the extent that records exist and could be found, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The kinds of records of your interest would appear to consist of factual information. If that is so, I believe that the would be accessible [see Freedom of Information Law, §87(2)(g)(i)].

Lastly, it is possible that the records might be maintained by entities other than the Town of Smithtown. You indicated, for example, that jurisdiction over the road is unclear and that a portion borders the Town of Huntington. Therefore, you might seek the records from the Town of Huntington, as well as Smithtown. You also indicated that the records might have been used in a lawsuit. In this regard, although the courts are not subject to the Freedom of Information Law, court records are generally public under other provisions of law. It is suggested that records filed with a court be requested form the clerk of the court pursuant to §255 of the Judiciary Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Yvonne Lieffrig

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 9, 2004

Ms. Katherine Colley
[redacted]

The staff of the Committee on 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. Colley:

As you are aware, I have received your letter and the materials attached to it. You have sought an advisory opinion concerning the propriety of a denial of your request made under the Freedom of Information Law for a record of the Village of Afton. According to a letter addressed to you by the attorney for the Village, Ms. Beth E. Westfall, the request involves "a copy of the agreement terminating the K-9 Program in the Village of Afton," and she wrote that "the agreement between the Village and Scott Cirigliano contains a confidentiality provision, which the Village is bound to honor."

From my perspective, based on the language of the Freedom of Information Law and judicial decisions, the "confidentiality provision" has no impact on the public's right of access to the agreement. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The Court of Appeals, 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).

Second, 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 the situation described in the materials.

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)]. The Court 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".

Based on a review of exceptions to rights of access, appearing in §87(2) of the Freedom of Information Law, none, in my opinion could be asserted as a reason of denying access to a contract into which the Village has entered. Again, the "confidentiality provision" has no bearing on rights of access.

Lastly, I note that when an agency denies a request for records, the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision 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..."

Additionally, the regulations promulgated by the Committee on Open Government, which have the force of law, require that a person denied access must be informed of the right to appeal, as well as the name and address of the person to whom an appeal may be made [21 NYCRR §1401.7].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Beth E. Westfall

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 9, 2004

Ms. Maria Torchia
[redacted]

The staff of the Committee on 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. Torchia:

As you are aware, I have received your letter and the materials attached to it.

According to the correspondence, your husband attended the Nassau County Police Academy, and he requested the "academic tests" that he took, as well as a transcript of his grades. Based on a letter addressed to him by the Commanding Officer of the office of Legal Affairs at the Nassau County Police Department, only the first aspect of his request was addressed. Specifically, Officer Robert W. McGuigan denied access to the academic tests, citing paragraph (g) and (h) of §87(2) of the Freedom of Information Law. No reference was made to the portion of the request involving your husband's grades or a transcript of his grades.

From my perspective, the position of your husband's request that was addressed might have been determined in manner consistent with law. The other portion of the request for which there was no response involved a record or records which, in my view, should be made available to him. 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 respect to the academic tests, the exceptions cited in the in the denial are pertinent to an analysis of rights of access.

Assuming that the tests were prepared by the County, another government agency or consultant for an agency, they would fall within the scope of §87(2)(g). That provision authorizes an agency, such as the County, to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The questions on an exam could in my view, be withheld, for they would not fall within the categories of accessible information listed in subparagraphs (i) through (iv) of §87(2)(g).

More significant is §87(2)(h), which permits an agency to withhold records that:

"are examination questions or answers which are requested prior to the final administration of such questions..."

The purpose of that provision is obvious. If questions used in an examination, whether it be a civil service exam or an examination given to students, are disclosed before they are finally given, the examination process and its integrity would be compromised. In short, to the extent that if examination questions will be used in the future, the Law permits an agency to deny access to both the questions and the answers.

Second, a record or records indicating your husband's grandes or a transcript of his grades would, in my opinion, be accessible to him or a person authorized to gain access on his behalf. The grades, the outcome of an examination or examinations, would reflect statistical or factual information available under §87(2)(g)(i). Further, although the grades might be withheld from the general public on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], your husband cannot invade his own privacy, and §89(2)(c) indicates that the subject of a record ordinarily enjoys rights of access to a record pertaining to him or her.

In sum, while the request for the tests taken by your husband might properly have been withheld, I believe that a transcript of his grades or equivalent records, should be made available.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Deputy Chief Robert W. McGuigan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 9, 2004

E-Mail

TO: Tom McGinty

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. McGinty:

I have received your letter in which you sought my opinion concerning the propriety of a denial of access to records by the Nassau County Police Department.

Citing the Freedom of Information Law, you requested "copies of all documents held by the Nassau County Police Department pertaining to the arrest on March 15, 2002, of Louis Sito of 308 Richmond Road, Douglas Manor, NY on charges of driving while impaired and speeding." Sgt. Thomas C. Krumpter denied the request on the ground that disclosure would constitute "an invasion of personal privacy pursuant to Section 87(2)(b) of the New York State Public Officers Law."

From my perspective, unless the records were sealed pursuant to law, the response by the Department was inconsistent with law. In this regard, I offer the following comments.

First and most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The state's highest court, the Court of Appeals, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from that to which allusion was made in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

Second, in my view, unless the arrest or booking records have been sealed pursuant to §§160.50 of 160.55 of the Criminal Procedure Law, they must be disclosed. Under §160.50, when criminal charges have been dismissed in favor of an accused, the records relating to the arrest ordinarily are sealed. Under §160.55, if a charge of a felony or misdemeanor is reduced to a violation, although the records relating to the event in possession of agencies, such as a police department or office of a district attorney, are sealed, they remain available from the court in which

the matter was determined. I note, however, that that sealing requirement does not apply in the case of a charge of driving while impaired, and that a record of such an arrest is not sealed unless the charge is fully dismissed.

While 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, i.e., booking records, must be disclosed [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)]. I point out that the decision rendered by the Court of Appeals dealt specifically with arrests for speeding.

Third, the provision of to which Sgt. Krumpter referred, §87(2)(b) of the Freedom of Information Law, does not authorize an agency to deny access when disclosure would result in "an invasion of privacy"; rather, it refers to the ability to deny access when disclosure would result in an *"unwarranted"* invasion of personal privacy. That being so, there are numerous situations in which disclosure would constitute a permissible invasion of personal privacy, and that is generally so in the case of arrest or booking records. If charges are dismissed and the records are sealed pursuant to the Criminal Procedure Law, the records would be exempted from disclosure by statute in accordance with §87(2)(a) of the Freedom of Information Law.

Lastly, unless sealed, the records sought would in my opinion be available in great measure, if not in their entirety. The only portions of such records that might be withheld, depending on the facts and circumstances, would involve the identities of witnesses, for example. If the identities of witnesses have not yet been disclosed or are not part of a public court record, those portions of the records might be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy pertaining to those persons.

I hope that I have been of assistance. A copy of this response will be sent to Sgt. Krumpter.

RJF:jm

cc: Sgt. Thomas C. Krumpter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3896
FOIL-AO-15035

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December 9, 2004

Ms. Paulette Glasgow
[redacted]

The staff of the Committee on 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. Glasgow:

As you are aware, I have received your letter in which you sought information concerning "executive sessions and citizen[s] having to pay to obtain town board minutes."

You wrote that the Lewiston Town Board "has had over 20 executive sessions", that an executive session was held prior to a meeting and that the Board "merely cite[s] as the reason 'legal' 'personnel' 'contract'." You added that minutes of meetings must be requested "through FOIL" and that citizens "are being charged."

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that limits or restricts the number of executive sessions that may be held by a public body, such as a town board. The issue involves whether or the extent to which executive sessions are validly held.

Second, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As 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. Therefore, an executive session may be held only after

an open meeting has been convened. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Further, it has been held judicially 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)"

In short, it is reiterated that a public body may validly conduct an executive session only to discuss one or more of the subjects listed in §105(1) and that a motion to conduct an executive session must be sufficiently detailed to enable the public to know that there is a proper basis for entry into the closed session.

Third, with respect to subjects cited by the Board in its motion to enter into executive session, I note that there is no provision specifically concerning "legal" matters. Section 105(1)(d), however, authorizes a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of Lewiston."

Next, the term "personnel"appears nowhere in the Open Meetings Law, and the language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division has confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's

> reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Similarly, with respect to "contracts" or "contract negotiations", the only ground for entry into executive session that mentions that term is §105(1)(e). That provision permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, §105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union.

In terms of a motion to enter into an executive session held pursuant to §105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter into executive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle, supra].

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the police union."

Lastly, with respect to minutes, I direct your attention to the Freedom of Information Law. That statute includes all agency records within its coverage, including minutes. Under the law, an agency may not charge for the inspection of accessible records. However, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, including minutes of meetings [see Freedom of Information Law, §87(1)(b)(iii)].

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

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FOIL-AO-15036

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December 9, 2004

Mr. Carl A. Falk
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Falk:

As you are aware, I have received your letter in which you raised a series of questions concerning the Town Board of the Town of Richland and the Zoning Board of Appeals.

In brief, you indicated that the Town Board and Planning Board members disagree with respect to a certain requirement, and the Town Supervisor "wants to ask the ZBA for their 'opinion' on the matter." To do so, you asked whether the board "would have to take some sort of vote." Similarly, you asked whether you are "wrong in thinking that all action taken by the ZBA should require a Document of Decision and a public hearing."

In this regard, §63 of the Town Law states in relevant part that "[e]very act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board." If the request for an opinion constituted an "act", §63 would require that a vote be taken by the Board. However, since I am not an expert relative to the Town Law and the powers of town boards, it is suggested that you seek clarification from the town attorney or the Association of Towns.

With respect to the Zoning Board of Appeals, although the Board must in some instances conduct a public hearing before taking action, I do not believe that every action taken by the Board must be preceded by a public hearing. Again, I recommend that you seek guidance from those with greater expertise. In any instance in which action is taken, minutes must be prepared in accordance with §106 of the Open Meetings Law. That provision states that:

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 sent to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Robert L. North, Town Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 9, 2004

E-MAIL

TO: Richard Olson, Esq.

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. Olson:

As you are aware, I have received your letter in which you questioned the status of the Anderson School under the Freedom of Information Law.

You wrote that the Anderson School is "a Chartered Educational Institution which serves individuals suffering from autism...and is funded through the Office of Mental Retardation and Development Disabilities (OMRDD)." According to your letter, the School is "investigating locations for a new independent residence unit in a local town and has received a FOIL request for all records relating to the investigation." It is your view that that School is not subject to the Freedom of Information Law.

I agree with your contention. The Freedom of Information Law is applicable to agencies, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally apples to entities of state or local government.

Having acquired information pertaining to the Anderson School, I learned that it is a not-for-profit corporation and not a governmental entity. That being so, in my view, it does not constitute

an "agency" that is required to comply with the Freedom of Information Law, notwithstanding the receipt of government funding.

While I do not believe that the Anderson School is subject to the Freedom of Information Law, I point out that records pertaining to or received from the school by OMRDD or any other agency fall within the coverage of the Freedom of Information Law and would be subject to rights of access conferred by that statute.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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December 9, 2004

E-MAIL

TO: E. Bernstein

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. Bernstein:

As you are aware, I have received your letter in which you sought advice concerning rights of access to records involving "investigations of a crime....by a local police department." You wrote that "a local house was extensively damaged by a person or persons unknown" and that there has been no arrest.

In this regard, I believe that the contents of such records and the effects of disclosure serve as the key factors in considering 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 I am unaware of the contents of all of the records in which you are interested or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records at issue, relevant is a decision by the Court of Appeals, the state's highest court, concerning "complaint follow up reports" prepared by police officers in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or

deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 9, 2004

E-MAIL

TO: Chris Caesar

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. Caesar:

As you are aware, your letter addressed to Ms. Mercer has been received by this office.

You referred to communications transmitted via e-mail and raised the following question:

> "Are emails that I sent to my Director at NYCTA, from my home while I had left on disability (I had filed for it), to his email at work (received in his office) subject to the FOIL?"

You added the following details concerning the matter:

> "...I was out sick....for a year and terminated. The emails involved were wiped from my hard drive due to a virus. I asked him for a copy and he said he deletes his emails after printing hard copies and could not forward it (he keeps everything on his staff in private files). I asked him to mail me a copy, or scan the text and email that. He ignored me."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records and §89(3) of that statute provides in part that an agency is not required to create or prepare a record in response to a request. Therefore, if information never existed in the form of a record, or if records were destroyed, the Freedom of Information Law would not apply.

Second, the Freedom of Information Law pertains to all agency records; there are no "private files." Relevant is §86(4) of the Freedom of Information Law, which defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes".

The Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved a case cited earlier concerning documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" (see Westchester Rockland, supra, 581) and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In the same decision as that cited earlier, the Court emphasized that the Freedom of Information Law must be construed broadly in order to achieve the goal of government accountability, for the court found that:

> Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such

> objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In short, based on the considerations referenced in the preceding commentary, I believe that the contents of the "private files" to which you referred constitute "records" that fall within the scope of the Freedom of Information Law.

Third, §89(3) also states that an applicant must "reasonably describe" the records sought. Assuming that the email communications of your interest continue to exist, the ability to locate and retrieve them relates to any agency's responsibilities under the Freedom of Information Law. Insofar as an agency can locate and identify records sought with reasonable effort, I believe that it would be required to do so; on the other hand, if records cannot be located or retrieved except by reviewing hundreds or perhaps thousands of records (or emails) individually, a request in my opinion would not "reasonably describe" the records as required by the law [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Next, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Lastly, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons or "records access officers." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to him or her. If you choose to submit a request to the records access officer, it is suggested that you attempt to provide sufficient detail to enable agency staff to locate and identify the records.

When a proper request is made to an agency, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15040

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December 10, 2004

Joel Kupferman, Esq.
Executive Director
New York Environmental Law
and Justice Project
351 Broadway, Suite 400
New York, NY 10013-3902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kupferman:

As you are aware, I have received your letter and the materials relating to it.

It is my understanding that Pier 57 on the Hudson River in New York City is owned by the Hudson River Park Trust ("the Trust"). According to the correspondence, a request was made on September 20 by the New York Environmental Law and Justice Project for records "related to events during the RNC convention"(the Republican National Convention), specifically:

> "1. Communications with NYC Police Department, NYC Department of Corrections, NYC Law Department and/or any other city or state agency/department regarding lease, license, or temporary transfer of Pier.
>
> 2. Any lease or use agreement.
>
> 3. Copy of title and certificate of occupancy.
>
> 4. List of Park Trust and Department of Parks and Recreation employees assigned to Pier 57 from August 26 to September 15, 2004.
>
> 5. Any employee reports or complaints filed regarding health and safety conditions about Pier 57.

6. Any photographs or videos of the interior of Pier 57.

7. Any MDS (Material Safety Data Sheets) on file.

8. ENVIRONMENTAL ASSESSMENT/TESTS RECEIVED FROM NYC Transit or MTA."

The receipt of your request to the Trust was acknowledged on September 23, when you were informed that a reply would be prepared within "the next two to three weeks." However, as of the date of your letter to this office, you had apparently received no further response.

A similar request was made to the New York City Police Department, for you sought:

"All environmental test/analysis data and reports performed on Pier 57.

All agreements, stipulations, leases with the HUDSON RIVER PARK TRUST

All communications with other city agencies, including but not limited to the NYCDHMH Buildings

All health and safety complaints by police officers and civilians assigned to Pier 57 from August 26 to present."

The Police Department denied your request in its entirety on the basis of §87(2)(e)(i) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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, the response by the Police Department in my opinion reflects a failure to abide by a decision rendered by the state's highest court involving requests made to the Department, 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 separate from that cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the 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 Hudson River Park Trust 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)(i), authorizes an agency to withhold records "compiled for law enforcement purposes" to the extent that disclosure would "interfere with law enforcement investigations or judicial proceedings."

From my perspective, many of the records sought cannot justifiably be characterized as having been "compiled for law enforcement purposes." Agreements, stipulations or leases, would have been prepared in the ordinary course of business or for purposes unrelated to law enforcement. To characterize those records as having been compiled for law enforcement purposes, even though they may be used in or pertinent to an investigation, would be inconsistent with both the language and the judicial interpretations of the Freedom of Information Law cited earlier. Based upon the thrust of those decisions, §87(2)(e) should be construed narrowly in order to foster access. Further, case law illustrates why §87(2)(e) should be construed narrowly, and why a broad construction of that provision would give rise to an anomalous result. Specifically, in King v. Dillon (Supreme Court, Nassau County, December 19, 1984), the District Attorney was engaged in an investigation of the petitioner, who had served as a village clerk. In conjunction with the investigation, the District Attorney obtained minutes of meetings of the village board of trustees. Those minutes, which were prepared by the petitioner, were requested from the District Attorney. In granting access to the minutes, the decision indicated that "the party resisting disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he:

> "must note in the first instance that the records sought were not compiled for law enforcement purposes (P.O.L. 87[2]e). Minutes of Village Board meetings serve a different function...These were public records, ostensibly prepared by the petitioner, so there can be little question of the disclosure of confidential material."

Often records prepared in the ordinary course of business, which might already have been disclosed under the Freedom of Information Law, become relevant to or used in a law enforcement investigation or perhaps in litigation. In my view, when that occurs, the records would not be transformed into records compiled for law enforcement purposes. If they would have been available prior to their use in a law enforcement context, I believe that they would remain available, notwithstanding their use in that context for a purpose inconsistent with the reason for which they were prepared.

Even if some of the records sought were compiled for law enforcement purposes, it is questionable how, at this juncture, disclosure would "interfere" with an investigation or judicial proceeding. In short, the extent to which §87(2)(e)(i) may properly be asserted appears to be limited and minimal.

Notwithstanding the foregoing, I believe that some of the records may be withheld in whole or in part, depending on their contents.

Communications between the Police Department and other City agencies, as well as health and safety complaints made by police officers, would 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.

As indicated earlier, the Court of Appeals in Gould emphasized that a blanket denial of access on the basis of §87(2)(g) may be inconsistent with its specific language, for subparagraphs (i) through (iv) require disclosure, unless a different exception may be asserted. The Court focused on portions of inter-agency and intra-agency materials consisting of factual data, stressing that such data includes "objective" information, as opposed to expressions of advice or opinion that reflect the deliberative process and the thought process of agency officers and employees (Gould, supra, 276-277).

Insofar as complaints by police officers include information reflective of the medical problems or conditions of the officers, I believe that those portions of the records may be withheld pursuant to §87(2)(b) and 89(2)(b) on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Complaints from members of the public would not fall within §87(2)(g). However, 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. Following the deletions of identifying details, I believe that the substance of the complaints would be available.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be forwarded to the Police Department and the Hudson River Park Trust.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jonathan David
Lt. Daniel Gonzalez
Laurie Silberfeld
Laura Blackman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 15041

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December 13, 2004

Mr. Curtis Robinson
00-B-0830
Five Points Correctional Facility
Route 96, P.O. Box 119
Romulus, NY 14541

Dear Mr. Robinson:

I have received your letter of November 28, which reached this office on December 10. Please note that the address of the Committee on Government has changed.

You have appealed a denial of access to records that apparently relate to your arrest. In this regard, I point out that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records.

The provision dealing with the right to appeal a denial of access to records, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I note that certain aspects of your appeal deal with records involving the grand jury. Here I point out that first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or

> upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

As such, grand jury minutes or other records "attending a grand jury proceeding" would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 13, 2004

Mr. Derwood Grant
03-R-3754
Five Points Correctional Facility
State Route 96, P.O. Box 119
Romulus, NY 14541

Dear Mr. Grant:

I have received your letter in which you appealed a denial of access to records that you requested from the Office of the New York County District Attorney.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or compel an agency to grant or deny access to records.

The provision dealing with the right to appeal a denial of access, §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, I believe that the person designated to determine appeals by the District Attorney is Mr. Gary J. Galperin.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO - 15043

From: Robert Freeman
To: [redacted]
Date: 12/13/2004 11:42:27 AM
Subject: Dear Ms. Fearn:

Dear Ms. Fearn:

I have received your letter, and I believe that the issue involves whether Maria College is subject to the Buckley Amendment. The official title of that statute is the Family Educational Rights and Privacy Act ("FERPA").

According to the regulations promulgated by the U.S. Department of Education (34 CFR Part 99), FERPA is applicable to any educational agency or institution that receives federal funds, and such an entity is considered to be in receipt of funding when funds: "(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or (2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as undeer the Pell Grant Program and the Guaranteed Student Loan Program..."

If Maria College receives funding as described in the regulations, I believe that it is obliged to comply with FERPA. If it does not receive funding, there is no law that governs access to or the disclosure of its records.

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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(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

From: Robert Freeman
To: [redacted]
Date: 12/13/2004 1:10:56 PM
Subject: Dear Mr. Bernstein:

Dear Mr. Bernstein:

I have received your letter in which you questioned whether the public has rights of access to "corporate tax records other than property tax..."

In this regard, the provisions pertaining to personal privacy in the Freedom of Information and Personal Privacy Protection Laws pertain to records involving natural persons; they do not apply when records relate corporate entities. However, insofar as your inquiry pertains to records sent to the Department of Taxation and Finance by a corporate entity or are prepared by the Department upon receipt and review of those records, they would fall within a different exception. Section 87(2)(a) of the Freedom of Information Law authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." There are several statutes within the Tax Law that require that the kinds of records described above are confidential and cannot be disclosed. The statute most commonly cited is §697(e) of the Tax Law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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FOIL-AO-15045

From: Robert Freeman
To: ed@allegrodata.com
Date: 12/13/2004 4:53:09 PM
Subject: http://www.dos.state.ny.us/coog/ftext/f8395.htm

http://www.dos.state.ny.us/coog/ftext/f8395.htm

Dear Mr. Rubeo:

Attached is an advisory opinion that might offer clarification.

The provision concerning the obligation of an agency to inform an applicant of the right to appeal is not found in the Freedom of Information Law itself. As you may be aware, the law requires the Committee on Open Government to promulgate general rules and regulations concerning the procedural implementation of the law. In turn, the law requires that each agency adopt its own regulations consistent with the law and the Committee's regulations. One element of the regulations, §1401.7, pertains to appeals, and states part that: "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 provision quoted above was cited and served as the basis for the decision rendered by the state's highest court in Barrett v. Morgenthau.

For your information, Article 78 is found in the Civil Practice Law and Rules (CPLR). It includes the series of statutes that enable members of the public to initiate suit against a government agency or official when it is contended that the person or agency acted unreasonably or failed to carry out a duty imposed by law. This office does not participate in Article 78 proceedings. However, the terms of Article 78 as well as a variety of related material can be found in any law library of substance (i.e., as in the case of the library in a county courthouse).

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO- 15046

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December 16, 2004

E-MAIL

TO: Louis Bonomo

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. Bonomo:

As you know, I have received your correspondence. You have asked whether "an e-mail that an employee of the Administrative Tribunal of the New York City Department of Health received regarding [your] appeal to the Review Board qualifies as a record that [you] can request under the Freedom of Information Act."

From my perspective, that communication falls within the coverage of the Freedom of Information Law. That statute pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, I believe that an e-mail communication received by an agency would clearly constitute a "record" that falls within the coverage of the Freedom of Information Law.

Email may be viewed on a screen and printed. In my view, it is merely a means of communicating information and its contents should be treated for purposes of the Freedom of Information Law in the same manner as if its content was transmitted on paper or other traditional means.

I hope that I have been of assistance.

RJF:tt

cc: Records Access Officer, NYC Department of Health

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1507

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December 16, 2004

Mr. Jay L. Wilber
Public Defender
Broome County Office of the
Public Defender
229-231 State Street
Binghamton, NY 13901

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wilber:

I have received your letter in which you requested an advisory opinion concerning the Freedom of Information Law. Specifically, you asked whether:

> "Local Police Departments must make available under the Freedom of Information Law (FOIL) the Table of Contents for their Policy & Procedures Manuals for General and Special Orders. Additionally, must they turn over, if requested pursuant to FOIL, their Policy & Procedures Manuals for General and Special Orders?"

From my perspective, the table of contents would be accessible. The other materials would likely be accessible in part. In this regard, I offer the following comments.

Perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (I) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated and expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In my view, three of the grounds for denial are pertinent to an analysis of rights of access.

First, the records would appear to fall within §87(2)(g). As indicated in Gould and suggested above, while that provision potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. 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.

From my perspective, a table of contents merely consists of a factual statement indicating the general content of a document. If that is so, I believe that it would be available under subparagraph (i) of §87(2)(g). The remainder of the materials, policies and procedures, would in my opinion be accessible under subparagraphs (ii) or (iii), except to the extent either of two exceptions may properly be asserted.

Relevant is §87(2)(e)(iv), which permits an agency to withhold records that are "compiled for law enforcement purposes" to the extent that disclosure would "reveal criminal investigative techniques or procedures, except routine techniques and procedures."

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, a denial of access would be appropriate.

Lastly, §87(2)(f) states that an agency may withhold records or portions of records when disclosure "could endanger the life or safety of any person." Insofar as disclosure could reasonably be expected to endanger the lives or safety of law enforcement personnel or others, I believe that §87(2)(f) would serve as a basis for a denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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FOIL-AO-15048

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December 16, 2004

James Cheeseman, President
West Gate Landscaping Inc.
166 Route 59
Suffern, NY 10901

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Cheeseman:

As you are aware, I have received a variety of correspondence from you concerning your requests for records made to Rockland County. It is your view "that the Freedom of Information Law is being deliberately and knowingly violated by some County officials", and you asked whether I agree and that I inform County officials of the obligations imposed by that statute.

In short, based on conversations with several County officials, I disagree, for it appears that the County has engaged in substantial efforts to make the records sought available to you. It is my understanding that the County has disclosed and that you have made copies of all records in its possession that fall within the scope of your requests.

I was informed that from February 23 to March 25, you used your scanner to copy County records five days a week, focusing on the records of the County Highway Department and Drainage Agency; that from March 30 to May 6, for two days per week, you continued your review and copying of the records sought; and that from July 7 to October, you spent one day a week reviewing and copying records. In sum, it is my understanding that you have inspected and copied the complete contents of thirty-three boxes of documents, and that there are no additional documents requested that are maintained by the County. As stated by Charles H. Vezzetti, Superintendent of Highways, in a letter dated November 1:

> "All documents have been made available to you that are in our possession. Your continued implication that documents that you have requested have not been provided is unfair and untrue. We cannot provide what we do not have."

In an attempt to address your contentions and concerns, and to offer clarification regarding the County's obligations relative to the Freedom of Information Law, I offer the following additional comments.

First, in several instances, you referred to "specific documents" that might not have been made available. Similarly, following your review of records that make reference to other records, you requested those other records. For example, in a letter of November 9 addressed to the Drainage Agency, you wrote as follows in one aspect of a request:

> "In Box # 6, there is a document referring to the Nauraushan Brook with the Heading W.M. Walsh Company, Inc., Creskill, New Jersey, Test Boring Data. In the document, there are details of Test Hole No. B-7 for Adler Associates completed 5/21/73. There was no other Test Boring data. I request copies of the Test Boring data from the location just above the Private Bridge and downstream to Lake Tappan."

From my perspective, a request made for a "specific document" does not necessarily indicate that a person seeking the record has made a valid request that must be honored by an agency. As you are aware, based on our discussions and materials previously sent to you, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. In considering that requirement, the Court of Appeals, the state's highest court, has indicated that whether or the extent to which a request meets the standard may be dependent on the nature of an agency's filing, indexing or records retrieval mechanisms [see Konigsburg v. Coughlin, 68 NY2d 245 (1986)]. When an agency has the ability to locate and identify records sought in conjunction with its filing, indexing and retrieval mechanisms, it was found that a request meets the requirement of reasonably describing the records sought, irrespective of the volume of the request. By stating, however, that an agency is not required to follow "a path not already trodden" (id., 250) in its attempts to locate records, I believe that the Court determined, in essence, that agency officials are not required to search through the haystack for a needle, even if they know or surmise that the needle may be there.

For purposes of further illustration, assuming that the Rockland County telephone directory is a County record and that you request portions of the directory identifying those persons whose last name is "Cheeseman", the request would meet the requirement of reasonably describing the records, for items in the directory are listed alphabetically by last name. Even if there were ten thousand Cheeseman's, the request would be valid. But what if you request those listings in the directory identifying all of those persons whose first name is "James?" The request is specific and it is certain that, as a common first name, there are such entries. Nevertheless, to locate the entries pertaining to persons whose first name is James would require an entry by entry search of the entire directory. Despite the specificity of the request and the certainty that the entries sought are included within the record, the request, in my opinion, would not "reasonably describe" the records as required by the Freedom of Information Law.

In the context of some of your requests, you apparently obtained records that made reference to another "specific document", and requested that other document. In my view, a request of that

nature would not necessarily reasonably describe the record in accordance with the direction provided by the Court of Appeals. When an agency cannot locate the document with reasonable effort and an attempt to do so would involve the equivalent of a search for the needle in the haystack or for entries in the telephone book for those persons whose first name is James, the request, in my view, would not reasonable describe the records as required by law.

I am not suggesting that in such a circumstance there is any fault or deficiency on the part of either the person seeking records or an agency. Very simply, I do not believe that an agency is required to engage in an effort of such magnitude to satisfy the obligations imposed by the Freedom of Information Law.

Second, as you are aware, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. 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, too, that an agency is not required to maintain most of its records permanently. Pursuant to Article 57-A of the Arts and Cultural Affairs Law, the Commissioner of Education establishes schedules indicating minimum retention periods applicable to local government records. When the minimum retention period has been reached, an agency may dispose of or destroy its records. Since many of the records sought relate to events that occurred more than thirty years ago, it is likely that some of those records were legally destroyed in accordance with the retention schedule.

Lastly, it has been held that an agency is not required to make records available a second time when the records had previously been obtained by the person seeking the records or his or her representative, unless it can be proven that neither the person seeking the records nor his or her representative any longer maintains possession of the records [Lebron v. Morales, 706 NYS2d 329, 271 AD2d 241 (2000), mot lv to app den, 714 NYS2d 710, 95 NY2d 760; see also Moore v. Santucci, 151 AD2d 677 (1989)].

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: Sue Sherwood
Charles H. Vezzetti
Thomas Simeti

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-15049

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December 16, 2004

E-Mail

TO: Hon. Richard E. Slagle

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 Mayor Slagle:

As you are aware, I have received your letter in which you sought an opinion relating to the Freedom of Information Law.

By way of background, you wrote as follows:

> "Recently a village trustee removed documents from the desk in the office at the streets department. Two village employees witnessed him removing these documents but they were not aware of the contents. When confronted by the police about this he claimed that he had removed a park file. At a later meeting of the village board he claimed that he had removed the personal files of the former working streets supervisor and that he had the permission of this former employee to remove these records. I asked our records management officer/village clerk if she had given anyone permission to remove any records from the streets garage and her answer was she had not."

You wrote that it is your belief that:

> "...all village records are under the control of the records management officer and that no one may remove any files or records from any village building without first receiving permission from the records management officer."

If that is so, you asked whether you are:

> "...correct in assuming that this trustee illegally removed these records and if so could you tell me what the ramifications are of this action."

In this regard, first, I note that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. While it is clear that the Village Clerk is the custodian of Village records and its records management officer (see Arts and Cultural Affairs Law, §57.19), I cannot offer advice or an opinion concerning the legality of the trustee's action.

Second, however, in my view, the documents at issue clearly constitute Village records that fall within the scope of the Freedom of Information Law, despite their characterization as "personal."

The Freedom of Information Law pertains to all government 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 another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Further, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

In short, irrespective of their origin, function, or their characterization as "personal", I believe that the documents in question constitute Village records that fall within the coverage of the Freedom of Information Law and are subject to public rights of access conferred by that statute.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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FOIL-AO-15050

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December 16, 2004

E-MAIL

TO: Paul Bode

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. bode:

As you are aware, I have received your letter relating to the selection by the Board of Education of the Wappinger School District of a person to fill a vacancy on the Board. In addition to expressing your view concerning the selection process, you wrote that this office "directed" the District "not to release the names and addresses" of those being considered by the Board to fill the vacancy.

In this regard, first, the authority of the Committee on Open Government is advisory. This office cannot "direct" an agency to grant or deny access to records.

Second, it has consistently been advised that the names of those considered to fill a vacancy in what would normally be an elective office must be disclosed to comply with the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In typical circumstances, a person seeking to fill an elective position attempts to make his or her name known in order to attract the interest and support of voters. To suggest that names of those seeking to fill the same position that has become vacant and which may be filled by means of an appointment made by an elective body would in my view be an anomaly. I am not suggesting that personal details of individuals' lives must be disclosed. Nevertheless, in my opinion, disclosure of the names of candidates for a vacant elective position could not be characterized as "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

Further, although §89(7) of the Freedom of Information Law states in part that nothing in that statute requires the disclosure of the name "of an applicant for appointment to public employment", an applicant for a position on a board of education would not be a prospective employee seeking employment.

In a judicial decision dealt in part with a discussion in executive session concerning those under consideration to fill a vacant elective position on a public body, it was held that an executive session could not properly have been held. The court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994).

Based on the foregoing, it is clear in my view the names of candidates who seek to fill vacant elective positions must be disclosed.

Lastly, §89(7) also states that the home address of a current or former public officer or employee need not be disclosed pursuant to the Freedom of Information Law. In consideration of the direction given in that provision, I do not believe that the Freedom of Information Law would require the disclosure of the home addresses of candidates considered to fill a vacancy on the Board.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 16, 2004

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 facts presented in your correspondence.

Dear Ms. Snyder:

As you are aware, I have received your correspondence concerning requests for records made to the Village of Brockport pursuant to the Freedom of Information Law. You asked that I review the request and offer an opinion "as to whether the response and/or request(s) is consistent with the Freedom of Information Law." The request involves copies of certain invoices, vouchers, billing statements, and contracts. The Village Clerk approved the request and wrote that certain portions of the records sought would be gathered by the Village Treasurer and made available within thirty days. With respect to the other records requested, the clerk wrote that: "If those items exist, they will also be made available for pick up within 30 days. If they do not, you will be informed in writing."

From my perspective, it appears that both your request and the response by the clerk are appropriate. In this regard, I offer the following comments.

First, as a person seeking records, your responsibility under §89(3) of the Freedom of Information Law is to "reasonably describe" the records sought by providing sufficient detail to enable agency staff to locate and identify the records of your interest. It appears that your request meets that requirement.

Second, the Freedom of Information Law pertains to existing records. Therefore, insofar as your request might involve items that do not exist, the Freedom of Information Law would not apply.

Third, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law. In 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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Leslie Ann Morelli, Village Clerk

FOIL-AO-1515

From: Robert Freeman
To: lricci@hrg.net
Date: 2/8/2005 1:01:34 PM
Subject: Dear Mr. Ricci:

Dear Mr. Ricci:

The statement of intent appearing at the beginning of the Freedom of Information Law indicates that government agencies are supposed to make records available "whenever and wherever feasible." However, that statute pertains to all agency records [see definition of record, §86(4)], and §89(3) authorizes an agency to require that a request for a record be made in writing. Therefore, even if records are clearly public and historically available, an agency may require that they be requested in writing. Certainly an agency may waive its ability to require a written request, and it may choose to accept requests made orally. Further, often agencies now place records that are clearly public and requested frequently on their websites.

If you would like a more detailed or technical response, please so inform me.

Robert J. Freeman
Executive Director
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 16, 2004

Mr. Andrew J. DiBello
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. DiBello:

As you are aware, I have received your correspondence concerning your attempt to gain access to records of the City of Middletown.

By way of background, you delivered a request to the Deputy City Clerk on August 26. Soon after, the Deputy Clerk contacted you by phone, indicating that you could pick up the records. However, upon your review of the records made available to you, you determined that the City's response was incomplete and that some of the records requested were not included among those disclosed. You wrote that you attempted to discuss the matter with the Deputy Clerk on several occasions but that he did not return your phone calls. You also appeared before the Common Council to inform the Council of the City's failure to respond fully to your request and appealed in writing to the Council on September 27. As of the date of your latest communication with this office, you had received no further response from the City.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of that statute states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

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, the state's highest court has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In 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, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access or if an agency fail to grant or deny access in writing 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)].

Second, I believe that the records at issue are clearly accessible under the Freedom of Information Law.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The records sought are resolutions adopted by the Common Council authorizing a certain firm to carry out certain work for the City and copies of agreements between the City and that firm during a specified period. In my view, none of the grounds for denial could justifiably be asserted to withhold such records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Common Council
Charles Mitchell, Deputy City Clerk
Alex Smith, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15053

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 17, 2004

Mr. Anthony Bennett
96-B-1530
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bennett:

I have received your letter concerning access to records of banks and past employers.

In this regard, 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 includes entities of state and local government within its coverage. Banks and other private organizations are not subject to the requirements of that law. Consequently, the Freedom of Information Law does not enable you to obtain the records of your interest.

You also asked for the name of the agency "that issues the licenses for certified public accountant companies." I am unaware of whether those companies must be licensed. However, public accountants are licensed by the State Education Department. To obtain additional information, it is suggested that you might contact the Office of the Professions, State Education Department, 1450 Western Avenue, Albany, NY 12203.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15054

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 17, 2004

E-Mail

TO: Larry Miller

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. Miller:

I have received your letter in which you wrote that your requests for records of the Oceanside School District have not been answered.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknoweldges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15055

41 State Street, Albany, New York 12231
(518) 474-2518
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December 20, 2004

Ms. Lucille Held
[redacted]

Dear Lucille:

I hope that you and yours are well and enjoying the holiday season.

I have received your package involving requests made to the Harrison Town Clerk. To avoid the kinds of problems and pitfalls that you encountered recently, it is suggested that you request records rather than asking questions.

As you may recall, the Freedom of Information Law pertains to existing records, and §89(3) states in part that a government agency is not required to create a record in response to a request. That being so, it has been advised that applicants should never request a "list" unless it is known that a list already exists. For instance, you asked that the Town Clerk "list all recreation facilities." Since there may be no list, it is recommended that you request "records that identify recreation facilities in the Town", or something similar. You also asked: "How much $ do we have in our Harrison General Fund? What interest do we earn?" Again, the Freedom of Information Law does not require that agencies provide information in response to questions. If you request records indicating the amount of money currently in the General Fund and the rate of interest paid on the account, I believe the Town would be obliged to disclose those records.

Keep up the good work, and again, happy holidays!

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15056

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December 20, 2004

Mr. Angel Luis Acosta
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Acosta:

I have received your letter addressed to Secretary of State Daniels. As indicated above, the staff of the Committee is authorized to respond to inquiries and prepare advisory opinions on behalf of its members.

You referred to Asian Americans for Equality (AAFE), which is a not-for-profit corporation, and its subsidiary, the Community Homes Development Fund Company. The correspondence attached to your letter indicates that you requested records from AAFE, and you asked whether "not for profit organizations participating in publicly assisted projects are subject to the Freedom of Information Act."

In this regard, the New York Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, in general, entities of state and local government fall within the coverage of the Freedom of Information Law. In my view, participation in publicly assisted projects or the receipt of government funds by a not-for-profit organization would not transform that organization into a governmental entity or bring it within the scope of the Freedom of Information Law.

Notwithstanding the preceding point, it is emphasized that the Freedom of Information Law is expansive as it applies to agency records, for §86(4) defines the term "record" broadly to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Therefore, if, for example, AAFE or any other not-for-profit organization has a relationship with a government agency, the records maintained by or for that agency fall within the coverage of the Freedom of Information Law, irrespective of the function or origin of the records.

AAFE would appear to have relationships with the New York City Department of Housing Preservation and Development, and perhaps other agencies of New York City and state government. If that is so, requests may be made under the Freedom of Information Law to those agencies for records pertaining to the activities of AAFE and its subsidiaries.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15057

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December 20, 2004

E-MAIL

TO: Phil Kelly

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. Kelly:

I have received your letter in which you wrote that you are attempting to obtain "basic information/requirements and guidelines with regard to candidacy in the upcoming local elections for trustees" in the Village of Cedarhurst. You indicated, however, that the Village has refused to respond unless you provide your home address. You have sought clarification of the matter.

In this regard, first, it is noted that the Freedom of Information Law pertains to requests for existing records. That law does not require that government agency officials answer or provide information in response to questions. Similarly, §89(3) states in part that an agency is not required to create or prepare a record in response to a request.

Second, §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Therefore, insofar as the Village maintains records containing the information of your interest, those records fall within the coverage 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.

Lastly, 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), in my opinion, the residence of an applicant or use of the records are irrelevant.

In sum, insofar as the Village maintains records in which you are interested, I believe that they are subject to rights of access, irrespective of your intended use of the records or your address. That being so, I do not believe that the Village may condition disclosure of any such records upon your release of your residence address.

I hope that I have been of assistance.

RJF:tt

cc: Board of Trustees
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15058

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 21, 2004

Mr. Samuel S. Yasgur
Sullivan County Attorney
County Government Center
P.O. Box 5012
Monticello, NY 12701

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Yasgur:

I have received your letter in which you referred to two letters forwarded to you by the Sullivan County Real Property Tax Director, Mr. Paul J. Burkard, in which he was advised by two state agencies that certain information in his possession should not be disclosed to the public.

One letter was sent to Mr. Burkard by the Office of Cyber Security and Critical Infrastructure Coordination (CSCIC) concerning the delivery "copies of orthoimagery", and with it was the following admonition:

> "Also included in this delivery is a list of the 'sensitive' images and graphic files showing their location. These may NOT be shared with the general public.
>
> "As noted in our original delivery letter dated August 2, 2002, the full resolution imagery includes files deemed sensitive by (OHS). These *full resolution* sensitive images were provided only for the internal use of Sullivan County, contractors acting on behalf of the County, and municipalities within Sullivan County. These sensitive tiles are not to be distributed or displayed to the public. Any requests to distribute or display the full resolution sensitive images should be referred to CSCIC."

The other letter was addressed to Mr. Burkard by the Office for Technology concerning CD's sent to the County that include digital orthoimagery. The letter states that:

> "The enclosed 'Support CD' includes a list of all imagery tiles containing sensitive information as defined by the New York State Office for Public Security. Due to current public security concerns, we request that Sullivan County limit distribution of this sensitive imagery to only county and municipal entities within the county. Please refer requests by all others to OFT. In addition, please notify all entities receiving this imagery of the requirements for restricted distribution."

You wrote that it had been your belief that the images in question could be withheld if they were maintained by the County Sheriff's Department, but that you are unaware of any exception to rights of access that might be asserted when the records are maintained by the Real Property Tax Office.

From my perspective, the content of the records and the effects of their disclosure, not the unit of County government that maintains them, serve as the key factors in determining whether or the extent to which they may be withheld. In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to agency records, and §86(4) defines the term "record" expansively to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, I believe that the images sent to Sullivan County by state agencies constitute County records that fall within the coverage of the Freedom of Information Law. That being so, the County, in my view, would be required to respond to a request for those records in a manner consistent with that statute. I do not believe that the County would be required to refer any such request to another agency.

Second, while the County may consult with or seek guidance from a state agency or others in attempting to determine public rights of access to records, a state agency may not, in my opinion, prohibit the County from disclosing the records at issue or restrict the dissemination of those 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.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." The term "statute", according to judicial decisions, is an enactment of Congress

or the State Legislature. 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)]. In the context of the situation that you described, I know of no statute that would exempt the records from disclosure.

There is nothing in the Freedom of Information Law that authorizes a person or agency to impose, claim, promise or engage in an agreement conferring confidentiality. The Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available. In Washington Post v. Insurance Department, supra, the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court of Appeals reversed a finding that the documents were not "records" subject to the Freedom of Information Law, thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" (id., 564). Moreover, it was determined that:

> "Respondent's long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'records' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt (see *Matter of John P. v Whalen*, 54 NY2d 89, 96; *Matter of Fink v Lefkowitz,* 47 NY2d 567, 571-572, *supra*; *Church of Scientology v State of New York*, 61 AD2d 942, 942-943, affd 46 NY2d 906; *Matter of Belth v Insurance Dept.*, 95 Misc 2d 18, 19-20). Nor is it relevant that the documents originated outside the government...Such a factor is not mentioned or implied in the statutory definition of records or in the statement of purpose..."

The Court also concluded that "just as promises of confidentiality by the Department do not affect the status of documents as records, neither do they affect the applicability of any exemption" (id., 567).

In short, based on the language of the Freedom of Information Law and the judicial precedents cited above, I do not believe that the records in question may be characterized as exempt from disclosure by statute or that a state agency may require that the County prohibit disclosure to the public.

The foregoing is not intended to suggest that the records must disclosed, for it is possible that an exception might justify a denial of access by the County to certain records or perhaps portions of records. If indeed security is a valid concern, most pertinent in my opinion is §87(2)(f), which

was recently amended. By way of background, that provision had since 1978 authorized 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 was somewhat less stringent. In citing §87(2)(f), it was 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 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 sum, although §87(2)(f) referred to disclosure that *would* endanger life or safety, the courts clearly indicated that *"would"* meant *"could."*

Recently the Legislature acted to change the word "would" to "could" (Ch. 403, Laws of 2003). Therefore, when there is a reasonable likelihood that disclosure could endanger life or safety,

I believe that the County may deny access, whether the records are kept by a law enforcement agency or any other unit within County government.

Lastly, as indicated earlier, when an agency's denial of access is challenged in court, §89(4)(b) specifies that the agency has the burden of defending secrecy. In this regard, 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 [89 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Paul J. Burkard
Tim Ruhren
R. Bruce Oswald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3902
FOIL-AO-15059

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December 21, 2004

E-MAIL

TO: Rob Blair

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. Blair:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. In your letter, you raised the following questions:

> "Can a group move into executive session to discuss non performance of an ELECTED official in the performance of their job duties if the group has a prescribed manner to deal with the elected official in the non-performance of his/her job duties. Doesn't the electorate have a right to know that the official may not be performing his/her duties?"

In this regard, first, the Open Meetings Law is based on a presumption of openness and requires that meetings of public bodies (i.e., municipal boards) be conducted open to the public, except to the extent that there is a basis for entry into an executive session. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session.

Pertinent in the context of your inquiry is paragraph (f), which states that a public body may conduct an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."

If, as you indicated, the public body has the ability to discipline or impose sanctions against one of its members, it would appear that a discussion concerning the possibility of doing so could be

conducted during an executive session. Such a discussion would apparently involve a matter leading to the discipline of a particular person.

In a situation in which action is taken to impose some sort sanction or discipline upon a public officer or employee, I believe that the action must be memorialized in minutes prepared in accordance with §106 of the Open Meetings Law. That provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon' provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session. ..."

Whether action is taken in public or during an executive session, minutes must be prepared indicating the nature of the action. Further, I believe that the record indicating the nature of such action must be disclosed as required by the Freedom of Information Law.

Like the Open Meetings Law, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I note that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Two of the grounds for denial are relevant to an analysis of the matter; neither, however, could in my view serve to justify a denial of access.

Perhaps of greatest significance is§87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> I. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which there has been a written reprimand, disciplinary action, or findings that public

offices or employees have failed to carry out their duties or perhaps 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 the context of your inquiry, if indeed there is a determination to impose discipline or a sanction, I believe that the record so indicating would be accessible to the public. Based on the preceding analysis, disclosure would constitute a permissible invasion of privacy. Further, it would reflect a final agency determination accessible under subparagraph (iii) of §87(2)(g).

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 22, 2004

Mr. Edward Harrington
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Harrington:

I have received your letters and hope that you will accept my apologies for the delay in response. Both involve your efforts in gaining access to records of the City of Oswego.

One of the letters pertains to a denial of your request for bills concerning the use of cell phones by the Mayor and the Assistant Mayor that was the subject of a detailed advisory opinion addressed to you on September 8. The other involves a denial of access to a "sales slip" or receipt for charges on a city credit card for purchases at a named establishment. The amount of the charge was reimbursed, and the City Attorney denied access on the ground that disclosure would constitute "an unwarranted invasion of personal privacy", citing §89(2)(b)(iv) of the Freedom of Information Law.

Having reviewed the opinion of September 8, I do not believe that I can add anything of substance to it. As you may be aware, following the denial of an appeal, a person denied access has the ability to challenge the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. I note, too, that §89(4)(b) of the Freedom of Information Law specifies that the agency has the burden of proving that the denial was proper.

With respect to the sales slip or receipt, just as it was advised that portions of records indicating the use of a cell phone by a public officer or employee must in my opinion be disclosed, I believe that a record indicating the use of a City credit card must also be disclosed, even if the charges are reimbursed. As suggested in the opinion of September 8:

> "If a public employee makes personal calls and reimburses the agency for the cost of those calls, the numbers called may, in my opinion, be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. However, I believe that

> the remaining entries must be disclosed. It is my view that the public has the right to know whether a public employee is making personal calls during his or her workday, as well as the duration of those calls. Those items in my opinion clearly bear upon the performance of one's official duties and would, if disclosed, result in a permissible, not an unwarranted invasion of personal privacy."

From my perspective, there is nothing "personal" or intimate about the use of a City's credit card. That the amount charged was reimbursed, in my view, has little bearing in consideration of whether disclosure would constitute a permissible rather than an unwarranted invasion of privacy. Further, the facts involving the use of the credit card differ from those involving the use of a cell phone. In the earlier opinion, it was advised that the phone numbers on a bill indicating personal calls could be deleted if the charges were reimbursed, for release of phone numbers used to make personal calls could result in the disclosure of personal information (i.e., a person's unlisted home phone number). I do not believe that there would be a similar result or that a similar contention could be made in relation to a City credit card receipt reflective of purchases made at an eating establishment.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward J. Izyk
Mayor John J. Gosek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 22, 2004

E-MAIL

TO: Donna Bedell

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. Bedell:

I have received your letter in which you asked whether a volunteer department is subject to the Open Meetings and Freedom of Information Laws.

In this regard, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of the Law defines "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By reviewing the components in the definition of "public body", I believe that each is present with respect to the board of a volunteer fire company. The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law.

I point out that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was questionable whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions if the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland, I believe that the board of a volunteer fire company falls within the definition of "public body" and would be required to comply with the Open Meetings Law.

With respect to the scope of the Freedom of Information Law, as indicated above, that statute applies to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local government.

In Westchester-Rockland, the case involved access to records relating to a lottery conducted by a volunteer fire company, and it was determined that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their

> relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Similarly, the Open Meetings Law requires that meetings be conducted in public, except to the extent that there is a basis for entry in to an executive session. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session.

The text of the Freedom of Information and Open Meetings Laws, as well as "Your Right to Know", which describes both laws, are available on our website.

I hope that I have been of assistance.

RJF:tt

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December 23, 2004

E-MAIL

TO: Joy Canfield

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. Canfield:

As you are aware, I have received your correspondence concerning a variety of issues relating to the Town of Broadalbin, which you serve as a member of the Town Board.

The initial issue that you raised involved your attempt to videotape a public hearing conducted by the Planning Board during which you were asked to "shut off" your camera. In this regard, I point out that there is no provision of law that addresses the use of audio or video recorders at meetings. However, there are several judicial decisions involving meetings of public bodies, i.e., town boards or planning boards, indicating, in brief, that a person cannot be prohibited from recording an open meeting, unless the use of the device is obtrusive or disruptive [see e.g., Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83 (2003); Mitchell v. Board of Education, 113 AD2d 924 (1985); Peloquin v. Arsenault 616 NYS2d 716 (1994)].

It is noted that those decisions involved *meetings* of public bodies, not hearings, and that there may be a distinction between a meeting and a hearing. A meeting, according to §102(1) of the Open Meetings Law, is a gathering of a majority of a public body for the purpose of conducting public business, even if there is no intent to take action, and irrespective of the manner in which the gathering may be characterized. A hearing generally involves a situation in which members of the public are given the right to express their views in relation to a certain matter, and there is no general requirement that a majority of a public body be present during a hearing.

I point out the distinction between meetings and hearings because I know of no judicial decision concerning the use of recording devices during public hearings. While a court might reach the same conclusion concerning the use of those devices at public hearing as that reached in relation meetings, the outcome at this juncture is conjectural. However, it is possible that a hearing is also a meeting, if, for example, a majority of a public body is present during the hearing. If your

description of the facts is accurate, that the Planning Board, in addition to conducting a hearing, is, during the same gathering, "discussing business, voting and taking action on land use", I believe that the hearing would also be a meeting, and that you, or any other person, could audio or video record the event. I note, too, that all public bodies are treated in like manner under the Open Meetings Law and that there is no "exemption" from the law concerning planning boards or discussions relating to pending subdivisions.

Next, while a municipal board or official may choose to record open meetings or public hearings, there is no obligation to do so. If, however, a recording is prepared by or for a municipal agency, I believe that it would fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when a municipal board maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, case law indicates that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

The fact that any person could have heard the content the record, in my view, constitutes a waiver of the capacity to withhold what has become part of the public domain. As stated in a decision in which the ability to prohibit the use of audio tape recorders at open meetings was rejected, the Appellate Division determined that:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924, 925 (1985)].

With respect to the duplication of a tape recording, you asked whether you may do so at your home, and you added that the Town charges a ten dollar "handling fee" when you bring your own equipment to Town Hall and make your own copy of the Town's tape. In my view, the Town is not required to relinquish custody of its records to enable you to copy the tape at your home. Nevertheless, if you use your own equipment to duplicate the tape at Town Hall, I do not believe that a fee can be charged. Pursuant to §87(1)(b)(iii) of the Freedom of Information Law, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search or "handling." 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.

The Freedom of Information Law does not address issues involving the retention and disposal of records. Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

Based on the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials must "have custody" and "adequately protect" records until the minimum period for the retention of the records has been reached.

Questions regarding the retention of tape recordings of open meetings have been the subject of questions over the course of time, and I believe that the minimum retention period for such records is four months. However, to confirm whether that is so, it is suggested that you contact the State Archives, a unit of the State Education Department. That office may be reached at 474-6928.

Lastly, you raised questions concerning the ability to discuss certain matters pertaining to an elected official during an executive session. Here I point out that the term "personnel" appears nowhere in the Open Meetings Law, and the ability to cite the so-called "personnel exception" for entry into executive session is not restricted to matters involving employees. Section 105(1)(f) authorizes a public body to conduct an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."

Insofar as a discussion focuses on a particular person in relation to a topic identified in the language quoted above, I believe that an executive session may be conducted.

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Planning Board
Hon. Sheila C. Perry, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 23, 2004

Mr. Jeffrey Terborg
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. TerBorg:

I have received your letter and the materials relating to it. You wrote that you have encountered "numerous problems" with the office of the Monroe County Public Defender, which informed you that it could not represent you due to a "conflict of interest." That being so, you submitted a request to the Public Defender in which you referred to a proceeding in Family Court during which two attorneys working for the Public Defender withdrew from the case based on an alleged conflict of interest. Citing the Freedom of Information Law, you wrote in the request that you "would like to know what that conflict was."

In this regard, it is emphasized that the Freedom of Information Law deals with requests for existing records, and that §89(3) provides in relevant part that an agency is not required to create a record in response to a request for information. If there is no record that indicates the nature of the claimed conflict of interest, the office of the Public Defender would not be required by the Freedom of Information Law to prepare a record that explains the basis for such a claim. In short, if there is no record containing the information of your interest, the Freedom of Information Law would not apply.

Assuming that a record has been prepared indicating the reason or reasons for the 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. While I am unfamiliar with the content of any such record, it appears that two of the grounds for denial of access may be pertinent.

Section 87(2)(b) states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Insofar as a record identifies persons other than yourself, it is possible that their names or identifying details may be withheld.

Also potentially relevant is §87(2)(g), which pertains to internal governmental communications. 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 proper request is made, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Monroe County Public Defender

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15064

41 State Street, Albany, New York 12231
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December 23, 2004

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:

As you are aware, I have received your letter and related materials concerning a request for certain records that you directed to the Freeport Public School District. The focus of your interest is a report produced by Fanning Investigative Services, and you were informed that "[t]he District has no documents matching your request..."

In this regard, I have no knowledge of whether a report was prepared by Fanning Investigative Services. If no report was prepared, the Freedom of Information Law would not apply. On the other hand, if a report was prepared, I believe that it would fall within the coverage of that law, irrespective of the location at which it is maintained.

The Freedom of Information Law is expansive in its coverage, for it pertains to all agency records, and it §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises..

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In sum, insofar as the record sought is maintained for the District, I believe that the District would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law or obtain them in order to disclose them to you to the extent required by law.

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.

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: Eric L. Eversley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15065

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December 23, 2004

Mr. Gerald Stigliano
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Stigliano:

The Committee on Open Government, created as part of the state's Freedom of Information Law, has received materials relating to your request under that statute for copies of any dog license issued to named individuals at a particular address in the Bronx. Your request was denied by the Department of Health and Mental Hygiene on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

From my perspective, the denial of your request was inconsistent with law.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the law. Section 87(2)(b) authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted invasion of personal privacy.

It has consistently been advised that licenses and similar, related kinds of records are available to the public, even though they identify particular individuals. In my opinion, various activities are licensed due to some public interest in ensuring that individuals or entities are qualified to engage in certain activities, such as teaching, selling real estate, owning firearms, practicing law or medicine, etc., as well as owning a dog and ensuring that the dog is cared for appropriately. I believe that licenses and similar records are available, for they are intended to enable the public to know that an individual has met appropriate requirements to be engaged in an activity that is regulated by the state or in which the state has a significant interest.

The standard in the Freedom of Information Law pertaining to the protection of privacy in my opinion is flexible, and agency officials must, in some instances, make subjective judgments when issues of privacy arise. However, it is clear that not every item within a record that identifies an individual may be withheld. Disclosure of intimate details of peoples' lives, such as medical

information, one's employment history and the like, might, if disclosed, constitute an unwarranted invasion of personal privacy; nevertheless, other types of personal information maintained by an agency, particularly those types of information that are relevant to an agency's duties, would if disclosed often result in a permissible rather than an unwarranted invasion of personal privacy.

In this instance, the records would be available, for disclosure would, in my opinion, result in a permissible rather than an unwarranted invasion of personal privacy.

Names and addresses of licensees have been found to be available in Kwitny v. McGuire [53 NY 2d 968 (1981)] involving pistol licenses, American Broadcasting Companies v. Siebert [442 NYS 2d 855 (1981)] involving licensed check cashing businesses, Herald Company v. NYS Division of the Lottery [Supreme Court, Albany County, November 16, 1987] involving licensed lottery agents and New York State Association of Realtors, Inc. v. Paterson [Supreme Court, Albany County, July 15, 1981] involving licensed real estate brokers and salespeople. In short, I believe that records identifiable to licensees (or their dogs) are generally accessible to the public.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Department officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Wilfredo Lopez
Rena Bryant
Robert D. Clark

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2004

Mr. Matthew D. Chayes
Binghamton University Pipe Dream
4400 Vestal Parkway East
Vestal, NY 13850

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Chayes:

As you are aware, I have received your correspondence concerning a denial of your request for certain records maintained by Binghamton University. You sought "all of the SOOT results - - and/or any form of evaluation whatsoever completed by students - - delineated by individual instructor and then by course (separately) for the past eight semesters." "SOOT" is a program involving "Student Opinion of Teaching." The University denied the request on the basis of §89(2)(b)(i), "in that to release such evaluations would be an unwarranted invasion of personal privacy of the professor in that the evaluations are considered personnel records."

From my perspective, it is unlikely that the University can justify its response to your request. In this regard, I offer the following comments.

First, as you suggested in the correspondence, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another and from one employee to another. Neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent to an analysis of rights of access is §87(2)(b), which authorizes an agency to withhold records or portions of records which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article." The provision cited by the University as its basis for denying the request is found within that provision and states that an unwarranted invasion of personal privacy includes "disclosure of employment, medical or credit histories or personal references of applicants for employment."

In my view, the records sought could not be characterized as "employment histories". Further, it has been held that the language concerning employment histories is applicable to private employment, and that it cannot properly be asserted to withhold records involving public employment history [see Kwasnik v. City of New York and City University of New York, 262 AD2d 171 (1999)].

Notwithstanding the foregoing, I point out that the introductory language of §89(2)(b) indicates that the an unwarranted invasion of personal privacy "includes, but shall not be limited to" the examples of unwarranted invasions of privacy that appear in the ensuing provisions, the first of which is §89(2)(b)(i). 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, 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].

Evaluations of faculty members' teaching skills by students, those most familiar with the most significant aspect of the work of those public employees, in my opinion are clearly relevant to the performance of faculty members' duties. That being so, I do not believe that disclosure may be characterized as constituting an unwarranted invasion of personal privacy. In short, the evaluations are neither "personal", nor do they reflect intimate aspects of faculty members' lives [see Hanig v. State Department of Motor Vehicles, 79 NY2d 106 (1992)].

Lastly, it is emphasized that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals, the state's highest court, more than twenty-five years ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, supra, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (id., 565-566).

In an effort to encourage them to reconsider your request, copies of this opinion will be forwarded to University attorneys.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Stacey Hengsterman
Barbara Westbrook

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15067

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December 27, 2004

Mr. Richard L. Atkins
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Atkins:

I have received your letter and the correspondence attached to it. In brief, you described a series of difficulties and delays in your efforts in obtaining records from the City of Oswego. In consideration of your remarks, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and

that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

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)].

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: Jeanne Berlin, City Clerk
Edward J. Izyk, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-15068

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December 27, 2004

[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear [redacted]

As you are aware, I have received your letter in which you raised a series of questions relating to the Moriah Central School District, and particularly in relation to your son's educational program.

It is noted at the outset that the advisory authority of the Committee on Open Government pertains to the disclosure of information by government agencies, such as school districts. This office has neither the jurisdiction nor the expertise to address the issues that you raised concerning family relationships among members of the Board of Education and District employees or other matters involving ethics.

As I understand the situation, you are involved in a proceeding concerning your son's education, and you have raised issues questions and issues with the members of the Board and the Committee on Special Education (CSE). You were informed, however, that those persons were directed not to share information or communicate with you concerning matters discussed during an executive session pertaining to your child. The issue was apparently raised with the District's attorney who prepared a letter addressed to the Superintendent on the subject of "Executive Session Discussions – Confidentiality." The attorney focused on information identifiable to students and advised, in brief, that such is information is confidential and cannot be disclosed. I am in general agreement with the attorney. However, I do not believe that the prohibition concerning disclosure would apply to disclosure to the parent of a child who is the subject of the information.

In this regard, by way of background, the Freedom of Information Law pertains to government agency records and generally requires that agency records be disclosed, unless there is a basis for denial appearing in the Law that can be properly asserted. Similarly, the Open Meetings Law generally requires that meetings of public bodies, such as boards of education or committees on special education, be conducted in public, unless there is a basis for closing a meeting. I point out that there are two vehicles that may authorize a public body to discuss public business in private.

One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not applicable.

Pertinent to the issues you raised is §108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law."

Relevant with respect to both records and meetings are the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) and the regulations promulgated pursuant to FERPA by the U.S. Department of Education (34 CFR Part 99). In brief, FERPA applies to all educational agencies or institutions that participate in grant or loan programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Concurrently, FERPA provides rights of access to education records to a parent of a student under the age of eighteen.

The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, disclosure of students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

I note that the term disclosure is defined in the regulations to mean:

> "to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information

contained in those records, to any party, by any means, including oral, written, or electronic means."

In consideration of FERPA, if the Board or the CSE discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would deal with a matter made confidential by federal law that would be exempt from the Open Meetings Law. Nevertheless, when the information discussed by a board of education or CSE relates to a particular student, I do not believe that the prohibition against disclosure would apply to disclosures made to the parent of that student. If that kind of prohibition were to apply, parent-teacher conferences could not occur, and parents would be unable to discuss their children's educational programs with teachers or others involved with the education of their children.

In short, I agree that information identifiable to a student ordinarily cannot be disclosed to a member of the public, unless a parent of the student consents to disclosure. That prohibition, however, cannot sensibly apply in my opinion in a situation in which a parent of a student discusses matters involving his or her child with a member of a board of education or CSE.

It is suggested that you consider clarification of your rights under FERPA as well as the ability of Board members and others to discuss matters involving your child with you by contacting the federal agency that oversees FERPA, which is the Family Policy Compliance Office, Department of Education, 400 Maryland Avenue, S.E., Washington, DC 20202-5901.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Harold Bresett
Edward J. Sarzynski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15069

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December 27, 2004

Mr. Gerard E. Black
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Black:

I have received your letter and the correspondence attached to it. You have sought assistance in obtaining a copy of the resume of the person selected to fill the position of director of purchasing for the Seaford Fire District. The Chairman of the Board of Fire Commissioners denied your request "on the grounds that it would be an unreasonable invasion of that individual's privacy to advance you a copy of his resume."

Based on the judicial interpretation of the Freedom of Information Law, I believe that portions of the resume must be disclosed.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to tbe 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 inferred 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 judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 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 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 a resume that are irrelevant to the performance of one's duties may generally be withheld. However, in consideration of judicial decisions cited above, those portions of such a record or its equivalent detailing one's prior public employment, 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 Chairman.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: George W. Von Glahn, Jr., Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2004

Ms. Elaine Willi
[redacted]

The staff of the Committee on 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. Willi:

I have received your letter and the materials attached to it. You have asked that I review the City of Schenectady's denial of your request for "copies of the proposal regarding the development phase as described in the Central Park Municipal Golf Course RFP issued by the City....including but not limited to site plans, narrative, surveys, studies, maps, etc." Although the Mayor's response to you indicates that summaries of the proposals have been disclosed to the public, the records sought were withheld pursuant to §87(2)(c) and (d) of the Freedom of Information Law.

From my perspective, the blanket denial of your request is likely inconsistent with law. In this regard, I offer the following comments.

Perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency, such as the City of Schenectady, to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The state's highest court, the Court of Appeals, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Department contended that certain records could be withheld in their entirety on the ground that they fell within an exception different from those cited by the City, that pertaining to intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, because the records sought have been withheld in their entirety, the determination is, in my view, be inconsistent with the language of the law and judicial interpretations. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the City for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof...* as long as the requisite particularized showing is made" (id., 277; emphasis added).

As suggested in the response to your request, relevant is §87(2)(c), which enables agencies to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." In my view, the key word in the quoted provision is "impair", and the question involves how disclosure would impair the process of awarding a contract.

Section 87(2)(c) often applies in situations in which agencies seek bids or RFP's. While I am not an expert on the subject, I believe that bids and the processes relating to bids and RFP's are different. In the traditional competitive bidding process, so long as the bids meet the requisite specifications, an agency must accept the low bid and enter into a contract with the submitter of the low bid. When an agency seeks proposals by means of RFP's, there is no obligation to accept the proposal reflective of the lowest cost; rather, the agency may engage in negotiations with the submitters regarding cost as well as the nature or design of goods or services, or the nature of the project in accordance with the goal sought to be accomplished. As such, the process of evaluating RFP's is generally more flexible and discretionary than the process of awarding a contract following the submission of bids.

When an agency solicits bids, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage *vis a vis* those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, when the deadline for submission of bids has been reached, all of the submitters are on an equal footing and, as suggested earlier, an agency is generally obliged to accept the lowest appropriate bid. In that situation, the bids would, in my opinion, be available, even before a contract has been signed.

In the case of RFP's, even though the deadline for submission of proposals might have passed, an agency may engage in negotiations or evaluations with several of the submitters resulting in alterations in proposals or costs. Whether disclosure at that juncture would "impair" the process of awarding a contract is, in my view, a question of fact. In some instances, disclosure might impair the process; in others, disclosure may have no harmful effect or might encourage firms to be more competitive, thereby resulting in benefit to the agency and the public generally.

Claims have been made in situations similar to that described in your letter that proposals and other records pertaining to the RFP process may always be withheld prior to the final award of a contract. In general, I have disagreed with those kinds of blanket assertions. Again, unlike the bid process in which an agency essentially has no choice but to accept the low appropriate bid, in the RFP process, the figures offered by submitters are subject to negotiation and change; they do not reflect the "bottom line." In view of the flexibility of the process, it is difficult to envision how disclosure of those figures would adversely affect an agency's ability to engage in the best contractual arrangement on behalf of the taxpayers.

It has also been contended that the kinds of records at issue should be withheld because the negotiations with the apparently successful submitter may not culminate in an agreement or may be rejected by the ultimate decision maker. It is my understanding that the RFP process is intended to

encourage creativity on the part of submitters so that they can offer the best possible solutions in terms of an agency's needs or goals. That being so, and because proposals are subject to negotiation and alteration, even if the apparently successful proposal is rejected or set aside for some reason, the agency is not bound but rather is free to continue to attempt to engage in an optimal agreement. If anything, disclosure might encourage submitters to better accommodate the needs of the agency or propose what might be characterized as a better deal. Rather than impairing the process, disclosure might enhance it.

The other exception cited by the City is also pertinent to an analysis of rights of access. 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 a 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, which, for the first time, considered the phrase "substantial competitive injury" in Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale [87 NY2d 410(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise...as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors

> to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

From my perspective, it is likely that the records in question may have *some* value to the submitters of the proposals competitors, but whether every aspect of every record that has been withheld would, if disclosed, cause *substantial injury* to their competitive position is questionable, and that is the standard that must be met to justify a denial of access.

In an effort to encourage reconsideration of the denial of your request, copies of this response will be sent to City officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Brian U. Stratton
L. John Van Norden

From: Robert Freeman
To: [redacted]
Date: 12/27/2004 4:24:33 PM
Subject: Dear Mr. Schmidlin:

Dear Mr. Schmidlin:

I have received your inquiry in which you asked whether a district attorney's "closed criminal cases [can] be FOILed."

In this regard, the term "closed" can have two meanings. If a person is the subject of a charge, and the charge is dismissed in favor of the accused, the records relating to the matter are generally sealed pursuant to §160.50 of the Criminal Procedure Law. If, however, a case is closed due to a conviction, the records are subject to rights of access conferred by the Freedom of Information Law. This is not to suggest that the records are accessible in their entirety, for there may be portions that may justifiably be withheld (i.e., names of informants, internal memoranda consisting of opinions or advice, etc.). I note, too, that if there is a conviction as the result of a trial, although the courts are not subject to the Freedom of Information Law, court records are generally public under other provisions of law (see e.g., Judiciary Law, §255).

If you would like to discuss the issue further, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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December 27, 2004

Hon. Joyce Barnett
Town of Spafford Council Member
2680 Nunnery Road
Skaneateles, NY 13152

Dear Ms. Barnett:

I have received your letter in which you wrote that "[a]s a Town Council member [you] have been denied access to Town records that [you] believe should be available under FOIL guidelines." You wrote that the "Town Supervisor has indicated that town correspondence and documents addressed to him by name or title are considered by him to be his property" and that he stores those documents in his home. The documents that you requested that have been withheld include grant applications, award letters, correspondence and contracts between the Town and County Community Development Department.

From my perspective, the Supervisor's position is inconsistent with several provisions of law. In this regard, I offer the following comments.

First, irrespective of where the documents in question may be kept, they are kept due to and in the performance of the Supervisor's official duties and in his capacity as Supervisor. Consequently, I believe that any such documents would fall within the scope of the Freedom of Information Law. It is emphasized that the Freedom of Information Law pertains to agency records and that §86(4) of the Law defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In a case in which an agency contended, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that claim. As stated by the state's highest court, 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)].

Again, the documents at issue would not come into the possession of the Supervisor except in his capacity as a government official acting in the performance of his duties as Supervisor. That being so, based on the documentation provided by the Court of Appeals, it is my opinion that records involving the performance of those duties are "records" subject to rights conferred by the Freedom of Information Law.

Similarly, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

As in the case of the Freedom of Information Law, I believe that the materials at issue would constitute a "record".

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

While the Supervisor may have physical possession of the records in question, I do not believe that he has legal custody of them. Section 30 of the Town Law specifies that the town clerk is the custodian of town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

A failure to share the records or to inform the clerk of their existence may effectively preclude the clerk from carrying out her duties as records management officer or as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if the records access officer does not know the existence or location of Town records, that person may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law. The same may be so in the case of yourself as a member of the Town Board. Unless the records at issue are shared with you and other Board members, you may be unable to perform your duties effectively.

Although the Town Supervisor may have certain areas of authority or responsibility, he is but one among five members of the Town Board. In my view, he is obliged to comply with rules and resolutions adopted by a majority of the Board, so long as such rules or resolutions are not inconsistent with law. I note that §64(3) of the Town Law states that the Town Board "Shall have the management, custody and control of all town lands, buildings and property of the town." Town property in my view clearly includes "records" as defined by both the Freedom of Information Law and the Arts and Cultural Affairs Law. Similarly, §63 of the Town Law provides that "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board", and that "The board may determine the rules of its procedure."

In short, I do not believe that the records that are the subject of your correspondence are the property of Supervisor or that he has the legal authority to exercise control over the records in the manner described in your letter.

In an effort to enhance compliance with and understanding of applicable law, copies of this response will be sent to the Supervisor and the Town Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Gordon Ireland
Hon. Lisa M. Valletta

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2004

Mr. Albert P. Roberts
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Roberts:

I have received your letter in which, in your capacity as Town Attorney for the Town of Wappinger, you questioned "whether or not plans, such as certified plot plans, proposed subdivision plats or proposed site plan maps, may be copied pursuant to a FOIL request." You indicated that Town employees "were advised that duplication or copying of stamped engineer's, surveyor's or architect's drawings would be violative of the copyright laws."

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, unless an agency, such as a town, can deny access to the records at issue based on one or more of the exceptions to rights of access, those records must be made available for inspection and copying. In this regard, I offer the following comments.

First, as a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records and the motivation of the applicant are in my opinion irrelevant. Whether the owner of property consents to permit access to a building plan is irrelevant; if a record is available under the Freedom of Information Law, the subject of the record does not have the ability to control disclosure.

Second, access to plans, drawings and surveys that are marked with the seal of an architect, a land surveyor or an engineer has been the subject of several questions and substantial research. Professional engineers and architects are licensed by the Board of Regents (see respectively, Articles 145 and 147 of the Education Law,). While §§ 7209 and 7307 of the Education Law require that the licensees identified above have a seal, and that state and local officials charged with the enforcement of provisions relating to the construction or alteration of buildings cannot accept plans or specifications that do not bear such a seal, I am unaware of any statute that would prohibit the inspection of such records under the Freedom of Information Law. Some have contended that an architect's seal, for example, represents the equivalent of a copyright. Having discussed the matter with numerous officials, including officials of the appropriate licensing boards, the seal does not serve as a copyright, nor does it restrict the right to inspect and copy; it merely indicates that a person is qualified as a licensee.

Third, other considerations may become relevant in relation to copyright. In an effort to obtain guidance, I have discussed the matter with a representative of the U.S. Copyright Office and the Office of Information and Privacy at the U.S. Department of Justice, which advises federal agencies regarding the federal Freedom of Information Act (5 U.S.C. §552), the federal counterpart of the New York Freedom of Information Law.

It is noted that the Federal Copyright Act, 17 U.S.C. §101 et seq., appears to have supplanted the early case law concerning the Act prior to its amendment in 1976. Useful to the inquiry is a federal court decision in which the history of copyright protection was discussed, and in which reference was made to notes of House Committee on the Judiciary (Report No. 94-1476) referring to the scope and intent of the revised Act. Specifically, it was stated by the court that:

> "The power to provide copyright protection is delegated to the Congress by the United States Constitution. Article 1, section 8, clause 8, of the Constitution grants to Congress the power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'
>
> Copyright did not exist at common law but was created by statute enacted pursuant to this Constitutional authority. See Mazer v. Stein, 347 U.S. 201, 74 S.Ct. 460, 98 L.ed. 630 (1954); see also MCA, Inc., v. Wilson, 425 F.Supp. 443, 455 (S.D.N.Y. 1976); Mura v. Columbia Broadcasting System, Inc., 245 F.Supp. 587, 589 (S.D.N.Y. 1965), and cases cited therein.

> Prior to January 1, 1978, the effective date of the revised Copyright Act of 1976, there existed a dual system of copyright protection which had been in effect since the first federal copyright statute in 1790. Under this dual system, unpublished works enjoyed perpetual copyright protection under state common law, while published works were copyrightable under the prevailing federal statute. The new Act was intended to accomplish 'a fundamental and significant change in the present law by adopting a single system of Federal statutory copyright... (to replace the) anachronistic, uncertain, impractical, and highly complicated dual system.' H.R. Rep. No. 94-1476; 94th Cong. 2d Sess. 129-130, reprinted in [1976] 5 U.S. Code Cong. & Ad. News 5745. This goal was effectuated through the bed-rock provision of 17 U.S.C. subsection 301, which brought unpublished works within the scope of federal copyright law and preempted state statutory and common law rights equivalent to copyright. Id. at 5745-47. Thus, under subsection 301(a), Congress provided that Title 17 of the United States Code, the Federal Copyright Act, preempts all state and common law rights pertaining to all causes of action which arise subsequent to the effective date of the 1976 Act, i.e., January 1, 1978:
>
> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified in sections 102 and 103, whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." [Meltzer v. Zoller, 520 F.Supp. 847, 853 (1981)]

Based upon the foregoing, "common law" copyright appears to be a concept that has been rejected and replaced with the current statutory scheme embodied in the revised Federal Copyright Act.

In view of the language of the Copyright Act, case law and discussions with a representative of the Copyright Office, it is clear in my opinion that architectural plans and similar documents may be copyrighted.

Assuming that a work is subject to copyright protection, it is noted that such a work may "at any time during the subsistence of copyright" [17 U.S.C. §408(a)] be registered with the Copyright Office. No action for copyright infringement can be initiated until a copyright claim has been registered. As I understand the Act, if a work bears a copyright and is reproduced without the consent of the copyright holder, the holder may nonetheless register the work and later bring an action for copyright infringement.

In terms of the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to

copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to §87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use'

> copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.).

Due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department might be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, that exception would not apply.

The remaining provision of potential significance, §87(2)(f) of the Freedom of Information Law, permits an agency to withhold records insofar as disclosure could "endanger the life or safety of any person." It has been advised that the cited provision might properly be invoked insofar as the kinds of records at issue include information concerning alarms, security systems and the like.

In sum, assuming that an agency cannot rely upon the grounds for denial discussed above, I believe that the agency is required to permit an applicant to inspect and copy a copyrighted work. In that situation, the government agency that discloses the record should bear no liability or responsibility relating to the use of the work. Rather, if the holder of the copyright believes that the recipient of a copy of the work has in some manner violated the Copyright Act, that person or entity may initiate proceedings against the recipient for copyright infringement.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2004

Hon. Dee Barbato
Council Member, District 6
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 Councilmember Barbato:

I have received your letters and related correspondence concerning your frustration in attempting to obtain records from the City of Yonkers.

By way of background, you verbally requested certain information during a departmental budget hearing from the City's Finance Commissioner. Having received no response, you submitted a request to the Mayor on August 19 seeking a "list of all properties and entities that have PILOT agreements with the City of Yonkers (entity, PILOT amount, duration of PILOT)." You wrote that you expected that the request would not be difficult to fulfill, for a City official indicated that the information was readily available in the Finance Commissioner's office. Having received no response, you submitted a request on September 8 under the Freedom of Information Law for "lists" containing the same information. In a letter dated the same day acknowledging the receipt of that request, you were advised that the request would be granted or denied in whole or in part within thirty days. Essentially the same request was made to the City's Corporation Counsel on September 15. In a letter dated November 16, approximately two months later, the City's Freedom of Information Officer wrote to you and indicated that "the City does not maintain a comprehensive list or document that contains the specific fields detailed" in your requests.

In consideration of that response, you submitted another request on November 22 in which you requested:

> "A copy of all PILOT agreements within the City of Yonkers in addition to any information in any format that pertains to the city PILOTS including but not limited to any reference to the amount of any and all PILOTS, individually or collectively; reference to the duration of any and all PILOTS, individually or collectively;

> reference to how revenue is dispersed and/or distributed from any and all PILOTS individually and collectively."

From my perspective, although the City's response may have been technically consistent with law, it appears that City officials failed to recognize the spirit of the law or consider your function as a member of the City Council. In considering a somewhat analogous series of facts involving delays and circumventions of the clear intent of the Freedom of Information Law, the Chief Judge of the Court of Appeals, the state's highest court, was prompted, in a unanimous decision rendered earlier this year, to emphasize that "What is clear above all is that the 'runaround' must end" (New York Civil Liberties Union v. City of Schenectady, 2 NY3d 657 661).

As you are likely aware, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency is not required to create a record in response to a request. In the context of the situation that you described, the City appears to have maintained no list or lists containing the items that you requested. If that was so, it would not have been required to prepare a new record or records containing the information sought on your behalf. Nevertheless, in consideration of your request during the budget hearing and the clear nature of the information sought, I believe that City officials, instead of rejecting your request outright some three months after your initial written request was submitted to the Mayor, should have contacted you, explaining that there is no list, but that other records containing the information sought could be retrieved and made available. Upon receipt of those items, you could prepare your own list or analyze their content as you see fit.

In my view, your request of November 22 does not involve the creation of a record, for you sought PILOT agreements as well as information "in any format" that contains the items of your interest. I do not believe that the City can justify a denial or rejection of that request.

In consideration of the delays that you encountered, I note, 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..."

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)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be sent to City officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Philip A. Amicone, Mayor
Kevin Crozier
Sean P. McDermott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2004

Mr. Edward J. Murphy
Attorney at Law
118 Norman Ridge Road
Vermontville, NY 12989

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Murphy:

I have received your letter and the correspondence relating to it. You have requested an advisory opinion "on whether the times and/or place at which the Franklin County Legislature conducts its official business violate the Open Meetings Law."

By way of background, Franklin County is physically large, consisting of more than 1,600 square miles, and its county seat, Malone, is located at the northern end of the County. You and "roughly 47 percent of the County's population" live in the southern end of the County. The trip from the southern end of the County to Malone involves approximately fifty miles, and travel from your residence to Malone is time consuming and, in consideration of the cost of gasoline, expensive. You wrote that meetings of the County Legislature are "held during the daytime, typically between 10 AM and 2 PM", and that many County residents who may be interested in attending "must take off at least a half-day of work" to do so. You have questioned the legality of the location of meetings of the County Legislature and the time during which the meetings are held.

In this regard, there is nothing in the Open Meetings Law that specifies precisely where or when meetings must be held. Nevertheless, it has been advised in a variety of contexts that every provision of law, including the Open Meetings Law, must be carried out in a manner that gives reasonable effect to its intent. Section 100 of that statute, the legislative declaration, states in part that: "It is essential...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." In my opinion, a meeting of the County Legislature, or any municipal body, must be held at a location where members of the public who might want to attend may have a reasonable opportunity to do so.

What is reasonable, in my view, may be dependent on attendant facts and circumstances. As you are aware, there are judicial decisions indicating that meetings held by a board of education

some twenty miles from the district it serves (Goetschius .v Board of Education, Supreme Court, Westchester County, March 8, 1999) and others held at 7:30 a.m. [Goetschius v. Board of Education, 244 AD2d 552 (1997)] effectively precluded many from attending and represented an unreasonable exercise of authority in a manner inconsistent with the Open Meetings Law. In those cases, it appears that a public body's actions were intended to ensure that some individuals, notably the petitioner, a union activist, and other District employees, could not attend. In the context of the facts that you presented, the County is physically much larger than the school district in Goetschius, the meetings of the Legislature are held within the County at the seat of County government, and they are held during regular business hours.

Meetings scheduled at 7:30 a.m. can likely be attended by relatively few; meetings held at 7:30 p.m. by the County Legislature would likely involve driving late at night by many who would be interested in attending. While meetings scheduled during regular business hours might involve a hardship for some, it is an appropriate and reasonable time for others. Further, as indicated by the Chairman of the Legislature, County officials, whose expertise may be needed by the Legislature during meetings, are readily available during business hours to provide guidance to legislators meeting in the seat of County government.

I doubt that there is a perfect time or place for holding meetings that would accommodate the needs of all of those interested in attending. While a substantial percentage of the County's population resides in the southern end of the county, a greater percentage apparently resides closer to Malone. What may be fair to some may be unfair to others. In consideration of the facts associated with the situation that you presented, I do not believe that a court would determine that the time and place of meetings of the County Legislature are unreasonable or constitute a violation of the Open Meetings Law.

With respect to your suggestion that a variety of information and records be made available via the internet, I fully agree. While there is no law that requires that notices of meetings, agendas, minutes, budgets, announcements of employment opportunities, etc. be accessible online, it has become common practice to do so, and this office has encouraged agencies to do so. Further, when records are made available online, the time and effort needed to respond to a traditional request for those records under the Freedom of Information Law can be eliminated.

Lastly, in separate correspondence, you inferred that a County official complained with respect to a request made under the Freedom of Information Law that involved an hour to fulfill. Upon review of the records by the applicant, that person decided that he/she wanted only three photocopies involving a payment of a fee to the County of only seventy-five cents. In this regard, the language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in

> conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
>
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. Earl J. LaVoie, Chairman
James N. Feeley
Ms. Vallone, Clerk of the Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2004

Mr. Robert J. Brignola
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brignola:

I have received your letter in which you sought clarification concerning four requests made pursuant to the Freedom of Information Law to the City of Troy that apparently were denied.

The first involves certain aspects of the Police Department's "Standard Operating Procedures manual". 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. In consideration of your request, several of the grounds for denial may be pertinent to an analysis of rights of access. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

From my perspective, three of the grounds for denial are pertinent to an analysis of rights of access. There is no question that an agency's procedure manual constitutes intra-agency material that falls 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 significance is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations of judicial proceedings...

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Perhaps most relevant in the context of your request would be §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the techniques or procedures contained in the records sought could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

The other provision of possible significance as a basis for denial is §87(2)(f). Again, that provision permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." As suggested with respect to the other exceptions, I believe that the City is required to review the documentation at issue to determine which portions fall within this or the other exceptions.

Your second and third requests respectively involve copies of laws, rules and regulations concerning the duties or authority of the Commissioner of Public Works to issue parking violations and municipal laws that may supersede state laws relating to the definition of an abandoned vehicle. It is questionable in my view whether those requests involve records, or rather an interpretation of law that requires a judgment. Depending on the nature of the matter, any number of provisions might be applicable, and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Further, two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 10 of the City Charter", no interpretation or judgment is necessary, for sections of the law appear numerically and can readily be identified. That kind of request, in my opinion would involve a portion of a record that must be disclosed. Again, a request for laws that might be related to a certain activity or that supersede other laws is not, in my view, a request for a record as envisioned by the Freedom of Information Law, but rather a request that research be conducted that may involve the making of judgements or interpretations of law.

Your final request involves "the names, tenure, and remuneration of all persons having served in the Capacity of Corporation Counsel or Assistant Corporation Counsel, or Outside Legal Counsel position(s) for the city of Troy from 1990-2004." In my view, the items included within that request must be disclosed. Although tangential to your inquiry, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd

45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Based on the foregoing, those portions of records identifying agency employees by name, public office address, title and salary must in my view be maintained and made available. Similarly, portions of records indicating the amount of payments to outside counsel have been found to be accessible to the public [see Orange County Publications v. County of Orange, 637 NYS2d 596 (1995)].

I believe that portions of records indicating dates of a public employee's "tenure" would also be accessible. Again, disclosure in that instance would, in my view, constitute a permissible, not an unwarranted invasion of privacy, for dates of attendance clearly would be relevant to the performance of a public employee's duties. I note that in Capital Newspapers, supra, the state's highest court determined that records indicating the days and dates of sick leave claimed by particular public employees were accessible. That being so, it is clear in my opinion that records indicating a public employee's tenure would also be available to the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer
Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2004

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 facts presented in your correspondence.

Dear Ms. Demjanenko:

I have received your letter and the materials attached to it. You have asked that I "investigate" what you view as an unreasonable delay in responding to a request made under the Freedom of Information Law to the State University at Buffalo. The records sought involve the resume of a University employee and the contract between that person and the University.

In this regard, it is noted at the outset that neither the Committee on Open Government nor its staff has the authority or resources to conduct investigations. The primary function of this office involves providing guidance and opinions concerning rights of access to government information. While the opinions rendered by this office are not binding, it is our hope that they are educational and persuasive and that they enhance compliance with law. With that goal, 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, based on the judicial interpretation of the Freedom of Information Law, it is likely that portions of the resume or equivalent record must be disclosed.

By way of background, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Relevant to 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 judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 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 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 a resume 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.

Lastly, a contract between a public employer and a public employee is, in my view, clearly accessible, for none of the grounds for denial of access would be applicable.

In an effort to encourage compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the University's records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Elizabeth Lidano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2004

Mr. Robert McErlean
[redacted]

The staff of the Committee 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. McErlean:

As you are aware, I have received your letter and the materials attached to it. You have sought my views concerning your unsuccessful efforts in obtaining records from the Department of Environmental Conservation. It is my understanding that you have been dealing primarily with Region 2 of the Department.

Attached to your letter is correspondence dated August 31, 2004 between Joseph Paine, the Department's principal fish and wildlife biologist, and the senior vice president of Carpenter Environmental Associates, Inc. concerning "tax block 3711 designated as freshwater wetlands on the official map for Richmond County." That communication also indicates that the Department initiated an enforcement proceeding against Dayna Realty, the owner of the parcel. Your request, which was made on October 25, involves records relating to the enforcement proceeding, as well as a variety of materials relating to "tax block #3711 and block 3713 Staten Island." In addition, you requested "regulatory guidance memorandums or policies relating to fill enforcement proceedings in Wetlands" and a copy of DEC's "master subject list, or list of all available materials."

In this regard, I offer the following comments.

First, in consideration of your request, of possible significance is the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. It has been held 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.

I am unaware of the nature of the Department's record keeping or retrieval mechanisms. Insofar as the records of your interest are maintained or retrievable by "tax block" number, it may be relatively easy to locate records relating to particular parcels. In that circumstance, to the extent that Department staff can locate the records of your interest with reasonable effort, I believe that your request would have "reasonably described" the records sought as required by law. On the other hand, insofar as records of your interest are not filed or retrievable in a manner in which they cannot be located with reasonable effort, i.e., if locating the records involves a search of hundreds or perhaps thousands of records individually to locate those falling within the scope of your request, the request, in my view, would not have reasonably described the records, and staff would not be require to engage in that degree of effort.

Second, you wrote that you were informed that you are required to "come and review or copy the documents [you] want", but that it is your understanding that it is the agency's "obligation to look for and locate the documents (within reason) and send them to [you]." I agree with your contention. In short, to the extent that records can be located with reasonable effort and you are willing to pay the requisite fee for copies, I believe that the Department is required to copy the records and send them to you. I note that it has been advised that an agency may choose to charge for postage when mailing records to an applicant.

Third, you informed me during a recent telephone conversation that you were told by an attorney in Region 2 that he would "get to your request when he can" and that he offered no indication of the date when you might obtain the records. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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, as in this instance, 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, if you request a document that does not exist, you asked whether the agency must inform you that is so, or does it "not have to respond leaving [you] to wonder." In my view, when responding to a request, an agency must grant access to records, deny access in writing, or inform the applicant that the record cannot be found or does not exist. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

In the final aspect of your request, you requested the Department's subject matter list "or list of all available materials." In this regard, as a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to a list maintained by an agency. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and

in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Ruth Earl
Fawzy I. Abdelsadek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 28, 2004

Mr. Thomas Rossi
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rossi:

I have received your letter in which you sought an advisory opinion concerning a request to made to the City of Yonkers for "copies of monthly Yonkers Police Precinct incident and offense report summaries." You wrote that the document in question "is commonly known as a police blotter" and that it consists of "a monthly list of residential burglaries, commercial burglaries, car thefts, rapes, murders, etc. all of which are listed by place of occurrence, date and time reported, and the precinct patrol sector where they occurred."

From my perspective, the kind of record that you described should be accessible under the Freedom of Information Law.

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.

In my view, police records indicating the location of crimes and other incidents have historically been available as police blotter entries or as portions of equivalent records. The phrase "police blotter" is not specifically defined in any statute. It is my understanding that it is a term that has been used, in general, based upon custom and usage. The contents of what might be characterized as a police blotter may vary from one police department to another, and often police departments use different terms for records or reports analogous to police blotters. In Sheehan v. City of Binghamton [59 AD 2d 808 (1977)], it was determined that, based on custom and usage, a police blotter is a log or diary in which any event reported by or to a police department is recorded. The decision specified that a traditional police blotter contains no investigative information, but rather merely a summary of events or occurrences and that, therefore, it is accessible under the Freedom of Information Law. When a police blotter or other record is analogous to that described in Sheehan in terms of its contents, I believe that the public has the right to review it in its entirety.

If police blotters or records prepared for a similar purpose are more expansive than the traditional police blotter described in Sheehan, portions might be withheld, depending upon their contents and the effects of disclosure. For instance, a police blotter or equivalent record might include names of witnesses or victims, the disclosure of which might constitute an unwarranted invasion of personal privacy [see §87(2)(b)] or even endanger one's life or safety [see §87(2)(f)]. However, those portions of the records indicating that an event occurred at a particular location, i.e., a crime, an automobile accident, etc., would be the kinds of items found to be clearly accessible.

It appears that the monthly list that you described consists of summaries of events, and that it does not include detailed information relating to those events. If that is so, again, I believe that it is accessible under the Freedom of Information Law.

You also asked "what legal recourse [you] have due to a longstanding problem of FOIL requests not being filled by the City of Yonkers." As alternative to initiating a lawsuit, I point out that this office, the Committee on Open Government, is authorized to provide advice and opinions concerning the Freedom of Information Law. While the opinions are not binding, it is our hope that they are educational and persuasive, and that they serve to enhance compliance with law. It is also noted that the Committee submits an annual report to the Governor and the State Legislature that includes a series of recommendations designed to improve the operation of the law. Enclosed is a copy of this year's report, which includes recommendations that relate to the problems to which you referred (see especially pages 1-11). If you feel that the recommendations have merit, it is suggested that you share your views with your state senator and assemblyman.

Lastly, with respect to "requests not being filled", the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal

> fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Sean P. McDermott, FOIL Officer

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 28, 2004

Ms. Kelly Rhinesmith
[redacted]

The staff of the Committee on 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. Rhinesmith:

I have received your letter and the materials attached to it. According to the correspondence, the State Board of Elections received a complaint "alleging that you engaged in certain improper activities" relating to a primary election conducted in 2003. Having requested "copies of said complaint and supporting materials", the Board's records access officer denied access, stating that:

> "Under Section 87(2)(e) of the New York State Freedom of Information Law, records may be denied if disclosure would, 'interfere with law enforcement investigations or judicial proceedings' and/or 'identify a confidential source or disclose confidential information relative to a criminal investigation.'"

You were also informed that you had the right to appeal the denial of access within thirty days. One of the attachments to your letter, a memorandum sent to the Office of the Inspector, apparently on November 16 of this year, states in part that you contacted me and that I advised that the Board "must provide [you] with a copy of the complaint and all 'supporting materials'...including the name of the complainant(s)."

While I recall speaking with you, I do not believe that I would have advised that the name of a complainant should be disclosed. In this regard, I offer the following comments.

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 consistently 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.

The provisions cited by the Board involve subparagraphs (i) and (iii) of §87(2)(e) of the Freedom of Information Law, both which pertain to records "compiled for law enforcement purposes." The former states that those records may be withheld when disclosure would interfere with law enforcement investigations or judicial proceedings. If my understanding of the facts is accurate, any investigation has been completed, and there will be no judicial proceeding. If that is so, §87(2)(e)(i) would not serve as a basis for a denial of access. The latter states that records compiled for law enforcement purposes may be withheld to the extent that disclosure would "identify a confidential source or disclose confidential information relating to a criminal investigation." In my view, the identity of the complainant may be deleted based on this provision when he or she is a "confidential source." As indicated previously, I believe that a complainant's identity may alternatively be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

In sum, it is clear in my opinion that those portions of the records sought may be withheld to the extent that disclosure would identify the person who made the complaint. It appears, however, that other portions of the records should be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Lee Daghlian
William J. McCann, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15081

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 28, 2004

E-MAIL

TO: Ken Koppemhaver RJF

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Koppenhaver:

As you are aware, I have received your letter. I hope that you will accept my apologies for the delay in response.

If I understand the issue accurately, you have asked whether the Town of Irondequoit must honor a request for copies of records that have previously been made available for inspection. In this regard, requests are frequently made to inspect records so that an applicant can review them to ascertain which may be significant and thereafter request copies. In my view, an agency in that circumstance would be required to honor a request for copies of records previously inspected. However, I note that there are judicial decisions indicating that if a copy of a record has previously been made available to an applicant or that person's representative (e.g., his or her attorney), an agency is not required to make a second copy, unless that person can demonstrate in evidentiary form that neither he/she nor that person's representative continues to possess a copy of the record [see Lebron v. Morales, 271 AD2d 241, motion for leave to appeal denied, 95 NY2d 760 (2000); Moore v. Santucci, 151 AD2d 677 (1989)].

It is also noted that it has been held that an agency may require that an applicant pay the proper fee in advance of preparing copies of records (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

If I have misinterpreted your question, please feel free to contact me.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15082

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December 28, 2004

Ms. Cynthia S. Hunter
[redacted]

Dear Ms. Hunter:

I have received your letter addressed as "Dear Representative". It is unclear whether you intended to send it to this office as a copy, or as a request for information.

In this regard, the major function of the Committee on Open Government involves providing advice and opinions pertaining to public access to government information, primarily in relation to the Freedom of Information Law. The Committee does not have custody or control of records generally, and it is not empowered to compel a government agency to grant or deny access to records. In short, I cannot make the information of your interest available to you, because this office does not maintain it. Nevertheless, in an effort to provide guidance, I offer the following comments.

According to your letter, a welfare examiner employed by the Ulster County Department of Social Services "used a bill [you] supplied to her...and called [your] customer..." It is your view that she acted inappropriately, and you requested the "actual words to be documented and supplied to [you] that took place between" the examiner and your customer.

In terms of your rights of access, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) of that law states in relevant part that an agency is not required to create a record in response to a request. If the "actual words" were not reduced to writing and no record containing those words exists, the Freedom of Information Law would not apply.

If, however, a record does exist indicating the conversation between the examiner and your customer, it would appear to be available to you. 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.

With respect to records maintained by a social services agency, §87(2)(a) of the Freedom of Information Law pertains to records that "are specifically exempted from disclosure by state or federal statute." Several statutes within the Social Services Law prohibit public disclosure of records identifiable to either applicants for or recipients of public assistance (see e.g., Social Services Law, §§136 and 372). In my view, because the records in question are exempted from disclosure to the

public, the Freedom of Information Law does not govern rights of access to them; rather, any rights of access would be conferred by the Social Services Law and applicable regulations.

With respect to access by the subject of case files, state regulations, 18 NYCRR §357.3, provide in relevant part that:

> "(c) Disclosure to applicant, recipient, or persons acting in his behalf. (1) The case record shall be available for examination at any reasonable time by the applicant or recipient or his authorized representative upon reasonable notice to the local district. The only exceptions to access are:
>
> > (i) those materials to which access is governed by separate statutes, such as child welfare, foster care, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Services;
> >
> > (ii) those materials being maintained separate from public assistance files for purposes of criminal prosecution and referral to the district attorney's office; and
> >
> > (iii) the county attorney or welfare attorney's files.
>
> (2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

Based on the foregoing, if you are the subject of a case file, it is likely that you would have rights of access under the regulations cited above.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Kimberly Schmiedle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15083

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December 29, 2004

E-Mail

TO: Jason Whong

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. Whong:

As you know, I have received your inquiry relating to the ability of a law enforcement agency to publish information on the internet that is acquired from the sex offender registry pursuant to the Sex Offender Registration Act (hereafter "the Act").

In this regard, I know of no law that would prohibit a law enforcement agency or any person from disseminating information on the internet that was acquired from the sex offender registry. It is noted that I do not believe that the Freedom of Information Law is the governing statute concerning items maintained pursuant to the Act. Although I will offer an opinion concerning your question, it is suggested that you contact the agency most familiar with the Act, the Division of Criminal Justice Services, to seek its views.

By way of brief background, subdivision (1) of §168-b of the Act directs the Division of Criminal Justice Services to "establish and maintain a file of individuals required to register" under the Act and includes guidelines concerning the content of what is characterized as the "registry." Subdivision (2) states that:

> "The division is authorized to make the registry available to any regional or national registry of sex offenders for the purpose of sharing information. The division shall accept files from any regional or national registry of sex offenders and shall make such available when requested pursuant to the provisions of this article. *The division shall require that no information included in the registry shall be made available except in the furtherance of the provisions of this article*" (emphasis added).

Based on the sentence highlighted above, it is the position of both the Department of Law and the Division of Criminal Justice Services, and I concur, that information contained in the registry is to be disclosed only pursuant to the provisions of the Act, "only in the furtherance of the provisions of this article", which is Article 6-C of the Correction Law.

While the Freedom of Information Law deals generally with access to records, agencies' obligations to disclose records, and their ability to deny access, according to the rules of statutory construction (see McKinney's Statutes, §32), the different or "special" statute prevails when such a statute pertains to particular records. Since information contained in the registry may be disclosed only in furtherance of the Act, the Freedom of Information Law, in my view, does not apply to that information.

As you are aware, certain aspects of the contents of the registry are forwarded to local law enforcement agencies in conjunction with notification requirements imposed upon the "Board of Examiners of Sex Offenders" pursuant to §168-l of the Act. In subdivision (6) of that provision, reference is made to "three levels of notification...depending upon the degree of the risk of re-offense by the sex offender."

Paragraph (a) of §168-l(6) provides that "[i]f the risk of repeat offense is low, a level one designation shall be given to such sex offender." In that instance, certain law enforcement agencies are notified. There is no statement in that provision regarding the further dissemination of information concerning the level one offender. Paragraph (b) states that "[i]f the risk of repeat offense is moderate, a level two designation shall be given..." Pursuant to paragraph (c), "[i]f the risk of repeat offense is high and there exists a threat to the public safety, such sex offender shall be deemed a 'sexually violent predator' and a level three designation shall be given..." In both of those instances, local law enforcement agencies are authorized to disclose various kinds of information pertaining to sex offenders to other entities, such as school districts. Those entities "may disclose or further disseminate such information at their discretion."

While there is no mention of the publication on the internet of information derived from the sex offender registry, again, I know of no provision in the Act or any other law that would prohibit or preclude an entity or person from so doing. I point out that in a case dealing with records required to be filed with the State Department of Insurance based on a provision in the Insurance Law, it was held that a person who acquired them following a request made under the Freedom of Information Law was not prohibited from disseminating their contents on the internet [see Belth v. New York State Department of Insurance, 733 NYS2d 833 (2001)].

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15084

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December 30, 2004

Mr. Wayne A. Marks
03-B-0272
Groveland Correctional Facility
P.O. Box 36, 7000 Sawyer Road
Sonyea, NY 14556-0001

Dear Mr. Marks:

I have received your letter in which you indicated that you "would like to know the procedure when reporting an agency or company for ignoring FOIL requests..."

In this regard, this office is authorized to prepare advisory legal opinions pertaining to the Freedom of Information Law. Although the opinions rendered by the Committee on Open Government are not binding, it is our hope that they are educational and persuasive, and that they enhance compliance with law.

With respect to your question, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing

> body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Since you referred to "an agency or company", it is noted that the Freedom of Information Law applies to agency records and that §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In consideration of the foregoing, the Freedom of Information Law does not apply to private companies.

Lastly, you expressed interest in obtaining "a current list of all State records" that are accessible to the public, as well as lists of money judgments and unclaimed funds. There is no list of records available to the public, and due to the structure of the Freedom of Information Law, there can be no such list. In short, there are instances in which records might properly be withheld now but which may become accessible to the public in the future. To the best of my knowledge, there is no statewide list of money judgments; I believe that records involving judgments are maintained by county clerks. The Office of the State Comptroller maintains records regarding abandoned property and unclaimed funds.

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-15085

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 30, 2004

Mr. Christopher Thomas
02-A-2739
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-0010

Dear Mr. Thomas:

I have received your letter in which you requested records pertaining to your case from this office, including "rosario notes, minutes of grand jury, news articles...", etc.

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 to you, because this office does not possess them. Nevertheless, to enhance your understanding of that law, I offer the following comments.

First, a request should be directed to the "records access officer" at the agency that you believe maintains the records of your interest, such as the office of a district attorney or police department. The records access officer has the duty of coordinating an agency's response to requests. I note, too, that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable staff of an agency to locate and identify the records. Another source of records may be the court in which the proceeding was conducted. Although the courts are not subject to the Freedom of Information Law, court records are often available under other provisions of law (see e.g., Judiciary Law, §255).

Second, Rosario relates 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.

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 is different from that 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 nor your attorney any longer have copies of records previously disclosed, those records need not be disclosed to you again.

Lastly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant with respect to grand jury related records is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law, deals with grand jury proceedings and provides in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding."

As such, grand jury minutes, records of testimony and other information presented to a grand jury would, in my view, ordinarily be exempt from disclosure.

As such, grand jury minutes, records of testimony and other information presented to a grand jury would, in my view, ordinarily be exempt from disclosure.

I hope that the preceding remarks enhance your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

OML-AO - 3915
FOIL-AO - 15086

From: Robert Freeman
To: bhuston@mu.clarityconnect.net
Date: 12/30/2004 10:41:11 AM
Subject: Dear Mr. Huston:

Dear Mr. Huston:

As you are aware, I have received your letter, and your kind words are much appreciated.

You have asked that I reconsider the opinion addressed to you in August in which it was advised that the WSKG Public Telecommunications Council is not subject to the Freedom of Information or Open Meetings Laws.

Having reviewed the opinions to which you referred and section 236 of the Education Law, I continue to believe that the nexus between WSKG or other public television stations and the government of New York is so significant that it can be concluded that those entities are subject to the state's open government laws.

I note that numerous entities and individuals are licensed, overseen or regulated by the state. Professional licensees, such as physicians and attorneys, cannot practice in New York absent a license conferred by the state. Further, state agencies have the authority to revoke their licenses and their ability to practice. Despite that degree of control, I do not believe that an argument could effectively be made that a law firm or group of physicians fall within the coverage of the state's Freedom of Information or Open Meetings Law. Every educational corporation, whether public or private, receives a charter from the Board of Regents, and private colleges and universities must transmit annual reports to the Board of Regents/State Education Department. Those elements, however, do not bring those private institutions within the coverage of open government laws. Thousands of corporate entities are regulated by state agencies, such as power companies, insurance companies, bank corporations, bus companies, etc. Nevertheless, those entities fall beyond the coverage of those laws.

In short, absent specific statutory or judicial direction, I do not believe that I can advise that the records or meetings of public television stations fall within the scope of the Freedom of Information or Open Meetings Law.

Notwithstanding the foregoing, I wish you a happy and healthy new year.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15087

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 30, 2004

Mr. John Duke
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Duke:

I have received your letter and the materials attached to it. In brief, a summons was issued to you due to an alleged failure to clear ice and snow from your property. The summons was the subject of a hearing, and you requested a transcript of the hearing in May. As of the date of your letter to this office, it appears that you received no response to your request.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government, each agency, such as the City of Buffalo, is required to designate one or more persons as "records access officer" (see 21 NYCRR §1401.2). The records access officer has the duty of coordinating an agency's response to requests for records, and requests should ordinarily be made to that person. In my opinion, your request should have been answered directly by the recipient in a manner consistent with law or forwarded your request to the designated records access officer. It is suggested that requests made in the future be addressed to the records access officer.

Second, it is important to 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. I would conjecture that the expense of preparing transcripts of hearing is substantial and that transcripts are prepared in rare instances. If there is no transcript, the Freedom of Information Law would not apply, and the City in my opinion would not be required to create a transcript on your behalf.

Third, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests for records. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." 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: Linda Scott
Records Access Officer, Office of the Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15088

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December 30, 2004

Ms. Sally Sonne
[redacted]

The staff of the Committee on 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. Sonne:

I have received your letter in which you raised a question concerning the Freedom of Information Law.

You described a situation in which a former female police officer sued the then police chief of the Village of Tuxedo Park for sexual harassment, as well as the Mayor due to his support of the chief. The matter was recently settled, and upon asking for information concerning "the amount of public funds that were involved in settlement", the Mayor indicated that the case was "sealed."

In this regard, I offer the following comments.

First, if the matter was brought in federal court and the court ordered the settlement document to be sealed, release of the record would violate the order. If the matter was brought in a state court, the authority of the court to seal the records would be limited and governed by §216.1 of the Uniform Rules of the New York State Trial Courts involving "Sealing of court records in civil action in the trial courts." That provision states in relevant part that:

> "Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard."

If a state court judge ordered the settlement document sealed, §216 requires that there be "written finding of good cause", specifying the reason. Should that provision be applicable, it is suggested that you review the written finding.

Second, assuming that there is no court order validly sealing the settlement document, I believe that it would be available under the Freedom of Information Law.

I note that situations have arisen in which the parties to an agreement or stipulation of settlement have agreed to refrain from speaking about or disclosing the terms of the agreement or stipulation on their own initiative. In my view, it is likely that the parties may validly agree not to speak about a settlement or agreement. However, the Freedom of Information Law pertains to records, not to speech. In a decision that may be pertinent to the matter that you described, Paul Smith's College of Arts and Sciences v. Cuomo, it was stated that:

> "Plaintiff was the subject of a complaint made by a former employee who alleged that he was a victim of age discrimination. Prior to a scheduled hearing and with the assistance of an employee of defendant State Division of Human Rights (hereinafter SDHR), plaintiff entered into a stipulation of settlement with the complaining employee. Plaintiff's stated purpose for settling was to eliminate any negative publicity resulting from a public hearing on the allegations. The order after stipulation signed by defendant Commissioner of Human Rights on August 23, 1989 provided for absolute confidentiality except for enforcement purposes. The order also provided for the withdrawal of the charges and discontinuance of the administrative proceeding. Plaintiff did not admit to a Human Rights violation. On October 27, 1989, SDHR issued a press release detailing the allegations, disclosing that the matter hade been settled and set forth certain parts of the settlement terms" [589 NYS2d 106,107, 186 AD2d 888 (1992)].

The Appellate Division determined that the issuance of the press release "was both arbitrary and capricious and an abuse of discretion" (id.), but it also found that the stipulation of settlement was subject to rights of access conferred by the Freedom of Information Law.

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)].

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. Unless records may justifiably be withheld in accordance with one or more of the grounds for denial, a claim, a promise or an agreement to maintain confidentiality would, based on judicial decisions, be meaningless.

In Geneva Printing Co. v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

In 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 proper assertion of a ground for denial appearing in §87(2) of the Freedom of Information Law or a valid court order sealing the record, I believe that the stipulation of settlement must be disclosed on request, notwithstanding a claim of confidentiality.

Lastly, I point out that §50-a of the Civil Rights Law makes personnel records pertaining to police officers confidential when such records are "used to evaluate performance toward continued employment or promotion." However, it has been held that the application of that statute ends when the subject is no longer a police officer [see Village of Brockport v. Calandra, 305 AD2d 1030 (2003)]. Therefore, §50-a would not serve as a bar to disclosure in this instance.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15089

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December 30, 2004

E-MAIL

TO: Martina Frawley

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. Frawley:

As you are aware, I have received your letter in which you referred to a series of delays by the Town of Ramapo in responding to your request for records made on September 28. As of the date of your letter to this office, you had been neither granted nor denied access to those records by the Town.

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.

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)].

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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the kinds of records that your requested, contracts between the Town and certain private companies and minutes of Town Board meetings, must be disclosed, for none of the grounds for denial of access would be applicable.

I hope that I have been of assistance.

RJF:tt

cc: Hon. Christian G. Sampson, Town Clerk