STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15090

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

January 3, 2005

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 facts presented in your correspondence.

Dear Mr. Luster:

As you are aware, I have received your letter in which you sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, the City of Ithaca is reviewing a proposal under which the City would obtain title to several parcels in order to apply for benefits under the brownfields restoration program, "with title ultimately vesting in a private developer." Under the proposal, the City would take title by means of an assignment of an existing option to purchase between the current owner and a developer. It is your view that "public disclosure of the option agreement prior to such acceptance and exercise by the City might alert other potential purchasers to the terms and conditions therein thereby creating a de facto bidding situation to the City's detriment." Further, should the parcels be purchased by a private party, "the environmental remediation desired by the City could not be accomplished since the particular program involved is available only to municipalities and their agencies."

You have asked whether the terms of the option to purchase must be disclosed. In this regard, I offer the following comments.

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

The provision to which you referred in your letter, §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" a contracting or bargaining process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That an agreement has not been signed or consummated, in my view, is not determinative of rights of access or, conversely, an agency's ability to deny access to records. Rather, I believe that consideration of the effects of disclosure is the primary factor in determining the extent to which §87(2)(c) may justifiably be asserted.

As I understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Similarly, if an agency is involved in collective bargaining negotiations with a public employee union, and the union requests records reflective of the agency's strategy, the items that it considers to be important or otherwise, its estimates and projections, it is likely that disclosure to the union would place the agency at an unfair disadvantage at the bargaining table and, therefore, that disclosure would "impair" negotiating the process.

I point out that the Court of Appeals has sustained the assertion of §87(2)(c) in a case that did not clearly involve "contract awards" or collective bargaining negotiations. In Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In each of the kinds of the situations described earlier, there is an inequality of knowledge. In the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the context of collective bargaining, the union would not have all of the agency's records relevant to the negotiations; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an records regarding collective bargaining strategy or appraisals would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

The situation that you described is, in my view, most analogous to the facts in Murray. If, as you suggested, disclosure of the option agreement would potentially result in a "de facto bidding situation" or encourage the current owner of the property to withhold consent to the assignment and seek another purchaser that offers a higher price than the City may be willing or able to pay, I would agree that disclosure at this juncture would "impair" the City's ability to engage in an optimal contractual agreement on behalf of its taxpayers. In consideration of the effect of disclosure, I believe that the record at issue may be withheld on the basis of §87(2)(c).

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-15091

41 State Street, Albany, New York 12231
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January 4, 2005

Ms. Katherine Garry
[redacted]

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

Dear Ms. Garry:

I have received several items of correspondence from you, each of which deals with a request for records of the Village of Hempstead. The Village has, according to the materials, either failed to respond by granting or denying access to the records sought or has failed to fully respond to 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. 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: Hon. James Garner
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15092

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January 4, 2005

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

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

Dear Mr. Allen:

I have received your letter in which you wrote that you are interested in obtaining statements made by witnesses and a criminal history record pertaining to your brother.

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, with respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. Nevertheless, if, for example, criminal conviction records were used in conjunction with a criminal proceeding by a district attorney, it has been held that the district attorney must disclose those records [see Thompson v. Weinstein, 150 AD 2d 782 (1989)].

It is noted that in a decision rendered by the Appellate Division, Second Department, the Court reconfirmed its position that criminal history records are, in general, exempt from disclosure [Woods v. Kings County District Attorney's Office, 651 NYS2d 595, 234 AD2d 554 (1996)]. In Woods, the Court upheld a denial of a request for the rap sheets "of numerous individuals who were

not witnesses at [the petitioner's] trial." However, it distinguished its determination from the holding in Thompson, supra, in which it was found that a rap sheet must be disclosed when the request is "limited to the criminal convictions and any pending criminal actions against an individual called by the People as a witness in the petitioner's criminal trial." Therefore, insofar as your request involves records analogous to those found to be available in Thompson, I believe that the District Attorney would be required to disclose.

Finally, it is also noted that while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law. I believe, for example, that a person's New York conviction history may be obtained by payment of a fee of fifty-two dollars from the Office of Court Administration.

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-15093

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January 4, 2005

Mr. Jose Rivera
97-R-1863
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. Rivera:

I have received your letter in which you complained that you submitted a Freedom of Information Law request to the Albany City Police Department, but that as of the date of your letter to this office, you had not received a reply.

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

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January 4, 2005

Ms. Gail M. Cristantello
[redacted]

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

Dear Ms. Cristantello:

As you are aware, I have received your letter and the materials relating to it. You described a series of difficulties in obtaining certain records from the Amherst Central School District.

By way of background, in June, you requested copies of all contracts negotiated between the District and its bargaining units. The receipt of your request was acknowledged soon after, and you were informed by the District's freedom of information officer that you would be contacted following review of your request by the Board of Education. After "some interim follow-up", you received a letter in October, "refusing release of the Teachers' Contract (a new one of which is presently under negotiation)." You were told that the contract would be released at the close of negotiations. You appealed and received a letter of November 2 from the Board directing its Freedom of Information Officer to "forward you copies of all collective bargaining unit contracts that are not currently being negotiated by the Amherst Central School District." However, an invoice detailing the fees for copies of certain contracts excludes reference to the contract now in effect between the District and the Teachers' Association, and to date, that contract has been withheld.

From my perspective, any contract currently in force is clearly accessible under the law. In this regard, I offer the following comments.

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

Second, contracts, bills, vouchers, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff must generally be disclosed, for none of the grounds for denial could appropriately be asserted to withhold those kinds of records. The only provision significant to an analysis of rights of access is §87(2)(c), which enables an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." In a case decided twenty-five years ago by the Court of Appeals, the State's highest court, the facts involved rights of access to a compilation of salary and fringe benefit data concerning teachers and school district administrators from a number of school districts. The data was prepared based upon the terms of a series of collective bargaining agreements, contracts and related records indicating the salaries and benefits of school district officials. Although it was contended that the records could be withheld pursuant to §87(2)(c), the Court of Appeals found that there was no basis for denial [Doolan v. BOCES, 48 NY 2d 341 (1979)]. The records that were used in the preparation of the data in Doolan, collective bargaining contracts, were available, individually, from the school districts that participated in the study. The fact that collective bargaining negotiations might have been ongoing within a district or districts did not permit an agency to withhold a contract then in force or information derived from such a contract.

In short, while records involving ongoing collective bargaining negotiations might properly be withheld pursuant to §87(2)(c) on the ground that disclosure would impair the negotiations, I do not believe that there would be any basis for withholding a collective bargaining agreement that is currently in effect. It would have been accessible when initially signed by the parties, and it has been distributed to hundreds of members of the collective bargaining unit, as well as others. That negotiations are ongoing with respect to a new and as yet incomplete and unsigned agreement has no effect, in my opinion, on rights of access to the agreement now in force.

Second, based on the language of the law and judicial decisions, the District failed to comply with law in relation to the nature of its responses and the delays that you have encountered. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

FOIL-AO-15095

State of New York
COMMITTEE ON OPEN GOVERNMENT
MEMORANDUM

TO: Victor Whitman

January 4, 2005

FROM: Bob Freeman

SUBJECT: Empire State Development Corp.

Following are two advisory opinions, neither of which deals directly with the issue that you raised. More on point is the language of the Law itself. Specifically, the exception upon which the Empire State Development Corp. relied, §87(2)(d), states that an agency may withhold records or portions of records that:

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

The records of your interest were neither submitted to an agency by a commercial enterprise nor are they derived from information obtained from a commercial enterprise. On the contrary, they represent an agency's determinations.

As we discussed, detailed financial information submitted by a commercial enterprise might if disclosed cause substantial injury to its competitive position. However, the decision and amount of a tax break in my view could not justifiably be withheld, for §87(2)(d) would not apply.

I hope that I have been of assistance.

RJF:jm

Encs.

STATE OF NEW YORK
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January 4, 2005

Mr. Jonathan David
Records Access Appeals Officer
Office of Deputy Commissioner
Legal Matters
One Police Plaza, Room 1406A
New York, NY 10038

Dear Mr. David:

I appreciate having received copies of numerous determinations following appeals made pursuant to the Freedom of Information Law. In several, you have granted appeals and remanded them to the Department's records access officer for reconsideration. In those determinations, you wrote that the records access officer "shall issue a new determination within sixty days of the date of this decision."

Based upon its clear language, those determinations, in my view, are inconsistent with the Freedom of Information Law. 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**" (emphasis added).

As I understand the foregoing, an agency in receipt of an appeal has two options: within ten business days of its receipt, the agency must either fully explain its reason for further denial or make the records available. Delaying disclosure for as much as sixty additional days in my view represents a failure to comply with law.

If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Tyrone Ford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 4, 2005

Ms. Mary Pasciak
The Buffalo News
4558 Main Street
Snyder, NY 14226

The staff of the Committee on 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. Pasciak:

As you are aware, I have received a variety of materials relating to your request made on September 17 to the Orchard Park Central School District for "copies of correspondence exchanged from July 1, 2003, through June 30, 2004, among all board members holding office during that period." You indicated that the request is intended to include "traditional written communication as well as correspondence that has been exchanged via e-mail."

The receipt of your request was acknowledged on September 22, when you were informed that you would be contacted "as soon as possible as to when, and whether these materials will be made available." Having received no response, you wrote that on October 14 you phoned the District's attorney who informed you that his staff was reviewing the request and that he was "certainly hoping we're talking about weeks and not months" before you would receive a "formal response." In a letter dated December 6, the District's records access officer denied your request and wrote as follows:

> "...there are no communications between individual members of the Board of Education maintained by or on the District's computer system or in its system of records beyond the copies enclosed with my letters to you dated September 22 and September 28, 2004.
>
> "Contrary to the assertion set in your request, the Freedom of Information Law does not provide the public the right to access any and all communications of a private individual simply because the individual also serves as a member of the Board of Education. Communications by Board members using their home computers or personal e-mail accounts do not meet the definition of a 'record' under the law. Any such communication made involving Board,

> District or personal matters would have been made for the benefit of the Board members, not produced by, with or for the District or Board of Education as a whole.
>
> "In addition, to the extent the requested records may be located on a Board member's personal computer or personal e-mail account, those records would be the personal property of the Board member. Board members do not give up their privacy rights granted under the Fourth Amendment of the U.S. Constitution upon their election to the board of education."

From my perspective, the response by the District is inconsistent with the language of the Freedom of Information Law and its judicial interpretation. In this regard, I offer the following comments.

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

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

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

In a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University pursuant to a contract were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. It is emphasized that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Also pertinent is the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", in which the matter involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the

Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

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

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there may be "considerable crossover" in the activities of Board members. In my view, when Board members communicate with one another in writing, in their capacities as Board members, any such communications constitute agency records that fall within the framework of the Freedom of Information Law.

Also relevant is another decision rendered by the Court of Appeals in which the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Any "prescreening" of records to determine whether they fall within the coverage of the Freedom of Information Law would, in my view, conflict with the clear direction provided by the Court of Appeals and the language of the law itself.

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather

were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

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

> "...respondents base petitioner's exclusion from certain materials by saying that some of the appointment books contain both personal and business appointments created for the Mayor's convenience. That contention, of course, has little probative meaning here:
>
> '*** personal or unofficial documents which are intermingled with official government files and are being 'kept' or 'held' by a governmental entity are 'records' maintained by an 'agency' under Public Officers Law §86 (3), (4). Such records are, therefore, subject to disclosure under FOIL absent a specific statutory exemption' (Capital Newspapers v. Whalen, 69 N.Y. 2d 246, 248).
>
> "At the Appellate Division level of Capital Newspapers, it was ruled that papers of a personal nature were protected from disclosure under the FOIL and that the law was intended by the Legislature to subject to disclosure only those records that revealed the workings of government and that disclosure of private papers of a public office holder would not further the purpose of FOIL (113 App. Div. 2d 217, 220). It is that ratio decidendi that the Court of Appeals rejected in its unanimous ruling.
>
> "The Court then went on to re-state the appellate conclusion that FOIL 'is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government' (citing Matter of Washington Post Co. v. New York State Ins. Dept., 61 N.Y. 2d 557, 564). Any narrow construction of FOIL, it was added, 'is contrary to these decisions and antagonistic to the important policy underlying FOIL' (p. 52 of Capital Newspapers, supra)."

Second, the definition of the term "record" also makes clear that email communications between or among Board members fall within the scope of the Freedom of Information Law. Based on its specific language, 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)]. Whether information is stored on paper, on a computer tape, or in a computer, it constitutes a "record." In short, email is merely a means of transmitting information; it can be viewed on a screen and printed, and I believe that the email communications at issue must be treated in the same manner as traditional paper records for the purpose of their consideration under the Freedom of Information Law.

Third, the foregoing is not intended to suggest that the email communications that you requested must be disclosed in their entirety. Like other records, the content of those communications is the primary factor in ascertaining rights of access.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The records at issue, because they involve communications between or among agency officials, fall with one of the exceptions, §87(2)(g). Due its structure, however, that provision may require substantial disclosure. Specifically, §87(2)(g) enables an agency to withhold records that:

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

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

In this vein, the Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for

> exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

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

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

When records consist of intra-agency material, as in this instance, that they may be preliminary to a decision does not remove them from rights of access. One of the contentions offered by the agency in Gould was that certain reports could be withheld because they are not final and because they relate to matters for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][iii)]. However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated

> exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." (id., 276).

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

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" (id., 276-277).

Lastly, in consideration of the delays that you have encountered, 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)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Paul J. Grekalski
Margaret E. Sauer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15098

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January 5, 2005

E-MAIL

TO: [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Dolinar:

I have received your letter and materials relating to it concerning a request made pursuant to the Freedom of Information Law to the Fire Island Union Free School District.

By way of background, in a request made on December 4, you sought six categories of records. Category 1 was granted, and in the case of categories 4 and 6, you were informed that no records existed. The remaining categories and the District's responses to them are as follows:

> Category 2: Copies of all material received from the Fire Island National Seashore or its employees, including any written reports or memos on verbal discussions concerning [redacted].
>
> Response: This request does not adequately describe the record sought.
>
> Category 3: Copies of all surveillance reports on [redacted], Bay Shore, and 60 West Walk, aka Scooner Walk, in Fire Island Summer Club.
>
> Response: The request does not adequately describe the records being sought. To the extent records exist which may generally fall within the category or records requested, such records constitute inter- or intra-agency correspondence, which are exempt from disclosure.

> Category 5: Copies of all school bus attendance records, e.g. who took the bus when, for the past four years if records exist. Alternately, all records concerning [redacted] use of the school, bus, including any notes or memos in which school board employees describe that they indicated to Ms. Maleski that she need not call in on days when her daughter is not being picked up.
>
> Response: The request does not adequately describe the record being sought. To the extent that records exist regarding a particular student, the disclosure of such records would constitute an unwarranted invasion of personal privacy.

You have sought an advisory opinion concerning the propriety of the District's responses, and in this regard, I offer the following comments.

First, as you are likely aware, the Freedom of Information Law pertains to existing records. Section 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. 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.

It is noted that the Freedom of Information Law includes within its scope not only records in the physical possession of an agency, but also those that may be kept or maintained elsewhere. That statute pertains to all agency records, and §86(4) defines the term "record" expansively to mean:

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

In consideration of the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the

agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Perhaps most significant is a decision rendered by the Court of Appeals in which it was found that materials maintained by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Insofar as records "kept, held, filed, produced or reproduced...*for* an agency", such as the District, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law.

Second, it is questionable, if not doubtful, in my view, that the requests for existing records do not "adequately describe" the records sought in a district as small as Fire Island. Although the Freedom of Information Law as initially enacted required that an applicant must seek "identifiable" records, since 1978 it has merely required that an applicant "reasonably describe" the records sought. Moreover, it has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the record keeping systems of the District, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the District staff can locate the records of your interest with a reasonable effort analogous to that described above, i.e., by reviewing perhaps hundreds of records, it would be obliged to do so. As indicated in Konigsberg, only if it can be established that the District maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

To the extent that the request does reasonably describe the records, the remaining issues involve 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.

Category 3 of your request pertains to surveillance reports, and you wrote that it is your understanding that "surveillance is conducted by a firm under contract to the district." As suggested earlier, records prepared by such a firm for the District would, in my view, constitute District records, irrespective of where they may be kept. The response indicated that any such records would fall within the exception concerning inter-agency and intra-agency materials, §87(2)(g). From my perspective, if the firm was retained as a consultant, that provision would be applicable. If it was retained merely to collect information or make observations, I do not believe that §87(2)(g) would serve as a basis for a denial of access. More importantly, even when that provision is clearly applicable, due to its structure, it often requires substantial disclosure.

Specifically, cited provision permits an agency to withhold records that:

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

I. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

The same kind of analysis would apply with respect to records prepared by consultants for agencies, for the Court of Appeals has held that:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency, may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the

staff of an agency. Again, if the surveillance firm did not perform as a consultant, §87(2)(g) would not serve as a basis for a denial of access.

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, records communicated between or among District officials or those prepared by a consultant for the District would be accessible or deniable, in whole or in part, depending on its contents.

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)"[Gould v. New York City Police Department, 89 NY 2d 267, 276-277].

Based on the language of the law and the direction provided by the state's highest court, even if records can be characterized as "inter-agency or intra-agency materials", that does not signify the

end of the analysis of rights of access. Rather, I believe that an agency must review the entirety of the content of those materials to determine which portions, if any, may justifiably be withheld.

Lastly, while I believe that the District must withhold records identifiable to students other than your daughter, based on a federal statute, it is required to disclose to you those records or portions of records identifiable to your daughter. 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 § 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, however, if a parent of a student requests records pertaining to his or her child, FERPA provides rights of access to the parent of the child to those portions of records that are personally identifiable to their child.

In sum, from my perspective, it is doubtful that the District can validly contend that no element of the three categories of records considered herein involves records that cannot be located with reasonable effort or that the requirement that records be reasonably described has not been met. To the extent that they can be found with reasonable effort, blanket denials of access would be inconsistent with law, for it would be the District's responsibility to review the records to ascertain which portions must be disclosed, and which others may properly be withheld.

I hope that I have been of assistance.

RJF:tt
cc: Wendell Chu
Nicholas J. Agro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 15099

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 5, 2005

Mr. Tommie Green
03-A-0939
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. Green:

I have received your letter in which you complained that you have encountered difficulty in gaining access to various court records. You indicated that you appealed, but as of the date of your letter to this office, you had not yet received a response.

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-15100

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

January 5, 2005

Mr. Ernest West
92-A-6203
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. West:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from the "Medical Department" under the Freedom of Information Law.

In this regard, it is unclear from your correspondence whether the "Medical Department"is part of a private or governmental facility. The Freedom of Information Law pertains to records maintained by entities of state and local government; it does not apply to private hospitals.

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

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

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. 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 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, enclosed are copies of the Committee's regulations, the Freedom of Information Law and an explanatory brochure that deals with the 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-1510 1

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

January 5, 2005

Mr. Vernon Ricks
92-A-7363
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582

Dear Mr. Ricks:

I have received your letter in which you wrote that it is your understanding that this office can assist you in obtaining records pertaining to your case.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee does not have custody or control of records generally, and it is not empowered to compel a government agency to grant or deny access to records. However, in an effort to provide direction, I offer the following comments.

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

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

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

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

Based on the foregoing, the courts are not subject to the Freedom of Information Law. However, court records are generally available under other statutes (see e.g., Judiciary Law, §255). To the extent that the records of your interest may be maintained by a court, it is suggested that a request be made to the clerk of the court, citing an applicable provision of law as the basis of the request.

If records in which you are interested are maintained by an agency subject to the Freedom of Information Law, such as a police department or the office of a district attorney, a request should be made to the agency's "records access officer." The records access officer 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.

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-15102

41 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 5, 2005

Mr. Lamarr Little
01-A-2318
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. Little:

I have received your letter in which you complained that you have been denied access to disciplinary records of a former New York City police officer. Having researched our files, I have located a copy of a determination of your appeal made to the New York City Police Department. The appeal was denied based on §50-a of the Civil Rights Law.

From my perspective, when a person has ended his or her service as a police officer, the protection accorded by §50-a ends. 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." As you are aware, one such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that §50-a exempts records from disclosure when a request is made in a context relating to litigation. More specifically, in a case brought by a newspaper, it was found that:

> "Given this history, the Appellate Division correctly determined that the legislative intent underlying the enactment of Civil Rights Law section 50-a was narrowly specific, 'to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in

> the context of a civil or criminal action' (Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, 109 AD 2d 92, 96). In view of the FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50-a should not be construed to exempt intervenor's 'Lost Time Record' from disclosure by the Police Department in a non-litigation context under Public Officers section 87(2)(a)" [Capital Newspapers v. Burns, 67 NY 2d 562, 569 (1986)].

It was also found that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568).

In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

If the subject of the record is no longer a police officer, I do not believe that §50-a would be applicable. In short, the rationale for confidentiality accorded by that provision would no longer be present.

The foregoing is not intended to suggest that all records identifying a police officer who has resigned must be disclosed, for other grounds for denial may be applicable. For instance, such records may consist of "intra-agency materials" that would be accessible or deniable, depending upon their contents, under §87(2)(g) of 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: Jonathan David

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15103

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 6, 2005

Mr. Carl Patterson, Jr.
96-A-1633
Livingston Correctional Facility
P.O. Box 1991
Sonyea, NY 14556

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

Dear Mr. Patterson:

I have received your letter in which you questioned the propriety of a denial of your request to obtain a copy of your pre-sentence report from the Division of Criminal Justice Services.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

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-15104

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January 6, 2005

Mr. Justin Pack
02-A-5243
Oneida Correctional Facility
Rome, NY 13442-4580

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

Dear Mr. Pack:

I have received your letter in which you complained that the Board of Examiners of Sex Offenders response to your Freedom of Information Law request indicating that it will make a determination within 45 days "serves as a defacto denial."

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)].

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 - 15105

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

January 6, 2005

Mr. Robert Lasky
[redacted]

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

Dear Mr. Lasky:

I have received your letter in which you asked that this office conduct an investigation in relation to your requests for records made to the City of Troy.

In this regard, the Committee on Open Government has neither the authority nor the resources to conduct investigations. However, having reviewed your comments, I offer the following remarks.

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

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3920
FOIL-AO-15106

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January 7, 2005

E-MAIL

TO: William G. Terry

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. Terry:

As you are aware, I have received your inquiry concerning the Open Meetings Law. If a town board conducts an executive session, you asked whether board members are "allowed to discuss what went on in the meeting..." You wrote that, as a member of a town board, you "were under the thought that when we were in executive session, we were sworn to the utmost secrecy."

From my perspective, unless there is a statute enacted by the State Legislature or Congress that prohibits disclosure of information acquired during an executive session, the is nothing that would preclude a member from discussing that information.

By way of background, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the state's highest court, 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 Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that may be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result

in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1071

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

January 7, 2005

E-MAIL

TO: Mee Jo

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. Mee Jo:

Your kind words are much appreciated. As you are aware, I have received your letter of December 6. In addition, I have received your letter of December 10.

You referred in the first letter to a situation in which a person was charged with shoplifting and pleaded not guilty, and the matter is now pending in court. You asked whether a police agency may disclose the defendant's security number, driver's license ID number, name, home address and phone number, date of birth and a photograph. In a related vein, you asked whether a police agency is "required to have a written request to disclose the information pursuant to Section 96." In the second letter, you raised similar questions, and you also questioned whether a request for records should be made in writing or whether a request can be made by phone.

In this regard, first, §96 is part of the Personal Privacy Protection Law. That law applies only to state agencies; it does not apply to local governments or municipal police agencies. For purposes of that statute, the term "agency" is defined in §92(1) to mean:

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

Based on the foregoing, again, the Personal Privacy Protection Law would not apply.

Second, the governing provision of law in the circumstance that you described is the Freedom of Information Law, which is applicable to state and local government agencies in New York. In my opinion, several of the items to which you referred *may* be withheld by a local government agency, such as a municipal police department. However, there is nothing in the Freedom of Information Law that requires that they must be withheld.

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

One of the exceptions to rights of access, §87(2)(b), states that government agencies may withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Some of the items to which you referred, such as a social security number and home telephone number may, in my opinion, be withheld. However, the Court of Appeals, the state's highest court, has specified that the Freedom of Information Law is permissive. In other words, although a local government agency may withhold records or portions of records when disclosure would constitute an unwarranted invasion of personal privacy, there is no provision in that law that prevents a police agency, for example, from disclosing [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

I point out that if charges are dismissed in favor of a defendant, §160.50 of the Criminal Procedure Law generally requires that the records relating to the charges that are maintained by a court, a police agency or an office of a district attorney, must be sealed. In that circumstance, the records would be exempted from disclosure by statute and beyond rights of access conferred by the Freedom of Information Law.

Lastly, pursuant to §89(3) of the Freedom of Information Law, an agency may require that a request for records be made in writing. However, an agency may choose to accept an oral request and provide information in response to a request either at a government agency or by phone.

As you requested, attached is a copy of "Your Right to Know", which summarizes the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

RJF:tt

Attachment

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15108

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

January 7, 2005

Mr. Fred N. Perry
Attorney at Law
175 Deer Park Road
Dix Hills, NY 11746

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

Dear Mr. Perry:

I have received your letter and the materials attached to it. You have sought an advisory opinion concerning the propriety of Nassau County's denial of your request made under the Freedom of Information Law.

The request involved "a computer copy of the data found in the Tax Impact Notices that is being mailed to the public..." The notices are sent to owners of real property pursuant to §511 of the Real Property Tax Law (RPTL). The County denied the request on the basis of §89(2)(b)(iii) of the Freedom of Information Law, citing COMPS, Inc. V. Town of Huntington, 269 AD2d 446, appeal denied, 95 NY2d 758 (2000) and Siegel, Fenchel & Peddy v. Central Pine Barrens Joint Planning and Policy Commission, 251 AD2d 670, 676 NYS2d 191; appeal denied, 93 NY2d 804 (1999). In addition to questioning the denial of that request, you also asked whether the County could deny "the same (but revised) request seeking only the tax id and new assessment fields of information (i.e., not the name and addresses)." You indicated that all of the data are available on the County's website. Having gone to the website, that is so; however, data is only available after having entered a particular address; it is not available as a list or in the array.

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. Long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969).

I note 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, supra.]

According to §511(1) of the RPTL, an assessor is required to "mail to each owner of real property...an assessment disclosure notice." As indicated above, those notices are accessible, individually, via the County's website. There is no provision of which I am aware that requires that a list or database of assessment disclosure notices be compiled and made available as a single record. In contrast is an assessment roll, which is a single record that includes data relating to the assessment of all parcels of real property within an assessing unit and which is characterized as a "public record" in §516(2) of the RPTL. In the case of a request for an assessment roll, §89(6) of the Freedom of Information Law 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, §516 of the RPTL. 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.

In sum, because there is no statute that requires that all assessment disclosure notices be made available as a single record as in the case of an assessment roll, I believe that the County may properly consider §89(2)(b)(iii) of the Freedom of Information Law in determining rights of access. A database or equivalent containing the information sought in my view constitutes a list of names and addresses, and if it would be used for a commercial or fund-raising purpose, the County, in my opinion, has the authority to deny a request.

With respect to a request for the database without names and addresses, an initial issue involves the County's ability to segregate those items from the remainder of the data. If it has the ability to do so with reasonable effort, I believe that it would be obliged to do so, assuming that the

data is available under the Freedom of Information Law [see New York Public Interest Research Group v. Cohen, 729 NYS2d 379 (2001)].

Whether §89(2)(b)(iii) would be applicable as a basis for a denial of access in that circumstance is questionable. As you are aware, in Siegel, Fenchel & Peddy, supra, although names and addresses were deleted from a real property inventory, leaving tax map numbers potentially available, the Appellate Division concluded that disclosure of the tax map numbers "would still allow the petitioner to identify the names and addresses of the property owners listed thereon" and upheld the agency's denial of access. Nevertheless, a distinction might be made between the facts in that case and your hypothetical request. In Siegel, Fenchel & Peddy, the request involved "the inventory of all privately-owned real property within the Central Pine Barrens Area" (id., 193), thereby focusing on relatively few parcels of real property among the thousands of parcels within Suffolk County. Your request, as I understand it, would not focus on any particular area; rather, it would encompass all parcels within the County. If that is so, it is conjectural whether Nassau County could justify a denial of access, absent names and addresses, based on a contention that disclosure would involve the functional equivalent of a list of names and addresses.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Ruth Markovitz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15109

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

January 7, 2005

Mr. Rodolfo Casiano
83-B-2494
Eastern Correctional Facility
Box 338
Napanoch, NY 12458

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

Dear Mr. Casiano:

I have received your letter and the materials attached to it. You complained that your Freedom of Information Law requests concerning your arrest directed to the New York City Police Department have been denied because you raised questions; in other instances records have been denied in whole or in part.

In this regard, I offer the following comments.

First, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request.

Therefore, Police Department officials in my view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive. In short, in the future, rather than seeking information or raising questions, it is suggested that you request existing records.

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

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

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., 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

FOIL-AO-15110

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

January 11, 2005

Hon. Wayne C. Skinner
Town of Wawayanda
P.O. Box 106
Slate Hill, NY 10973

The staff of the Committee on 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 Skinner:

I have received your note and the materials relating to it. It is apparently your view that a request made under the Freedom of Information Law is "improper" if more than one record is requested on a form and that separate forms should be submitted concerning each record that is requested.

In this regard, first, there is nothing in the Freedom of Information Law that limits the number of records that can be requested at the same time. Judicial decisions have dealt with requests involving thousands of pages, and as long those requests "reasonably describe" the records sought as required by §89(3) of that statute, any such request is proper [see e.g., Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Second, although an agency, such as a town, may require that a request be made in writing, there is nothing in the Freedom of Information Law that specifies that a form must be completed. Further, it has been consistently advised that an agency can neither reject a request nor delay responding due to a person's failure to complete an agency's prescribed form. In short, any written request that reasonably describes the records sought, irrespective of the number of records involved, would be consistent with law and should be acceptable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. Teresa E. Pierce

From: Robert Freeman
To: [redacted]
Date: 1/11/2005 9:14:51 AM
Subject: Dear Mr. LeFever:

Dear Mr. LeFever:

I have received your inquiry concerning access to records of non-profit organizations.

In this regard, as a general matter, the Freedom of Information Law pertains to governmental entities; it does not apply to private or non-profit organizations, except in rare instances (i.e., volunteer fire companies and government created or controlled entities). However, every not-for-profit corporation must annually complete IRS form 990, which is a basic financial statement that is available from both the corporation and the IRS. In addition, when organizations seek charitable contributions and reach a certain threshold, I believe that they must file a detailed report including some of the information of your interest with the Attorney General. To obtain additional information concerning those requirements or to obtain any such reports, it is suggested that you contact the Charities Bureau of the Department of Law at the State Capitol, Albany, NY 12224-0341 or by phone at (518)486-9797.

I hope that I have been of assistance.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15112

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

January 11, 2005

Ms. Suzanne McSherry
[redacted]

The staff of the Committee on 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. McSherry:

I have received your letter and the material attached to it, and I thank you for your kind words. You referred to a "struggle" in your attempts to obtain records from the Town of North Elba Building Department relating to development on a neighboring property. On several occasions, the Town's code enforcement officer responded to requests by indicating that "no additional paperwork has been added to this file since your last request." Nevertheless, you learned that documentation of your interest was supplied to a state agency by the code enforcement officer during the period in which your requests were made.

In this regard, first and perhaps most importantly, 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."

Based on the foregoing, a document that is not "added to a file" but which is maintained by or for the Town constitutes a "record" that falls within the framework of the Freedom of Information Law. In short, irrespective of where documentation of your interest had been located, as soon as it was kept or held by or for the Town, I believe that it constituted a "record" subject to rights of access.

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, and I am not suggesting that they may be applicable, §240.65 of the Penal Law and its companion, §89(8) of the Freedom of Information Law (which is Article 6 of the Public Officers Law), pertain to "unlawful prevention of public access to records." The former states that:

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

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

In an effort to enhance understanding of and compliance with 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:tt

cc: Hon. Shirley Seney
Hon. Barbara S. Whitney
James E. Morganson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15113

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 12, 2005

Mr. Edward Oathout
97-A-6317
Mohawk Correctional Facility
6100 School Road, P.O. Box 8451
Rome, NY 13442-8451

Dear Mr. Oathout:

I have received your letter, which is characterized as a "FOIL Appeal" concerning a request made to the Division of Parole. The receipt of your request was acknowledged on September 16, when you were informed that "you can expect to receive a response within approximately thirty days." Having received no further response, you wrote to the Chairman of the Board of Parole on December 2, but as yet had received no response.

In this regard, the Committee on Open Government is authorized to provide and opinions relating to 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. However, in an effort to provide guidance, I offer the following comments.

First, your request involves statistics indicating the "number of sexual predators that have been released on parole from prison, in the past five years." Here I point out that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. If statistics containing the information sought have not been prepared, the Division would not be required to create a new record including that information in order to satisfy your request. If such statistics have been prepared, I believe that they would be accessible pursuant to §87(2)(g)(i).

Second, 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)].

For your information, I believe that the person designated to determine appeals at the Division of Parole is Terrence X. Tracy, Counsel to the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Terrence X. Tracy
Lucretia Bailey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1514

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, 2005

E-MAIL

TO: Matthew D. Chayes

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. Chayes:

I have received your communication in which you indicated that your request made to Binghamton University was granted but that it was estimated that you might not receive the records until March 1. You asked whether a delay of that nature is reasonable.

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

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

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."

I hope that I have been of assistance.

RJF:tt

cc: Barbara Westbrook

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1515

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

January 14, 2005

Mr. Stanley Damus
#53549-066
FCI Schuylkill
P.O. Box 759
Minersville, PA 17954-0754

Dear Mr. Damus:

I have received your request for any records maintained by this agency pertaining to you.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the New York Freedom of Information Law. The Committee does not have custody or control of records generally, and this office has no records pertaining to you.

It is noted that requests for records should be directed to the "records access officer" at the agency or agencies that you believe would maintain records of your interest. The records access officer has the duty of coordinating an agency's response to requests. I point out that §89(3) of the Freedom of Information Law requires 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.

Lastly, although the federal Freedom of Information Act (which applies only to federal agencies) contains provisions concerning fee waivers, the New York Freedom of Information Law includes no similar provision. Further, it has been held that an agency may charge its established fee, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that 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-1516

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

January 14, 2005

E-MAIL

TO: Jim Stalker

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. Stalker:

As you are aware, I have received your letter. If you believe that "an employee of New York State has lied on their job application", you asked whether you may "go to personnel and request a copy of their job application."

In this regard, based on the judicial interpretation of the Freedom of Information Law, it is likely that portions of an employment application 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 the 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."

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 an employment 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.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1511?

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

January 14, 2005

Mr. Herman G. Brunelle, Sr.
[redacted]

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

Dear Mr. Brunelle:

I have received your letter and the materials attached to it. You referred to a request made to the State Insurance Fund pursuant to the Freedom of Information Law. Although some of the records sought were made available, others were apparently withheld without an indication of the reason or your right to appeal. You have sought assistance in the matter.

In this regard, 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 head or governing body of an agency to adopt rules and regulations consistent with those promulgated by the Committee and 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..."

Based on the foregoing, again, the records access officer must "coordinate" an agency's response to requests, and if any aspect of a request is denied, the reason or reasons must be explained in writing.

As you are aware, when an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

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

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the

> procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

The foregoing is not intended to suggest that a lawsuit should be initiated, but rather that an agency is required to inform a person denied access to records of his or her right to appeal the denial. 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 State Insurance Fund.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Edward D. Siegel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15118

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

January 14, 2005

E-Mail

TO: Malcolm Boyd

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Boyd:

I have received your correspondence in which you requested information from this office pursuant to the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information Law. The Committee does not maintain custody or control of records generally. In short, I cannot grant your request, because this office does not maintain the information of your interest. Nevertheless, in an effort to offer guidance, I offer the following comments.

First, a request should be made 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. In this instance, it appears that the source of the information is the New York State Department of Civil Service. I believe that the records access officer at that agency is Ms. Jane Prus.

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. Therefore, if, for example, there is no record indicating the number of places or houses in the state that employ individuals in a particular job title, or if there is no "total number of people employed" in that job title, an agency would not be required to prepare records containing the information requested on your behalf. Rather than seeking information by asking questions, it is suggested that you seek existing records, i.e., records indicating the places or houses in which employees in a certain title are employed.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-15119

From: Robert Freeman
To: Mark D. Vaughn
Date: 1/18/2005 8:40:41 AM
Subject: Re: Request for information from Corning-Painted Post School Board member Mark Vaughn

Dear Dr. Vaughn:

Thank you for your kind words.

From my perspective, it is clear that the general public would not have a right to obtain the email addresses of parents of students in the District, and it is questionable whether you may have the ability to obtain those items as a member of the Board of Education.

The governing statute is the federal Family Educational Rights and Privacy Act (20 USC §1232g; commonly known as "FERPA"). As you may know, FERPA pertains to information identifiable to students and generally prohibits the disclosure of information that is personally identifiable to a student without the consent of a parent. The federal regulations define the phrase "personally identifiable information" to mean not only the student's name or that of his/her parent, but any information that would make a student's identity easily traceable (34 CFR §99.3). Based on that provision, I do not believe that a school district would have the authority to disclose a parent's email address to the public absent consent by the parent. Additiionally, even if FERPA did not apply, I believe that parents' email addresses could be withheld under the Freedom of Information Law on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [§89(2)(b)].

The regulations include provisions that authorize disclosure of information that is personally identifiable to a student without prior consent in certain instances, one of which is when: "The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests" [§99.31(1)(a)] In my view, the governing body, i.e., the Board of Education, would have the authority to determine which persons and under which circumstances school officials may obtain personally identifiable information.

I hope that I have been of assistance.

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

>>> "Mark D. Vaughn" [redacted] > 1/17/2005 12:54:35 PM >>>
Mr. Freeman,

I had the pleasure of sitting in on one of your sessions at October's NYSSBA conference and was quite impressed by your knowledge and experience. I hope to benefit from both in regards to a request that I have.

I am concerned that our Board isn't doing enough to engage the community and have therefore begun my own email campaign to solicit community feedback. I have two daughters in middle school in the district and know that each year they are asked to provide the school with email addresses for me and my wife. I assume that this is done district-wide. I'd like to obtain a copy of the email addresses but expect that the Superintendent will be reluctant to oblige since she knows that I'm trying to engage the community.

If I am correct and there is a list of parent email addresses available, do I as a Board member have a right to receive a copy of the list? Do I have this right as an independent community member?

Your expeditious feedback is appreciated.

Best,

Dr. Mark D. Vaughn, member

Corning-Painted Post School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3925
FOIL-AO-15120

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

January 18, 2005

E-MAIL

TO: Guy Hayward

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. Hayward:

As you are aware, I have received your letter in which you questioned the propriety of executive sessions conducted by the Board of Trustees of the Village of Saranac Lake. It is my understanding that the matter relates to a "safe house" for battered women. It is your view that a "private project" would not qualify for consideration in private.

From my perspective, it appears that executive sessions might properly have been conducted, and I note that there is nothing in the Open Meetings Law that refers to "private projects" or that distinguishes private from public projects. In my view, the ability to enter into executive session relates to the subject matter under consideration and whether it falls within any of the grounds for entry into executive session listed in paragraphs (a) through (h) of §105(1) of that statute.

Although it is rarely cited, I believe that paragraph (a) would have been pertinent in the context of the situation that is the focus of your inquiry. That provision authorizes a public body, such as a village board of trustees, to conduct an executive session to discuss "matters which will imperil the public safety if disclosed." Similar factual situations have arisen in the past, and in consideration the need to provide safety and security to battered, abused or threatened women and their children, a public body may, in my opinion, enter into executive in any instance in which public discussion could place those persons in jeopardy or danger.

In a somewhat related vein, I point out that the analogous provision in the Freedom of Information Law, §87(2)(f), stated for more than two decades that an agency had the authority to deny access to records to the extent that disclosure "would endanger the life or safety of any person." As you may be aware, under that statute, an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more

of the grounds for denial [see §89(4)(b)]. However, in cases involving the assertion of §87(2)(f), the standard developed by the courts was somewhat less stringent, for 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...."[Stronza v. Hoke, 148 AD2d 900,901 (1989)].

It is noted that the principle enunciated in Stronza has appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Division of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994]. In short, the courts found that an agency could justify a denial of access to records when there was a reasonable likelihood that disclosure *could* endanger the life or safety of any person. Since those decisions were rendered, the law was amended, replacing "would" with "could." While there are no judicial decisions of which I am aware that focus on §105(1)(a) of the Open Meetings Law, I believe that the standard is similar, that an executive session may properly be held when it can reasonably be contended that public discussion could imperil public safety or endanger the life of any person.

I hope that I have been of assistance.

RJF:tt

cc: Board of Trustees
Kareen Tyler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1512

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

January 18, 2005

Mr. Michael Thomas
03-B-2134
Groveland Correctional Facility
7000 Sonyea Road
Sonyea, NY 14556

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

Dear Mr. Thomas:

I have received your letter in which you raised questions concerning the time limit for responses to Freedom of Information Law requests, as well as your ability to proceed with an Article 78 proceeding and prevail in the award of attorney's fee in such proceeding.

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, 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-15122

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

January 18, 2005

Mr. Adam Bennefield
00-B-2792
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. Bennefield:

I have received your letters in which you complained that you requested records under the Freedom of Information Law from the Erie County Correctional Facility and the Buffalo Holding Center but, as of the date of your letter to this office, that you had not received any response.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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-15123

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

January 18, 2005

Mr. Glenn Bookman
86-B-0227
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. Bookman:

I have received your letter in which you complained, that as of the date of its preparation, you had not received a response to your Freedom of Information Law request directed to the Superintendent of the Auburn Correctional Facility.

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 18, 2005

Mr. Gary Berman
731 Meisser Street
Franklin Square, NY 11010

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

Dear Mr. Berman:

I have received your letter in which you raised a series of questions relating to your requests made under the Freedom of Information Law to the Valley Stream Central High School District.

By way of background, in requests that quoted from the definition of the term "record" appearing in §86(4) of the Freedom of Information Law, you sought "everything that (four named) individuals have produced or reproduced in their jobs at the district." You added that the request involves "[n]ot a single document but every document that they wrote or saw in the course of their jobs." The District rejected the request on the ground that the request "does not reasonably describe a record."

I agree with the District's contention. Before focusing on that issue, I point out that the definition of the term "record" is expansive. However, that an item constitutes a record does not necessarily mean that the record is accessible to the public. "Record" is defined to include:

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

Written items pertaining to students are District records, but in most instances they are not accessible to the public because a federal law, the Family Educational Rights and Privacy Act, prohibits disclosure without consent of a parent. W-2 and W-4 forms pertaining to District employees constitute "records", but portions of them, i.e., social security numbers, may be withheld to protect their privacy. In short, all items of information extant in some physical form constitute records, but that does not necessarily lead to the conclusion that they must be disclosed to the public.

With specific respect to the District's response, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. It is likely that the District maintains records falling within the scope of your request in a number of locations or units and by means of different filing systems within those units. Moreover, your request is so all-encompassing that it includes items such as time sheets, records pertaining to students, communications with parents and other District employees, as well as material that certain employees "saw." In my opinion, it would likely be impossible to identify the records that a person might have seen in the course of his or her employment.

A request for all minutes of Board meetings within the past year would reasonably describe the records, for staff could locate and identify those records. However, a request for all records produced or seen by an employee during the course of his or employment would not, in my view, meet the standard of reasonably describing the records sought.

Next, you referred to an employee's evaluations and "an 'alleged' reprimand letter."

In this regard, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another and from one employee to another. Neither the characterization of

documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

If there was no determination to the effect that an employee engaged in misconduct, I believe that a denial of access to the records based upon considerations of privacy would be consistent with law.

I hope that the preceding commentary 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: Board of Education
Dr. Maria Fletcher
Dr. Bernstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 21, 2005

Mr. Shawn Boyd
90-A-9357
Attica Correctional Facility
P.O. Box 618
Auburn, NY 13021

Dear Mr. Boyd:

I have received your letter in which you complained that a request made pursuant to the Freedom of Information Law to the Office of the Queens County District Attorney nearly a year ago has not yet been answered.

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

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

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

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

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

STATE OF NEW YORK
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January 21, 2005

Mr. Gerry Nally
Seaport Tenants Committee
89 South Street, Pier 17
New York, NY 10038

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

Dear Mr. Nally:

As promised, I have reviewed the materials sent to this office concerning your request made to the New York City Economic Development Corporation ("the Corporation") for records pertaining to the redevelopment of Pier 17 at the South Street Seaport. In short, your request was denied in its entirety, and in justifying the denial of access, the Corporation's Freedom of Information Law appeals officer wrote that:

> "...discussions in connection with the potential redevelopment of Pier 17 are still ongoing and have not yet resulted in the execution of any binding contracts or agreements with or among the interested parties. Any documents contained in our files as to any understandings among the interested parties are preliminary in nature and still in draft form. The disclosure of any documents submitted by any interested parties at this preliminary stage could ultimately impair and compromise NYCEDC's and/or the City's ability to negotiate and enter into an agreement(s) to ensure the development of a project that would be in the best interests of the citizens of New York City."

She added that the "interested parties" that submitted records to the Corporation:

> "...had every expectation that these documents or the portions thereof containing trade secrets and other commercially sensitive information would be kept confidential and used only in the context of project negotiations or they would not have otherwise submitted the same to the City or NYCEDC. And yet, without this essential information, NYCEDC and the City cannot reasonably be expected to facilitate and undertake a project that effectively addresses the competing

needs of the interested parties while also promoting the public interest."

From my perspective, while some elements of the records sought might justifiably have been withheld, it is unlikely that the records may properly be withheld in their entirety. 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. 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). 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:

negotiations with a public employee union, and the union requests records reflective of the agency's strategy, the items that it considers to be important or otherwise, its estimates and projections, it is likely that disclosure to the union would place the agency at an unfair disadvantage at the bargaining table and, therefore, that disclosure would "impair" negotiating the process.

It is noted that the Court of Appeals sustained the assertion of §87(2)(c) in a case that did not clearly involve "contract awards" or collective bargaining negotiations. In Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In each of the kinds of the situations described earlier, there is an inequality of knowledge. In the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the context of collective bargaining, the union would not have all of the agency's records relevant to the negotiations; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an records regarding collective bargaining strategy or appraisals would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

In a case involving negotiations between a New York City agency and the Trump organization, the court referred to an opinion that I prepared and adopted the reasoning offered therein, stating that:

> "Section 87(2)(c) relates to withholding records whose release could impair contract awards. However, here this was not relevant because there is no bidding process involved where an edge could be unfairly given to one company. Neither is this a situation where the release of confidential information as to the value or appraisals of property could lead to the City receiving less favorable price.
>
> "In other words, since the Trump organization is the only party involved in these negotiations, there is no inequality of knowledge between other entities doing business with the City" [Community Board 7 v. Schaffer, 570 NYS 2d 769, 771 (1991); Aff'd 83 AD 2d 422; reversed on other grounds 84 NY 2d 148 (1994)].

Insofar as the records at issue are known to the parties involved in negotiations, the rationale described above and the judicial decisions rendered to date suggest that §87(2)(c) could not justifiably have been asserted to withhold the records. Contrarily, to the extent that the Corporation

> "...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 requested records 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 that agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*... as long as the requisite particularized showing is made" (id., 277; emphasis added).

The initial basis for denial cited by the Corporation,§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 process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That a contract has not been signed or ratified, in my view, is not determinative of rights of access or, conversely, an agency's ability to deny access to records. Rather, I believe that consideration of the effects of disclosure is the primary factor in determining the extent to which §87(2)(c) may justifiably be asserted.

As I understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Similarly, if an agency is involved in collective bargaining

maintains records which if disclosed to others would impair its ability to negotiate agreements optimal to the City's residents, I believe that §87(2)(c) could properly have been asserted.

The other significant exception upon which the Corporation relied to deny access, §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" (id., 419 - 420).

In my view, it is likely that certain records sought may have *some* value to competitors, but whether every aspect of every record that has been withheld based on §87(2)(d) would, if disclosed, cause *substantial injury* to the competitive position of a commercial enterprise is questionable, and that is the standard that must be met to justify a denial of access.

A copy of this opinion will be forwarded to Corporation in an effort to encourage its staff to reconsider its denial of your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Judy E. Fensterman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 24, 2005

Mr. Gerald T. Balone
74-C-0264
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. Balone:

I have received your letter in which you raised a variety of questions concerning the "Freedom of Information Law and Title 9 of Executive Law §259(i)" as it pertains to your parole case record and parole hearings. You indicated that you believe that you were not allowed access to all the materials in your case record.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. It does not have the expertise or the jurisdiction to respond to questions concerning matters relating to your parole hearing under §259(i) of the Executive Law. However, I offer the following comments concerning your request for your case record under the Freedom of Information Law.

The regulations promulgated by the Division of Parole state in relevant part that you may obtain "those portions of the case records 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)].

It is unclear whether you have a right to all the materials in your case record. 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 could endanger the life or safety of any person could be withheld pursuant to §87(2)(f); and pre-sentence reports and memoranda are exempt from disclosure pursuant to §390.50 of the Criminal Procedure Law and, therefore, §87(2)(a) of the Freedom of Information Law.

In short, if the Division has disclosed the records to be considered at the hearing that are not exempt from disclosure, I believe that the Division has acted in accordance 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-15128

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

January 25, 2005

Mr. Sami Akleh
97-A-5102
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

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

Dear Mr. Akleh:

I have received your letter in which you asked for assistance in obtaining records from the New York County District Attorney's Office. It appears that the District Attorney's Office has refused to give you records because they were previously provided to your attorney. You indicated that you have written to your attorney to request the records but that he refuses to respond. You explained the situation to Carmen Morales and Patricia Bailey of the District Attorney's Office, but they continue to refuse to provide you with the records.

Although there is no judicial decision dealing with the situation in which a client's attorney fails to provide his or her client with records disclosed to that attorney, I would conjecture that an affidavit or similar certification from a client specifying that his or her attempts to obtain records from the attorney have been unsuccessful would be adequate to justify a request made pursuant to the Freedom of Information Law.

In an effort to assist you, I have forwarded a copies of this response to Ms. Morales and Ms. Bailey.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Carmen Morales
Patricia Bailey

FOIL-AO-15129

From: Robert Freeman
To: William Ey
Date: 1/26/2005 9:32:04 AM
Subject: Re: Emails

There is no law dealing with the privacy of email communications in the situation that you described. Further, an email transmitted to a government official in his or capacity as a government official falls within the coverage of the Freedom of Information Law.

If you would like a more expansive opinion regarding the issue, please let me know.

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

>>> "William Ey" <supervisor@clarksonny.org> 1/25/2005 12:37:13 PM >>>
Bob,

Is there anything that you might be able to tell me about the following?

There was an email that was sent to one of our Conservation Board members. It had in it up-approved minutes for a meeting. The email was opened by the persons wife and read. She came into the Town to point out that she thought that there was an error in the email.

Question: Can emails sent to specific individuals be read by just anyone in the household? Is there anywhere that I could go for a legal opinion about the privacy of emails sent in the normal course of business?

Thanks for your help,

Bill Ey

Town of Clarkson
Supervisors Office
P.O. Box 858
Clarkson, NY 14430

Phone: (585) 637-1131
Fax: (585) 637-1138

FOIL-AO-15130

From: Robert Freeman
To: [redacted]
Date: 1/26/2005 4:29:33 PM
Subject: Dear Mr. Cordiner:

Dear Mr. Cordiner:

I have received your inquiry concerning your ability to obtain records of a homeowners' association. In this regard, the statute within the advisory jurisdiction of this office, the Freedom of Information Law, applies to entities of state and local government. It does not generally apply to not-for-profit corporations and does not apply in this instance. If there are rights of access, they may be referenced in the by-laws of the corporation. It is suggested that you review the by-laws.

I regret that I cannot be of greater assistance.

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

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January 28, 2005

Mr. Arthur Browne
Editorial Page Editor
Daily News
450 West Thirty-Third Street
New York, NY 10001-2681

The staff of the Committee 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. Browne:

I have received your letter in which you requested an advisory opinion concerning "the power of the Committee on Standards and Ethics of the New York City Council to conduct non-public proceedings and to bar council members from disclosing what transpires behind closed doors."

By way of background, the Committee on Standards and Ethics ("the Committee") publicly charged Councilman Allan Jennings with "alleged ethical breaches" and has conducted proceedings relating to the charges in executive session. Although Councilman Jennings asked that the proceedings be conducted in public, his request to do so was rejected. You added that:

> "While the hearings are underway, the committee has prohibited all council members, including Jennings, from discussing the proceeding publicly and from releasing a copy of the official transcript. The committee's acting chairman and the council's acting general counsel have made clear that Jennings would be subject to discipline were he or his lawyer to violate the panel's prohibition..."

A transcript of proceedings of the Committee conducted in executive session on September 21 refers to a statement made by the Acting Chairman, Councilman Rivera, who said that he had "made it perfectly clear" during the preceding day's proceedings "that no one should talk to the media", but that one or more persons present during that closed session did so, and that any such disclosure "does not do justice to the confidentiality agreement we have here in this Committee." Later during the executive session of September 21, he stated that:

> "...we're also going to read into the record, the Committee on Standards and Ethics proposed procedure for a disciplinary hearing says that 'all proceedings and related documents are confidential, and no Committee members shall discuss the proceedings with the responding Council member,' which means that, Councilman Jennings, we cannot have conversations in reference to these hearings in this location without your lawyer or any outside areas outside of this hearing. We cannot have any conversations with any of the members of any of the staff in reference to today's or tomorrow's proceedings while they are taking place.
>
> "So, those are the rules of this Committee, we're going to try to abide by them as much as possible."

Having obtained a copy of the Committee's rules, which were adopted in March of 2004, section (2) states in relevant part that:

> "All proceedings and related documents are confidential. No Committee Member shall discuss the proceedings with the respondent Council Member or Non-Committee Member, press, unauthorized staff or any member of the public."

In consideration of the foregoing, you have sought my views in relation to the following questions:

> "- - Does the committee properly rely on Section 105(1)(f) of the Public Officers Law (permitting closed executive sessions when the subject matter entails the possibility of employment-related discipline) in light of the councilman's own request that the sessions be open to the public?
>
> - - May the committee, invoking the threat of punishment, bar a committee member from speaking publicly about the substance of proceedings held in private under Section 105(1)(f) of the Public Officers Law?
>
> - - May the committee, invoking the threat of punishment, bar a council member from speaking publicly about the substance of proceedings held in private under Section 105(1)(f) of the Public Officers Law?
>
> - - May the committee, invoking the threat of punishment, impose the same bar on a council member who is not a committee member, who has been publicly charged with ethical breaches and whose conduct

is the focus of proceedings held in private under Section 105(1)(f) of the Public Officers Law?"

In this regard, first, §105(1)(f) of the Open Meetings Law permits a public body, such as a committee consisting of members of the City Council, 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..."

The facts that have been presented indicate in my view that executive sessions may validly have been held, for the issue involves a matter "leading to the...discipline...of a particular person", Councilman Jennings. However, there is nothing in the Open Meetings Law that gives the subject of a discussion the right to determine or direct a public body to consider an issue in public or in private. In short, I believe that discussing the conduct of Councilman Jennings in public or private is within the discretionary authority of the Committee, and that his desire to open the discussion to the public is irrelevant for purposes of the Open Meetings Law.

Your remaining questions involve essentially one issue: does the Committee have the authority to prohibit one of its members or any member of the City Council from speaking publicly about an executive session validly held under §105(1)(f) of the Open Meetings Law? Stated differently, is the Committee's rule that "[A]ll proceedings and related documents are confidential" concerning the discipline of a member of the City Council consistent with law?

In my opinion, there is no legal basis for prohibiting a member of the Committee, a member of the City Council, or any other person present during an executive session from speaking publicly about or disclosing information obtained during an executive session validly held. This is not intended to suggest that such speech or disclosures would be wise or proper in every instance, but rather, again, that there is no basis in law for prohibiting a person present during an executive session from speaking about that closed session. Further, I do not believe that a committee of the City Council can adopt a rule that has the force of law or is empowered to silence an elected official.

As you are aware, the Open Meetings Law sets forth a procedure for entry into executive session and specifies the subjects appropriate for consideration in executive session. Its statutory companion, the Freedom of Information Law, deals with documents, the other aspect of access to government information to which the rule refers. Both statutes contain permissive rather than mandatory language concerning the ability to discuss a matter in private or deny access to records.

A public body *may* enter into executive session in circumstances prescribed in the Open Meetings Law; it is *not required* to do so. Specifically, the introductory language of §105(1) entitled "Conduct of executive sessions" 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..."

The law clearly indicates that there is no obligation to conduct an executive session; a public body may choose do so, but only upon approval of a motion by a majority vote of its total membership. If a motion to enter into executive session is not approved, a public body is free to discuss the issue in public.

Similarly, although an agency *may* withhold records in accordance with the grounds for denial of access appearing in §87(2) of the Freedom of Information Law, the Court of Appeals has held that an agency is not obliged to do so and may opt 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].

In my view, records may be characterized as "confidential" only when a statute, an act of Congress or the State Legislature, specifies that they cannot be disclosed. That circumstance is reflected in §87(2)(a) of the Freedom of Information Law, the first exception to rights of access, which pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 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. The effect is that the Open Meetings Law simply does not apply in those instances.

Both the Court of Appeals and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" (id.).

In like manner, in construing the equivalent exception to rights of access in the federal Freedom of Information Act (5 USC §552), 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.

Since a public body, such as the Committee, 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, because a federal statute prohibits disclosure, 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. 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 a parent of the student consents 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.

I note that in a case in which the issue was whether discussions occurring during an executive session held by a school board could generally 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.

It is emphasized that it has been held by several courts, including the Court of Appeals, that an agency's rules or 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, a local enactment, such as the rule adopted by the Committee, cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with an ethics investigation or proceeding must be disclosed; rather, I am suggesting that those records *may* in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, but that a local enactment cannot confer or require confidentiality; only a statute may do so.

Similarly, insofar as a local enactment is more restrictive concerning access than the Open Meetings Law, I believe that it would be invalid. Section 110 of the Open Meetings Law, entitled "Construction with other laws," states in subdivision (1) that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Because the Open Meetings Law is permissive in that it authorizes but does not require executive sessions to be held in appropriate circumstances, it is not a statute that confers confidentiality or prohibits public discussion. I believe that the Committee's rule requiring that information discussed during an executive session is "confidential" is "more restrictive with respect to public access" than the Open Meetings Law and, therefore, should be deemed superseded and invalid.

Considering the issue from a different vantage point, based on a decision rendered by the U.S. Court of Appeals for the Second Circuit [Harman v. City of New York, 140 F.3d 111 (2nd Cir.

1998)], it appears that the Committee's rule may be unconstitutional. In Harman, the New York City Human Resources Administration (HRA) adopted an executive order that forbade its employees:

> "...from speaking with the media regarding any policies or activities of the agency without first obtaining permission from the agency's media relations department. The City contends that these policies are necessary to meet the agencies' obligations under federal and state law to protect the confidentiality of reports and information relating to children, families and other individuals served by the agencies" (id., 115).

I note that §136 of the Social Services Law prohibits a social services agency from disclosing records identifiable to an applicant for or recipient of public assistance. Additionally, §372 of the Social Services Law prohibits the disclosure of records identifiable to "abandoned, delinquent, destitute, neglected or dependent children..." As such, there is no question that many of HRA's records are exempted from disclosure by statute and are, therefore, confidential. Nevertheless, the proceeding in Harman was precipitated by commentary that was not identifiable to any particular recipient, 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 information may be characterized and exempted from disclosure by statute only when a statute forbids disclosure.

While a member of a city council or other governing body may not be an "employee", in consideration of the possibility of sanctions, I believe that the holding in Harman would be applicable in the instant situation. In creating a "balancing test", it was held in Harman 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 "blanket policy" created by the Committee's rule that "[A]ll proceedings and related documents are confidential" applies potentially to any person who may be present during or is aware of proceedings conducted during an executive session. That being so, it would appear to be invalid, as the executive order was found to be invalid in Harman. Moreover, it was stressed by the court that the harm sought to be avoided by means of a restriction on speech must be real, and not merely conjectural. It was determined that:

> "...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).

The Committee's rule is prospective, for, in the words of Harman, "it chills speech before it happens" and does not focus on any harm that has actually occurred. In short, I believe that it stifles free speech in a manner that has been found to be unconstitutional.

Councilman Jennings is not the focus of a criminal proceeding, but rather alleged breaches of ethical conduct. Even if the proceeding involved a criminal matter, he would not be prohibited from speaking or discussing the matter with the news media or the public generally. Everyone is familiar with the first admonition given to a person arrested: "you have the right to remain silent." That warning does not impose any obligation to be silent, and a person arrested is free to speak to anyone. Section 190.25(4) of the Criminal Procedure Law specifies that grand jury proceedings are secret and that government officials present during those proceedings, such as a district attorney or court clerk, are barred form disclosing information regarding a grand jury proceeding. In that situation, a statute prohibits those persons from disclosing. However, there is nothing in §190.25 that prohibits a person from testifying before a grand jury from disclosing or discussing his or her testimony.

In sum, for the reasons expressed in the preceding commentary, I do not believe that the Committee's rule can prohibit Councilman Jennings, or any other person, from discussing or disclosing information acquired during an executive session, nor can it require that documents relating to its proceeding be kept confidential.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Helen Sears, Chair
Hon. Joel Rivera
Hon. Allan Jennings
Hon. Jay Damashek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3931
FOIL-AO-15132

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January 31, 2005

Mr. Martin Z. Braun
Bloomberg News
732 Lexington Avenue
New York, NY 10022

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

Dear Mr. Braun:

I have received your letter in which you questioned the propriety of certain executive sessions held by the boards of New York City's five pension funds, as well as denials of access to their records.

According to your letter, five separate pension funds have been established for categories of City employees, their holdings are valued at approximately 83 billion dollars, and they are known collectively as the New York City Retirement System. Each board is independent, but each relies on the office of the City Comptroller for oversight of asset management and staff support.

Having attended meetings of the boards of the three largest funds on various occasions, you indicated that reviews of a fund's investment performance generally occur in public and that you are given a copy of a "flash report", a one page summary. Often, however, discussions involve "quarterly reports or particular investment classes", and you are excluded from them. Executive sessions have also been held to discuss " a 12 month plan", "investment advisor updates", quarterly reports on "private equity" and real estate, "investment policy", emerging markets, compliance with ethics laws, a selection process for investment counsel, a "post-trade" analysis, and a status report on "large cap growth."

Additionally, in response to a request for a report on the performance of a particular fund, you were told that the report was "privileged." A request for a copy of an investment policy adopted during an executive session was denied, and you were told that you should obtain it from the Comptroller's office. In another instance, after the Board provided authority to enter negotiations with two private equity consultants, your request for their names was rejected based on a contention that disclosure "could impair the ability of the City Comptroller's office to negotiate terms of [a] deal and actually place the investment."

In this regard, I offer the following comments.

First, 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 the boards that are the subject of your correspondence, cannot enter into an executive session to discuss the subjects of their 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 basis for entry into executive session to which you referred and which is pertinent to several of the matters 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, a business enterprise 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 acquisition, sale or exchange of securities; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

When the boards at issue focus on a particular enterprise and consider whether to purchase or sell securities associated with that enterprise, because they purchase and sell securities involving a great deal of money, public discussion could have a significant effect on the value of the securities. If the effect of a public discussion would result in a substantial change in the price of securities considered for acquisition or sale, I believe that an executive session could properly be held. In those circumstances, a board would be focusing on a particular security or securities, and its discussion would involve prospective action. From my perspective, §105(1)(h) may be invoked in instances in which the discussion focuses on particular purchases or sales yet to be made. Discussions regarding past purchases or sales would not appear to "substantially affect" the value of securities. As you are well aware, there are circumstances too numerous to count or identify that deal with the strengths and weaknesses, both actual and predicted, of entities that are the subjects of the purchase and sale of securities. That being so, unless a discussion by a board involves particular entities, as opposed to sectors, it is doubtful in my view that it can be justifiably be contended that publicity would "substantially" affect the value of securities

Moreover, the five funds, although large, are among thousands of institutional purchasers and sellers of securities. That being so, discussions by the boards of the funds involving their policy,

pertaining to certain sectors, i.e., emerging markets or large cap companies, updates regarding previous transactions, or "post-trade" analyses would appear to have perhaps minimal or perhaps no effect on the value of securities. If that is so, §105(1)(h), in my view, could not be asserted as a basis for consideration in executive session.

I point out that a different ground for entry into executive session might apply in the context of the functions of the boards. Section 105(1)(f) authorizes public bodies 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 a board discusses the "financial history" of a particular corporation, for example, I believe that §105(1)(f) could properly be cited as a basis for conducting an executive session.

With respect to your efforts in obtaining records, the Freedom of Information Law is pertinent. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Further, 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 [87 NY 2d 267 (1996)], stating that:

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

There is nothing in the Freedom of Information Law that authorizes a person or agency to claim, promise or engage in an agreement conferring confidentiality or a "privilege" absent a statutory authority to do so. The Court of Appeals has held that a request for, a claim 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" (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..." (id., 565-566).

The Open Meetings and Freedom of Information Laws frequently relate to one another, as in the case of matters involving access to minutes of executive sessions. The Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements pertaining to their contents. Specifically, §106 states that:

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must generally be recorded

in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

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)].

As indicated earlier, you referred to an executive session during which a board conferred authority to enter into negotiations with certain private equity consultants. When you requested the names of the consulting firms, the request was denied on the ground that disclosure would "impair the ability" of the City Comptroller to negotiate in an optimal manner. The provision in the Freedom of Information Law upon which the board appears to have relied, §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 process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That a contract has not been signed or ratified, in my view, is not determinative of rights of access or, conversely, an agency's ability to deny access to records. Rather, I believe that consideration of the effects of disclosure is the primary factor in determining the extent to which §87(2)(c) may justifiably be asserted.

As I understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Similarly, if an agency is involved in collective bargaining negotiations with a public employee union, and the union requests records reflective of the agency's strategy, the items that it considers to be important or otherwise, its estimates and projections, it is

likely that disclosure to the union would place the agency at an unfair disadvantage at the bargaining table and, therefore, that disclosure would "impair" negotiating the process.

I point out that the Court of Appeals sustained the assertion of §87(2)(c) in a case that did not clearly involve "contract awards" or collective bargaining negotiations. In Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

If there is no possibility that other consulting firms may be involved in the negotiations, it is difficult to envision how disclosure of the names of the two firms would "impair" the ability of a fund to reach an optimal agreement. This is not to suggest that other records involved in negotiations might not justifiably be withheld, but rather that the names of the two firms with which authority has been conferred to negotiate should be disclosed, unless there is justification for claiming that disclosure would impair a fund's ability to reach an optimal agreement on behalf of its members.

In an effort to enhance understanding of open government laws, copies of this opinion will be forwarded to the boards to which you referred.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Fire Department
NYC Employees
Police Pension Fund
Teachers' Retirement Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 1, 2005

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 facts presented in your correspondence.

Dear Mr. Hubbard:

I have received your letter in which you wrote that you are a member of the Greece Board of Education and questioned the propriety of a policy adopted by the Board that states in part that:

> "Matters discussed in executive sessions must be treated as confidential; that is, never discussed outside of that executive session. A violation of confidentiality will lead to disciplinary action as established by the Commissioner of Education."

You asked whether a board of education has the authority "to declare what is...and what is not, confidential" in relation to the Open Meetings and Freedom of Information Laws.

From my perspective, there is no legal basis for prohibiting a member of a board of education or any other person present during an executive session from speaking about or disclosing information obtained during an executive session validly held. This is not intended to suggest that such speech or disclosures would be wise, or ethical or in the best interest of a school district and its residents in every instance, but rather that there is no law that generally prohibits a person present during an executive session from speaking about that closed session. Further, I do not believe that a board of education can adopt a rule or policy that has the force of law or is empowered to silence an elected official.

As you are aware, the Open Meetings Law sets forth a procedure for entry into executive session and specifies the subjects appropriate for consideration in executive session. Its statutory companion, the Freedom of Information Law, deals with records. Both statutes contain permissive rather than mandatory language concerning the ability to discuss a matter in private or deny access to records.

A public body *may* enter into executive session in circumstances prescribed in the Open Meetings Law; it is *not required* to do so. Specifically, the introductory language of §105(1) entitled "Conduct of executive sessions" 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..."

The law clearly indicates that there is no obligation to conduct an executive session; a public body may choose do so, but only upon approval of a motion by a majority vote of its total membership. If a motion to enter into executive session is not approved, a public body is free to discuss the issue in public.

Similarly, although an agency *may* withhold records in accordance with the grounds for denial of access appearing in §87(2) of the Freedom of Information Law, the Court of Appeals has held that an agency is not obliged to do so and may opt 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].

In my view, records may be characterized as "confidential" only when a statute, an act of Congress or the State Legislature, specifies that they cannot be disclosed. That circumstance is reflected in §87(2)(a) of the Freedom of Information Law, the first exception to rights of access, which pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 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. The effect is that the Open Meetings Law simply does not apply in those instances.

Both the Court of Appeals, the state's highest court, 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" (id.).

In like manner, in construing the equivalent exception to rights of access in the federal Freedom of Information Act (5 USC §552), 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.

Since a public body, such as the board of education, 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, because a federal statute prohibits disclosure, 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. 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 a parent of the student consents 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.

I note that in a case in which the issue was whether discussions occurring during an executive session held by a school board could generally 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.

It is emphasized that it has been held by several courts, including the Court of Appeals, that an agency's rules or 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, a local enactment, such as a policy adopted by the board of education, cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with school district business must be disclosed; rather, I am suggesting that records *may* in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, but that a local enactment cannot confer or require confidentiality; only a statute may do so.

Similarly, insofar as a local enactment is more restrictive concerning access than the Open Meetings Law, I believe that it would be invalid. Section 110 of the Open Meetings Law, entitled "Construction with other laws," states in subdivision (1) that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Because the Open Meetings Law is permissive in that it authorizes but does not require executive sessions to be held in appropriate circumstances, it is not a statute that confers confidentiality or prohibits public discussion. I believe that the Board's policy requiring that information discussed during an executive session is "confidential" is "more restrictive with respect to public access" than the Open Meetings Law and, therefore, should be deemed superseded and invalid.

Considering the issue from a different vantage point, based on a decision rendered by the U.S. Court of Appeals for the Second Circuit [Harman v. City of New York, 140 F.3d 111 (2nd Cir. 1998)], it appears that the Board's rule may be unconstitutional. In Harman, the New York City Human Resources Administration (HRA) adopted an executive order that forbade its employees:

> "...from speaking with the media regarding any policies or activities of the agency without first obtaining permission from the agency's media relations department. The City contends that these policies are necessary to meet the agencies' obligations under federal and state law to protect the confidentiality of reports and information relating to children, families and other individuals served by the agencies" (id., 115).

I note that §136 of the Social Services Law prohibits a social services agency from disclosing records identifiable to an applicant for or recipient of public assistance. Additionally, §372 of the Social Services Law prohibits the disclosure of records identifiable to "abandoned, delinquent, destitute, neglected or dependent children..." As such, there is no question that many of HRA's records are exempted from disclosure by statute and are, therefore, confidential. Nevertheless, the proceeding in Harman was precipitated by commentary that was not identifiable to any particular recipient, 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 information may be characterized and exempted from disclosure by statute only when a statute forbids disclosure.

While a member of the board of education or other governing body may not be an "employee", in consideration of the possibility of sanctions, I believe that the holding in Harman would be applicable in the instant situation. In creating a "balancing test", it was held in Harman 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 "blanket policy" created by the Board that "[M]atters discussed in executive session must be treated as confidential" applies potentially to any person who may be present during or is aware of proceedings conducted during an executive session. That being so, it would appear to be invalid, as the executive order was found to be invalid in Harman. Moreover, it was stressed by the court that the harm sought to be avoided by means of a restriction on speech must be real, and not merely conjectural. It was determined that:

> "...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).

The Board's rule is prospective, for, in the words of Harman, "it chills speech before it happens" and does not focus on any harm that has actually occurred. In short, I believe that it stifles free speech in a manner that has been found to be unconstitutional.

In sum, for the reasons expressed in the preceding commentary, I do not believe that the Board's policy can validly prohibit a person from discussing or disclosing information acquired during an executive session, nor can it require that documents relating to its proceeding be kept confidential.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-15134

From: Robert Freeman
To: [redacted]
Date: 2/1/2005 8:56:52 AM
Subject: Dear Mr. Lineman:

Dear Mr. Lineman:

I have received your letter in which you asked "what steps" might be taken if your Mayor/Board of Trustees fails to determine your appeal within ten business days as required by §89(4)(a) of the Freedom of Information Law. From my perspective, there may be several options.

First, it may be worthwhile to remind the appeals person or body of the requirement that appeals be determined within ten business days of the receipt of an appeal by either granting access to the records sought or fully explaining in writing the reasons for further denial. Second, it has been held that a failure to determine an appeal within the statutory time may be deemed a denial of the appeal. In that circumstance, the person denied access would have exhausted his/her administrative remedies and could seek judicial review of the agency's denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. Third, if the records involve a matter of public interest, it may be worthwhile to seek public support, perhaps through the local news media, as a means of encouraging compliance with law. And finally, this office is authorized to prepare legal advisory opinions concerning the Freedom of Information Law. While our opinions are not binding, it is our hope that they are educational and persuasive, and that they enhance compliance with and understanding of the law.

I hope that I have been of assistance.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15135

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February 1, 2005

Mr. Mario D'Antuoro
01-B-2209
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. D'Antuoro:

I have received your letter in which you indicated that you have encountered difficulty in obtaining a copy of grand jury minutes pertaining to your case. You have asked for assistance in obtaining the minutes.

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.

Without knowledge of the contents of the records in which you are interested, I cannot offer specific guidance. However, I point out that 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 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 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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February 2, 2005

Mr. Benjamin Stephens, Jr.
83-B-0072
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

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

Dear Mr. Stephens:

Your letter addressed to Secretary of State Daniels has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State on which the Secretary serves, is authorized to provide advice and opinions pertaining to the Freedom of Information Law. Further, as indicated above, its staff is authorized to prepare advisory opinions on its behalf.

Based on a review of your correspondence, you requested "investigative reports/records...generated in connection with [your] inmate grievance complaint." Following several communications with officials of the Department of Correctional Services, the Department's Counsel and freedom of information appeals officer, Mr. Anthony J. Annucci, wrote that:

> "Pursuant to the Public Officers Law §87.2(g)(iii), non-final agency policy or determinations need not be disclosed under FOIL. Such rule is foster frank discussion among public employees while developing public policy. You may receive any written statement you make as well as the final determination."

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

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

Second, the provision to which Mr. Annucci referred, §87(2)(g), is indeed pertinent to an analysis of rights of access. Due to its structure and its interpretation by the Court of Appeals, the state's highest court, it may require disclosure of portions of the records sought.

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

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

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

One of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court 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, they must be disclosed, unless a different exception to rights of access may be invoked.

In consideration of the nature of the records at issue, it is possible that other grounds for denial might be relevant. For instance, references or information relating to persons other than yourself, i.e., witnesses or informants, might justifiably be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OM-AO-3935
FOIL-AO-15137

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

February 2, 2005

E-MAIL

TO: Robert Mirabile

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. Mirabile:

I have received your letter in which you indicated that the Board of Commissioners of a fire/water district has "refused to provide minutes of a public meeting stating they were not 'official' and refused to provide unofficial minutes." You added that your request for minutes of executive sessions were withheld on the ground that they involved "a personnel issue."

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

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

> available to the public within one week from the date of the executive session."

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

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

Second, if action is taken during an executive session, minutes reflective of the action, the date and the vote must generally be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

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

I hope that I have been of assistance.

RJF:tt

cc: Board of Commissioners

OML-AO-3934
FOIL-AO-1518

From: Robert Freeman
To: [redacted]
Date: 2/2/2005 12:05:08 PM
Subject: Re: Fax

While I do not fully understand your question, I note that all agency records are subject to the Freedom of Information Law. Further, the Open Meetings Law requires that minutes be prepared and made available to the public within two weeks of a meeting. There is nothing in that law or any other that requires that requires that minutes be approved. If minutes have not been approved within two weeks, it has been advised that they should be made available after having been marked as "draft", "unapproved" or "preliminary", for example.

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

>>> [redacted]> 2/2/2005 11:51:17 AM >>>
Good Morning Mr.Freeman,

At 11:21 this AM I sent you a 3 page fax pertaining to a FOIL that I filed. I would like to hear your opinion on it.

Thank You
Ron Lineman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15139

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

February 2, 2005

Mr. Clifton Crawford
Green Haven Correctional Facility
89-A-3964
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. Crawford:

I have received your letter and the correspondence attached to it. It appears that you made a Freedom of Information Law request to the Dutchess County Department of Health and that a response to that request was sent to the Superintendent at your facility indicating that $1.00 should be sent to cover the cost of copying four pages. Because the Department did not respond directly to you, you construed its response as a denial of access that you appealed. You have asked that this office investigate.

In this regard, the Committee on Open Government is authorized to provide advice concerning access to government records, primarily under the state's Freedom of Information Law. This office is not empowered to compel an agency to grant or deny access to records, nor does it have the authority to investigate. However, I offer the following comments.

Having reviewed the correspondence attached to your letter, it appears that the Dutchess County Department of Health did not deny access to the records. Rather than responding to you directly, the Department responded by writing to the Superintendent indicating the amount you owed for copies of the records. As the requester of the records, I believe that the Department should have responded directly to you.

It is suggested that you write directly to W. Stephen Capowski, Director of Environmental Health Services, indicating that you will pay the fee for copies of the records and ask that he correspond directly with you.

You contend that the Department engaged in "unlawful prevention of public access to records." I disagree. Section 89(8) and §240.65 of the Penal Law include essentially the same language. Specifically, the latter states that:

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

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

In an effort to enhance understanding of the Freedom of Information Law, I will forward a copy of this response to Mr. Capowski.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: W. Stephen Capowski

FOIL-AO-1540

From: Robert Freeman
To: [redacted]
Date: 2/3/2005 8:02:36 AM
Subject: Re: FOIL questions.

When responding to a request, an agency has three choices: to inform the applicant that the record is available, that it is being withheld, or that the agency does not maintain the record. The "need" of the applicant for the record is irrelevant, and it was held years ago by the courts that when a record is accessible under the Freedom of Information Law, it is available to any person, irrespective of that person's status, interest or need, or the intended use of the record.

I hope that the foregoing provides the clarification you are seeking.

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

>>> [redacted] > 2/3/2005 7:15:48 AM >>>
Mr.Freeman,

In regards to a Foil request, it is my understanding that the Records Office has two choices,either to fill it or deny the request. Is that right? And does this same officer have the right to decide whether the item requested is needed by the applicant?

Thank You
R.Lineman

FOIL-AO-15141

From: Robert Freeman
To: [redacted]
Date: 2/4/2005 8:56:51 AM
Subject: Re: Advice sought re claim of exemption

No, and in my opinion, no. When a consultant prepares records for an agency, they are the agency's records, not his or hers. I know of no decision dealing with the second part of your question. However, if an agency chooses to disclose, even when it has the discretionary authority to deny access, I do not believe that a staff person, an employee, or the agency's consultant would have standing to attempt to block disclosure.

At a conference that I attended recently, the speaker expressed a reality that I've known but never put into words as well as he did: when we permit we encourage. Too often, when an agency has the discretionary authority to deny access to records, it does, without considering the possibility that disclosure may be beneficial to the public and the agency's goals as well. Again, that authority should not be construed as requiring an agency to withhold records; withholding is merely an option.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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>>> <Dsc9101@aol.com> 2/4/2005 8:49:12 AM >>>
Well since you are in such a good mood....

Can the public official intercede, meaning....

If the YIDA decided to release documents otherwise possibly entitled to the intra agency exemption, but Mr. Robertson as their author did not want them released, would 1) the agency have an obligation to respect his wishes 2) would he have standing in an Article 78

FOIL-AO-15142

From: Robert Freeman
To: [redacted]
Date: 2/4/2005 8:36:33 AM
Subject: Re: Advice sought re claim of exemption

Good morning —

I fully agree with your interpretation. An agency *may* withhold records in accordance with the exceptions to rights of access appearing in §87(2) of the FOIL; it is not required to do so and may choose to disclose. The only instance in which that would not be so, as you suggested, would involve the situation in which a statute, an act of Congress or the State Legislature, forbids disclosure.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
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>>> [redacted] > 2/3/2005 4:30:28 PM >>>
Your advice and clarification is requested regarding the following issue related to the invocation of an exemption under FOIL.

In Capital Newspapers v. Hearst the Court notes that while an agency is permitted to restrict access to records falling within the statutory exemptions of FOIL, the language of the statute is permissive not mandatory. Does this mean that unless some other statute forbids disclosure of the document and/or information contained therein, the agency can disclose the document if it wishes to and not claim the exemption. Specifically, in the case of Councilman Dennis Robertson's reports to the YIDA, written when he was a consultant to that agency, these reports could be released if the YIDA felt it was in the public interest to do so, rather than invoke the intra agency exemption?

Thank you for your assistance.

Debra Cohen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15143

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February 4, 2005

Mr. Calvin Moore
04-A-1614
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

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

Dear Mr. Moore:

As you are aware, I have received your letter in which you complained that the New York City Police Department's response to your Freedom of Information Law request indicating that it would make a determination within 120 days was improper. You also wrote that another agency failed to respond 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.

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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1514

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February 4, 2005

Mr. Karl J. Paige
78-B-0571
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 12733-0116

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

Dear Mr. Paige:

I have received your letter in which you asked whether a copy of an individual's sentencing minutes and prosecutor's notes pertaining to the individual would be available under the Freedom of Information Law.

In this regard, I offer the following comments.

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

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

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

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

Based on the foregoing, offices of district attorneys, for example, would constitute agencies required to comply with the Freedom of Information Law. The courts, however, would be outside the coverage of the Freedom of Information Law.

That is not to suggest that court records are not available to the public, for there are other provisions of law that may require the disclosure of court records. For instance, §255 of the Judiciary Law states generally that a clerk of a court must search for and make available records in his custody. Insofar as your inquiry involves court records, i.e., sentencing minutes, it is suggested that you seek such records from the clerk of the appropriate court. A request should include sufficient detail to enable court personnel to locate the records in which you are interested.

With respect to agency records, such as a prosecutor's notes, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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. 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) and (d) of the CPLR authorize confidentiality regarding, respectively, the work product of an attorney, i.e., notes, and material prepared for litigation, those kinds of records remain confidential in my opinion only so long as they are not disclosed to an adversary or a filed with a court, for example.

I 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-1515

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

February 4, 2005

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 asked whether "an Article 78 the only recourse [you] can pursue" with respect to the New York City Police Department's determination of your appeal to deny access.

In this regard, as you are aware, §89(4)(a) of the Freedom of Information Law provides that:

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

In turn, §89(4)(b) states that:

> "...a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules..."

As such, I believe that the only legal remedy relating to a final denial of access to records would involve the initiation of 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.

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-15116

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

February 4, 2005

Mr. Raymond Johnson
[redacted]
B.B.K.C.
125 White Street
New York, NY 10013

The staff of the Committee on Open 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 whether a "Daily Activity Report" prepared by a police department would be available under the Freedom of Information Law. In addition, you asked whether the police department has five days in which to respond to a request.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I point out, too, that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of one or more of the grounds for denial that follow. Based on the quoted language, I believe that there may be situations in which a single record might be both available or deniable in part. Further, the same language, in my opinion, imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. As such, even though some aspects of a record might properly be denied, the remainder might nonetheless be available and would have to be disclosed.

While I am unfamiliar with the contents of the report question, it appears that it may be similar to a police blotter. I point out that the phrase "police blotter" is not specifically defined in any statute. It is my understanding that it is a term that has been used, more than anything else, based upon custom and usage. Further, the contents of what might be characterized as a police blotter may vary from one police department to another. 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 report or blotter is analogous to that described in Sheehan in terms of its contents, I believe that the public would have the right to review it.

When a report or blotter is more expansive than that described in Sheehan several grounds for denial may be relevant, and it is emphasized that many of them are based upon potentially harmful effects of disclosure. 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 blotter or 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). Further, when charges are dismissed in favor of an accused, the charges and related records are often sealed pursuant to §160.50 of the Criminal Procedure Law.

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. Since you indicated that those kinds of details could be deleted, §87(2)(b) would not likely be applicable.

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 police blotter containing the kind of information described in Sheehan could likely be characterized as a record compiled 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 blotters or records relating to a blotter entry 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 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 could appropriately be asserted. Concurrently, those 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 police blotters, reports or other records are prepared by agency employees, I believe that they could be characterized as "intra-agency materials". However, insofar as they consist of factual information, for example, they would be available, unless a different ground for denial applies.

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-15147

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

February 4, 2005

Mr. Darryl Swindell
98-R-8150
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

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

Dear Mr. Swindell:

I have received your letter in which you sought assistance in obtaining various court records from the Queens County Clerk.

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

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

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

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

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

It is suggested that 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 FPPL-AO-312
FOIL-AO-15148

41 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 7, 2005

Mr. John Banchs Rivera
94-R-7124
Camp Pharsalia Correctional Facility
496 Center Road
South Plymouth, NY 13844

The staff of the Committee on Open 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 complained that you have encountered difficulty in gaining access to your co-defendant's parole board hearing transcripts and the "Commissioner's worksheet" pertaining to him. It appears that the worksheets are destroyed after a determination is made concerning parole.

From my perspective, it is likely that the primary issue in terms of rights of access involves the extent to which disclosure would constitute "an unwarranted invasion of personal privacy" with respect to both the inmate and perhaps others, such as those associated with the victims.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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) enables an agency to withhold records insofar as disclosure would result in an unwarranted invasion of personal privacy. While that standard is not defined, §89(2)(b) provides a series of examples of such invasions of privacy.

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

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

Section 96(1) of the Personal Privacy Protection Law limits the circumstances under which state agency may disclose personally identifiable information. The only provision in my opinion that would permit the Division of Parole to disclose information identifiable to an inmate would involve §96(1)(c), which authorizes disclosure when personal information is available under the Freedom of Information Law, i.e., when disclosure would not constitute an unwarranted invasion of personal privacy.

While I am unfamiliar with the contents of the transcripts or the worksheet, information regarding the inmate's medical or mental condition, for example, would in my view constitute an unwarranted invasion of personal privacy if disclosed [see Freedom of Information Law, §89(2)(b)(i) and (ii)]. There may be other intimate details concerning the inmate that could be withheld in accordance with the privacy provisions.

Those provisions would also be applicable with respect to references to victims, their families and others affected by a crime. The extent to which they would apply would in my opinion be dependent on the specific nature of the information.

Also of potential significance is §87(2)(g), which permits an agency to withhold records that:

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

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

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

If, for example, a district attorney offered an opinion or recommendation to the Parole Board concerning the possibility of parole, the portions of the transcript reflective of that kind of advice or opinion could in my view be withheld under §87(2)(g).

Lastly, with respect to the destruction of the worksheets, I note that agencies cannot merely destroy records when they have the desire to do so. On the contrary, retention and disposal of records are governed by law. Specifically, §57.05 of the Arts and Cultural Affairs Law provides that the Commissioner of Education is empowered:

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

As such, it appears that the kinds of records in which you are interested may be destroyed only in accordance with a schedule established by the Commissioner of Education.

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-15149

41 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 7, 2005

Mr. Eduardo Baez
93-A-3097
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051-0975

Dear Mr. Baez:

I have received your letter in which you complained that the "Commissioner's worksheet" pertaining to your parole hearing has been destroyed. You asked that the "destruction of the worksheet be stopped."

In this regard, the Committee on Open Government is authorized to provide advice concerning access to government records, primarily under the state's Freedom of Information Law. As such, this office is not empowered to compel an agency to grant or deny access to records, or to force an agency to cease the destruction of records. However, I offer the following comments.

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

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

As such, it appears that the kinds of records in which you are interested may be destroyed only in accordance with a schedule established by the Commissioner of Education.

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-15150

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

February 8, 2005

Ms. Myra Snyder-Scott
[redacted]

Dear Ms. Snyder-Scott:

I have received your letter addressed to the Office of Court Administration, the Civil Court of the City of New York and this office, the Committee on Open Government, in which you requested materials that may be found within case files identified by index numbers.

In this regard, please be advised that the Committee on Open Government is authorized to provide advice and opinions relating to public access to government information, primarily concerning the Freedom of Information Law. The Committee does not have custody or control of records generally, and the Committee maintains none of the materials of your interest.

It is noted that your letter refers to both the New York Freedom of Information Law and the federal Privacy Act. The latter, in my view, does not apply to entities of state and local government in New York. Further, the Freedom of Information Law specifically excludes the courts from its coverage. That being so, your request for records maintained by the Civil Court of the City of New York would not fall within the scope of the Freedom of Information Law. This is not to suggest that court records are not generally available. On the contrary, other statutes frequently provided broad rights of access to court records (see e.g., Judiciary Law, §255). Should the need arise, a request for records maintained by a court should be made to the clerk of the court, citing an applicable provision of law as the basis for a request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-1515DA

From: Robert Freeman
To: [redacted]
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
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-15151

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

February 8, 2005

Mr. Michael M.J. Mathie, IV
90-T-1282
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403-0216

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

Dear Mr. Mathie:

I have received your letter in which you complained that, as the date of your letter to this office, your requests directed to the Parole Office at your facility had not been answered. You also asked whether "pre-parole interview summary reports", "parole hearing interview transcripts" and "parole board decisions" concerning other persons would be available to you.

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 Division of Parole to determine appeals is Terrence X. Tracy, Counsel to the Division.

With respect to your request for "pre-parole interview summary reports", and "parole hearing interview transcripts" concerning other people, from my perspective, it is likely that the primary issue in terms of rights of access involves the extent to which disclosure would constitute "an unwarranted invasion of personal privacy" with respect to both the inmate and perhaps others, such as those associated with the victims.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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) enables an agency to withhold records insofar as disclosure would result in an unwarranted invasion of personal privacy. While that standard is not defined, §89(2)(b) provides a series of examples of such invasions of privacy.

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

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves when a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". It is noted, too, that §89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such

disclosure is prohibited under section ninety-six of this chapter". Therefore, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law.

Section 96(1) of the Personal Privacy Protection Law limits the circumstances under which state agency may disclose personally identifiable information. The only provision in my opinion that would permit the Division of Parole to disclose information identifiable to an inmate would involve §96(1)(c), which authorizes disclosure when personal information is available under the Freedom of Information Law, i.e., when disclosure would not constitute an unwarranted invasion of personal privacy.

While I am unfamiliar with the contents of the transcripts or the pre-parole summary reports, information regarding the inmate's medical or mental condition, for example, would in my view constitute an unwarranted invasion of personal privacy if disclosed [see Freedom of Information Law, §89(2)(b)(i) and (ii)]. There may be other intimate details concerning the inmate that could be withheld in accordance with the privacy provisions.

Those provisions would also be applicable with respect to references to victims, their families and others affected by a crime. The extent to which they would apply would in my opinion be dependent on the specific nature of the information.

Also of potential significance is §87(2)(g), which permits an agency to withhold records that:

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

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

If, for example, a district attorney offered an opinion or recommendation to the Parole Board concerning the possibility of parole, the portions of the transcript reflective of that kind of advice or opinion could in my view be withheld under §87(2)(g).

With respect to parole board decisions, I believe that they would constitute final agency determinations that would be accessible under §87(2)(g)(iii).

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-15152

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 9, 2005

Mr. Robert A. Smolensky
Director of Public Affairs
J'accuse
10240 67th Drive #1C
Forest Hills, NY 11375-2814

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

Dear Mr. Smolensky:

I have received your letter pertaining to a request made pursuant to the Freedom of Information Law on August 19 and directed to the records access officer for the New York City Council. It was contended by the Acting General Counsel to the City Council that an appeal that you made was untimely, and you have asked whether his response is consistent with law.

Before responding to your question, I would like to offer the following observations. First, your correspondence contains inconsistencies. For example, you referred in your letter to me to six items or categories items sought in your request of August 19. However, a review of the August 19 request indicates that only five such categories were referenced; the sixth is subsumed within the fifth. Further, I note that the title of the Freedom of Information Law may be somewhat misleading, for it is not vehicle that requires government officials to respond to questions or to provide "information" *per se*; rather, that statute pertains to existing records, and agencies, except in rare circumstances, are not required to prepare or maintain particular records to comply with law. You asked, for instance, "Who approves the amount given to the City Council Members" and "Who monitors the account....". While agency officials may choose to provide answers in response to questions, they are not obliged to do so by the Freedom of Information Law.

As I understand the matter, the City Council's records access officer granted access to some of the materials that you requested. In his responses, no reference was made to other materials. That being so, although no reference was made in the responses to any denial of access, it is your contention that portions of your request were tacitly denied. When you concluded that to be so, you appealed. Nevertheless, Acting General Counsel dismissed the appeal, stating that it was untimely.

From my perspective, assuming the accuracy of the foregoing, it appears that the City Council denied portions of your request without informing you of the right to appeal. If that is so, I do not believe that the City Council could validly have concluded that your appeal was time barred.

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 an 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 officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public form continuing from doing so."

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor..."

Based on the foregoing, if an agency denies access to records or portions of records that have been requested, it is required to inform the person seeking the records of the denial access. It appears that the records access officer in this instance did not fully respond to request, thereby constructively denying some elements of your request. If that is so, I believe that he should have indicated in writing that portions of your request were denied, with the reason, and informed you of the right to appeal the denial.

The right to appeal a denial of access is conferred by §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

Additionally, the regulations promulgated by the Committee direct 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 records access officer shall not be the appeals officer" [§1401.7(b)].

It is emphasized that the Court of Appeals, 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)].

Absent a specification that a person denied access has the right to appeal, he or she may initiate a proceeding seeking judicial review of the denial, even though that person has not appealed the denial. If you were denied access in the context of your request, you, therefore, would have had the right, based on the holding in Barrett, to challenge the denial of access in court. In this instance, if there was a denial of access and you were not informed of the denial, you were effectively precluded from asserting your right to appeal. In my opinion, when that is so, particularly when a request is voluminous or multi-faceted, a person seeking records cannot reasonably be expected to ascertain quickly whether or the extent to which records sought might have been withheld or to appeal within thirty days. If he or she does not necessarily know that a request has been denied, it would be unreasonable in my view to limit the ability to appeal to thirty days. For that reason, I do not believe that the Acting General Counsel could justifiably have rejected your appeal on the ground that it was untimely.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jay B. Damashek
Edward O'Malley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15153

41 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, 2005

Mr. Randy Campney
03-A-3264
Bare Hill Correctional Facility
Caller Box 20, 181 Brand 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. Campney:

I have received your letter in which you complained that your request for a copy of your parole warrant was denied based on §87(2) of the Freedom of Information Law. It is unclear which aspect of §87(2) was relied upon by the Parole Office denying access.

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) permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." Assuming that no other ground for denial is applicable, I do not believe that a request made by the subject of a request for records pertaining to him could be denied on the basis of §87(2)(b). As stated in §89(2)(c) of the Freedom of Information Law:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision...
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: D. Bernier

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15154

41 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, 2005

E-Mail

TO: Kenneth J. Ormandy

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. Ormandy:

I have received your note concerning "FOIL non compliance by DHCR." Although your remarks are not completely clear, it appears that you are seeking guidance in relation to a request for records has not been answered in a timely fashion by that agency.

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:jm

cc: David Diamond

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15155

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

February 11, 2005

Ms. Cynthia S. Hunter
[redacted]

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

Dear Ms. Hunter:

As you are aware, I have received your letter. In brief, you wrote that the Ulster County Department of Social Services has failed to respond to requests for records pertaining to yourself and has apparently disclosed records pertaining to you without your consent.

In this regard, although the Freedom of Information Law is applicable with respect to rights of access and the ability of government agencies to withhold records, I believe that other provisions of law are most relevant in the context of the situation that you described.

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

The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §136 of the Social Services Law generally prohibits a social services department from disclosing records concerning an applicant for or recipient of public assistance.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1515b

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

February 11, 2005

Mr. Harvey M. Elentuck
[redacted]

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

Dear Mr. Elentuck:

I have received your letter addressed to me and several officials of the New York City Department of Education.

You sought advice concerning "the correct format for the FOIL §87(3)(b) record" and "what a reasonable charge would be if [you] were to purchase it on a computer disk or via E-mail."

As you are aware, §87(3)(b) of the Freedom of Information Law requires that each agency "shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency." From my perspective, the content or "format" of such a record is clear and unambiguous, as is the direction given to every agency that it must "maintain" such a record.

With respect to the fee, §87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge up to a maximum of twenty-five cents per photocopy up to nine by fourteen inches; for copying any other records, it may assess a fee based on the actual cost of reproduction. When information is maintained electronically and it transferred to a computer disk, I believe that the fee generally would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or compact disk) to which data is transferred. If the duplication of the data involves a transfer of data from one disk to another, computer time may be minimal, perhaps a matter of seconds. If that is so, the actual cost may involve only the cost of a disk.

I note that there is nothing in the Freedom of Information Law that requires that records be transmitted to an applicant via email. Therefore, while an agency may choose to do so, it is not, in my view, required to do so.

Lastly, you sought advice "as to the NYC Department of Education's practice...of denying access to certain inter-agency or intra-agency records...because they are 'not final agency policy or determinations'."

The provision to which you alluded, §87 (2)(g), enables an agency to withhold records that:

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

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

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

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

In short, that a record is predecisional or 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).]

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15157

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February 11, 2005

E-Mail

TO: Ed Schneider

FROM: Robert J. Freeman, Executive Director

Dear Mr. Schneider:

I have received your letter in which you wrote that your town government has denied several requests made pursuant to the Freedom of Information Law in their entirety. You asked whether there is a state agency "that would hear an appeal on these denials."

In this regard, first, as you may be aware, when a request is initially denied by an agency, such as a town, the agency is required to inform the person denied access of the right to appeal (see 21 NYCRR, §1401.7). The Freedom of Information Law, as it pertains to an appeal, states in relevant part that:

> "...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, there is no state agency that is empowered to hear appeals or to compel an agency to grant or deny access to records. However, this office, the Committee on Open Government, is authorized to prepare advisory opinions. Although the opinions are not binding, it is our hope that they are educational and persuasive and that they encourage compliance with law.

If you or others believe that records have been withheld in a manner that is inconsistent with law, any person may write to this office to seek an advisory opinion, and copies of the opinions would be sent to the proper officials.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3938
FOIL-AO-15158

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February 11, 2005

E-Mail

TO: Gary Hayes

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. Hayes:

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

With respect to the Open Meetings Law, you asked as follows:

> "Is it legal for a Mayor in open session to discuss the appraisal for a parcel of Real Estate the Village is attempting to purchase and remark about how he feels he can obtain it cheaper than the appraised value in open session?"

From my perspective, there is nothing in the Open Meetings Law that would require that the mayor or the governing body of a municipality to discuss the issue to which you referred during an executive session. In short, the Open Meetings Law *permits* a public body to enter into an executive session in particular circumstances; it does not *require* that an executive session be held. 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..."

Based on the foregoing, a motion to conduct an executive session must be approved by a majority vote of a public body's total membership. If no such motion is made or if the motion is defeated, an executive session cannot be held.

I note, too, that the ability of a public body to conduct an executive session in relation to the issue described would be based on the facts and the effect of public discussion. Section 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."

Therefore, a public body may validly conduct an executive session under paragraph (h) only to the extent that publicity would "substantially affect" the value of the property under consideration.

Your second question concerns rights of access to real estate appraisals.

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

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

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

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

consummation of a transaction would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

When there is no inequality of knowledge between or among the parties to negotiations, or if records have been shared or exchanged by the parties, it is questionable and difficult to envision how disclosure would "impair present or imminent contract awards", (see Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Further, if an agreement has been reached or a transaction has been completed, any impairment that might have existed prior to the consummation of an agreement would essentially have disappeared. In that event, §87 (2)(c), in my opinion, would not be applicable as a basis for a denial of access.

The other provision of relevance is §87(2)(g), which pertains to the authority to withhold "inter-agency or intra-agency materials." If an appraisal or survey is prepared by agency officials, it could be characterized as "intra-agency material." Further, the Court of Appeals has held that appraisals and other reports prepared by consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of §87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

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

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

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

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the

> report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 A2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v. Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

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

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

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial [i.e., §87(2)(c)] could properly be asserted. Therefore, if §87(2)(c) does not apply, insofar as an appraisal includes statistical or factual information, those portions of the appraisal must, in my view be disclosed.

Lastly, like the Open Meetings Law, the Freedom of Information Law is permissive; even though an agency *may* withhold records or portions thereof based on a ground for denial of access, there is no obligation to do so, and the agency may choose to disclose [see Capital Newspapers v. Burns, 67 NY2d, 562, 567 (1986)].

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 11, 2005

Mr. Hans Carlson
[redacted]

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

Dear Mr. Carlson:

I have received your letter in which you referred to assessment records that include "sales price data." Because the issue that you raised has been considered in detail in previous responses to your inquiries, I would like to offer clarification.

When a parcel of real property is sold, the sale price is included in records required to be made public pursuant to §574 of the Real Property Tax Law. To be distinguished are different kinds of assessment records that include the sale price of agricultural products. As suggested to you in an advisory opinion of September 4, 2003, portions of records indicating the sale prices of agricultural products reported on an Agricultural Assessment Renewal Application might in appropriate circumstances be withheld pursuant to §87(2)(d) of the Freedom of Information Law. To reiterate, that provision 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..."

Enclosed is a copy of that opinion for your review.

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
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15160

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 11, 2005

Ms. Shannon L. Vincent
[redacted]

The staff of the Committee on 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. Vincent:

I have received your thoughtful letter in which you contend that your rights have been violated.

In brief, you wrote that your application to the Schoharie County Department of Social Services for temporary assistance was denied based on a letter that agency obtained from a "Drug Court." The letter related to an "incident in which contraband was found in [your] vehicle", but in which you apparently had no involvement. It appears the incident pertained to "Paul", a person with whom you reside. Based on that disclosure, you wrote as follows:

> "Though I haven't so much as a parking ticket I am now being treated as if I were a criminal, and being told that I am 'unsafe to be on the roads.' It is due solely to this letter that I am being discriminated against and unfairly judged. I am aware that this letter was submitted to DSS by a member of the Drug Court Team. I am not a Drug Court participant and no member of this program has the right to discuss or divulge to any agency for any reason information that I have furnished the court in confidence. Though certain individuals are privy to this information and may have a close relationship with DSS this in no way gives them the right to interfere in my personal affairs. Consent was neither given nor was it implied for the release of such sensitive and personal material."

In this regard, first, while I am not suggesting that the disclosure to which you referred was appropriate, wise or fair, as I understand the matter, there was no violation of law.

I point out that the Freedom of Information Law does not apply to the courts. That statute is applicable to agencies, and §86(3) defines the term "agency" to mean:

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

In turn, "judiciary" is defined 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 would not have governed with respect to the disclosure of a record by the Drug Court. Further, although the Freedom of Information Law would not have applied, other provisions of law generally grant rights of access to the public to records filed with a court (see e.g., Judiciary Law, §255; Uniform Justice Court Act §2019-a). Unless a statute specifies that particular court records are exempt from disclosure, those records are public. I know of no statute in this instance that would prohibit disclosure.

Second, when access to records is governed by the Freedom of Information Law, that statute generally is permissive. Stated differently, although an agency *may* withhold records or portions of records in accordance with the grounds for denial of access appearing in §87(2) of the Freedom of Information Law, it is not required to do so. Therefore, even when an agency may withhold a record on the ground that disclosure would constitute an "unwarranted invasion of personal privacy" under §§ 87(2)(b) or 89(2)(b), there is no obligation to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

The only instance in which an agency *must* withhold records would involve §87(2)(a) concerning records that " are specifically exempted from disclosure by state or federal statute." That provision pertains to situations in which a statute separate from the Freedom of Information Law prohibits disclosure. I note that one such statute is §136 of the Social Services Law, which generally prohibits a social services department from disclosing records identifiable to an applicant for or recipient of public assistance. Based on the facts that you provided, the Department of Social Services was the recipient of a record that appears to have been used against you; it was not the entity that disclosed the record.

Lastly, I must admit that I am not an expert with respect to civil rights or other related matters. That being so, it is suggested that you might confer with representatives of a legal aid office or the Albany office of the New York Civil Liberties Union.

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

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February 14, 2005

Mr. Frank O. Maloney
[redacted]

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

Dear Mr. Maloney:

I have received your letter in which you asked whether Suffolk County Community College is subject to the Freedom of Information Law.

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

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

It is clear in my opinion that Suffolk Community College is an "agency" subject to the Freedom of Information Law. According to the Education Law, §6301, community colleges are established and operated by one or more entities of local government (i.e., Suffolk County), and it was held prior to the enactment of the Freedom of Information Law that records of a community college were required to be made available pursuant to §51 of the General Municipal Law, which pertains to the duty of municipal governments to disclose records [see Cline v Board of Trustees, 351 NYS 2d 81, affirmed 45 AD 2d 823 (1973)]. More recently, in 1993, the State's highest court, the Court of Appeals, confirmed that a community college is subject to the Freedom of Information Law. In its discussion of the matter, the Court:

> "reject[ed] the position of the intervenor-respondent Nassau Community College Federation of Teachers that the College is not an 'agency' within the scope of FOIL when it engages in its education function. Public Officers Law §86(3) defines an 'agency' as 'any * * * governmental entity performing a governmental or proprietary function'. Intervenor claims that the doctrine of academic abstention'

> and statutory construction compel the conclusion that the Legislature did not intend to extend FOIL's definition of an agency to a college's faculty committees and academic components when they perform education functions. To the extent that intervenor's argument is an invitation for us to delineate distinctions between the parameters of educational, proprietary and governmental functions, we decline to do so. We do hold that for the purposes of petitioner's FOIL inquiry, this public College constitutes an 'agency'. Nothing in the statute or legislative history requires a contrary holding, and the statutory language should be interpreted consistent with its natural and most obvious meaning" (Russo v. Nassau Community College, 81 NY 2d 690, 698).

In short, I believe that a community college is required to comply with the Freedom of Information Law.

As you requested, enclosed is a guide to the Freedom of Information Law, "Your Right to Know." Please note that page two of that publication includes the address of our website, which includes substantial information concerning that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15162

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February 14, 2005

Mr. Robert A. Smolenksy
Director of Public Affairs
J'Accuse
10240-67th Drive #1C
Forest Hills, NY 11375-2814

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

Dear Mr. Smolensky:

I have received your letter and the materials relating to it concerning a request for certain complaints made to the New York City Department of Information Technology and Telecommunications' 3-1-1 system. Specifically, you requested:

> "1. Copy(ies) of all Action Center Complaint System complaints received by 3-1-1 during the month of August, September, October and November with regard to an out (dark) street light on the block of 67th Drive between Queens Boulevard and Yellowstone Boulevard in front of 102-25, 102-55, 102-20 and 102-40 67th Drive (see attached map of locations);
>
> 2. Copy(ies) of all Action Center Complaint System updates to complaints received by 3-1-1 during the month of August, September, October and November with regard to an out (dark) street light on the block of 67th Drive between Queens Boulevard and Yellowstone Boulevard in front of 102-25, 102-55, 102-20 and 102-40 67th Drive (see attached map of location)."

In response to the request, you were informed that you must provide a complaint number in order to make a proper request.

The issue, as you are aware, involves the requirement in §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. Frequently,

whether or the extent to which a request meets that standard is dependent on an agency's filing or recordkeeping system. As indicated in Konigsberg v. Coughlin [68 NY2d 245 (1986)], the volume of a request or its specificity are not necessarily critical factors in ascertaining whether a request reasonably describes the records. Enclosed with your letter is a printout of a Street Light Complaint Form. Based upon the form, I would conjecture that the Department has the ability to locate records involving complaints made in relation to a particular location. If that is so, if the Department has the ability to locate, identify and retrieve or generate the records sought, I believe that it would be required to do so.

I note that you requested the complaints concerning particular time periods but that the form that you enclosed does not include reference to or a space for entering a date or time period. Whether the Department has the ability to retrieve the records of your interest with or without a date is unknown to me. However, insofar as the Department has the capacity to locate the records of your interest based upon the terms of your request, I believe that the request would reasonably describe the records, even though no complaint number may be included.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Debra Samuelson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15163

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

February 14, 2005

E-Mail

TO: William Margrabe

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. Margrabe:

I have received your letter in which you asked whether a non-resident of New York may "use the Freedom of Information Law to the same extent as a resident..."

In this regard, the Freedom of Information Law does not distinguish among applicants for records. It was held nearly thirty years ago that records accessible under the Freedom of Information Law must be made equally available to any person, irrespective of the person's status or interest [see Burke v. Yudelson; 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976); M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)]. That being so, any person may seek records under the Freedom of Information Law, including persons who are not residents of the State of New York.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15164

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

February 15, 2005

E-MAIL

TO: Debra Sherman

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. Sherman:

I have received your letter in which you questioned whether the Freedom of Information Law requires the disclosure of teachers' attendance records, including "their sick time, vacation time, accumulated or negative." Based on a unanimous decision rendered by the Court of Appeals, the state's highest court, the items to which you referred are accessible to the public.

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) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", and the courts have provided substantial direction regarding the privacy of public employees. According to those decisions, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that

disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

One of the decisions referenced above, Capital Newspapers v. Burns, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer, and in granting access, the Court of Appeals found that the public has both economic and safety reasons for knowing when public employees perform their duties and whether they carry out those duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of leave used or accrued must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties.

In affirming the Appellate Division decision in Capital Newspapers, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, it is clear in my view that the records at issue must be disclosed under the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

FOIL-AO-15165

From: Robert Freeman
To: Prior, Christopher J.
Date: 2/16/2005 10:57:47 AM
Subject: Re: FOIL Request implicating safety concerns

Thanks for your kind words.

From my perspective, the issue may not be so much matters involving security. The records relating to that concern have been disclosed dozens of times to countless individuals. Perhaps more significant is the extent to which the request "reasonably describes" the records as required by §89(3) of FOIL. To the extent that District staff can locate the records sought with reasonable effort, I believe that the standard would be met. However, insofar as the request involves a search for the equivalent of a very few needles in one or more haystacks, I do not believe that the request would reasonably describe the records.

I hope that I have been of assistance. If you would like to discuss the matter further, please feel free to call.
>>> "Prior, Christopher J." <CPRIOR@ALCLLP.COM> 2/16/2005 10:49:26 AM >>>
Hi, Bob. I represent a water district that has received a FOIL request by a condominium association's lawyer to produce "all documents which refer and/or relate to the installation, repair and maintenance of the system that provides water to The _____ Condominium, including, but not limited to, all easements, rights-of-way, contracts and/or agreements."

While terrorism by the requesting party is not a concern, I am somewhat concerned about disseminating publicly what effectively constitutes a map of the water supply infrastructure, at least for this development. Of course, all items that are recorded instruments already are of public record.

Any thoughts?

By the way, I very much enjoyed your presentation a few weeks ago at the NYSBA meeting in Manhattan.

Thanks. Chris.

Christopher J. Prior, Esq.
Ackerman, Levine, Cullen, Brickman & Limmer, LLP
175 Great Neck Road
Great Neck, New York 11021
Telephone (516) 829-6900
Facsimile (516) 829-6966
e-mail: cprior@alcllp.com

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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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-15166

41 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 16, 2005

E-Mail

TO: Dee Alpert

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. Alpert:

As you are aware, I have received your letter of January 10 in which you indicated that "[o]n several occasions, after examining copies of official documents disclosable under FOIL, [you] have been told by governmental entity representatives, or found statements in the entities' FOIL regulations or procedures, which prohibit [your] taking such pictures" with your digital camera. You have asked whether such prohibitions are consistent with law.

From my perspective, there is no valid basis for precluding you from copying records through the use of your own camera. Section 87(2) of the Freedom of Information Law specifies that accessible records must be made available for inspection and copying. Sections 87(1)(b)(iii) and 89(3) indicate that the only fee that an agency can charge involves its reproduction of records at the request of an applicant. Further, the regulations promulgated by the Committee on Open Government, which have the force and effect of law (21 NYCRR Part 1401), specify that no fee may be charged for the inspection of records.

Since no fee can be charged for inspecting records or for copying the contents of records by hand, an agency would not lose any proceeds when you take photographs of records. Further, your use of the camera, due to its size and independent power source, would not involve any use of agency resources or disruption of its activities different from inspection of records.

In good faith, I note that it has been held that a rule prohibiting the use of one's own photocopier has been found to be valid and reasonable when such use would cause disruption [see Murtha v. Leonard, 210 AD2d 411 (1994)]. However, the situation that you described is different, for there would be no use of the an agency's space or electricity, and there would be no distinction

in terms of the agency's efforts in retrieving the records between the more traditional inspection of records and the use of your camera. In short, I believe that a prohibition of the use of your camera is unreasonable and inconsistent with law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1516

41 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 17, 2005

Mr. Edgardo Rodriguez
02-B-0983
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582-0010

Dear Mr. Rodriguez:

I have received your letter in which you requested "assistance to file a lawsuit to compel disclosure of transcripts."

In this regard, the Committee on Open Government is authorized to provide advice concerning rights of access to government agency records, primarily in relation to the state's Freedom of Information Law. The Committee and its staff have neither the authority nor the expertise to offer guidance involving the procedure for initiating judicial proceedings.

It is noted that you did not provide information concerning the nature of the transcripts in which you are interested. If you are referring to transcripts of judicial proceedings maintained by a court, the Freedom of Information Law 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."

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

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

Based on the foregoing, the courts fall outside the coverage of the Freedom of Information Law. There are, however, other laws that generally grant access to court records (see e.g., Judiciary Law, §255). When seeking those records, it is suggested that a request be made to the clerk of the proper court, citing an applicable provision of law as the basis for the request.

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-15168

41 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 17, 2005

Mr. Salvatore Feudi
03-A-5653
Bare Hill Correctional Facility
Caller box 20, 181 Brand Road
Malone, NY 12953

Dear Mr. Feudi:

I have received your letter in which you requested a variety of materials from this office. In this regard, please be advised that the primary function of the Committee on Open Government involves providing advice and opinions pertaining to rights of access to records under the Freedom of Information Law. The Committee does not serve as a library or repository of records, and the only record of which I am aware that is maintained by this office and falls within the scope of your request is an advisory opinion concerning rights of access to certain records of a person convicted of a sex offense. Enclosed is a copy of that opinion.

For future reference, I point out that requests should be made to the "records access officer" at the agency that you believe would maintain the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. Additionally, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain detail sufficient to enable agency staff to locate and identify the records of interest. It is also noted that an agency may charge up to twenty-five cents per photocopy and that it has been held that an agency may charge its established fee, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that the foregoing serves to clarify your understanding and 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-15169

41 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 17, 2005

Ms. Martha T. Dallas
[redacted]

The staff of the Committee on 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. Dallas:

I have received your correspondence, which focuses on the status of historical papers and photographs maintained by the Village of Cambridge in relation to the Freedom of Information Law.

In short, from my perspective, the materials at issue fall within the coverage of that statute. In this regard, I offer the following comments.

First, the Freedom of Information Law includes all records of an agency, such as a village, within its scope, 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".

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 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)].

In short, that the materials are in the physical custody of the Village in my opinion brings them within the scope of the Freedom of Information Law, irrespective of their function, origin or authorship.

Second, as a general matter, records accessible under the Freedom of Information Law must be made available to any person for inspection and copying [see §87(2)]. If, due to their age or condition, handling the records would likely result in damage or perhaps 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 that fragile or delicate records 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 records 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.

Lastly, the Freedom of Information Law does not address issues involving records management. Article 57-A of the Arts and Cultural Affairs Law, however, 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, local officials must "have custody" and "adequately protect" records in their custody.

In an effort to enhance understanding of and compliance with law, copies of this response will be forwarded to Village officials. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Linda M. Record, Clerk

FOIL-AO-1510

From: Robert Freeman
To: [redacted]
Date: 2/18/2005 4:48:01 PM
Subject: Hi - -

Hi - -

I believe that I am familiar with the situation. In brief, when a municipal attorney provides legal advice to his/her client, a municipal board or official, the communication would fall within the scope of the attorney-client privilege and would be beyond the scope of rights conferred by the FOIL. However, insofar as a disclosure of that communication is made to a person other than the client, the attorney-client privilege would be waived. In the context of your inquiry, the issue involves the extent to which the the 8 page opinion has effectively been disclosed through release of the summary that has been made public. If there are elements of the opinion that were not disclosed in the summary, I believe that those portions of the may be withheld. The remainder, however, would appear to be accessible.

I hope that I have been of assistance. If you would like to discuss the matter, please contact me soon, for I will be out of the office until Friday of next week.

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

OML-AO-3944A
FOIL-AO-1517
OOG

From: Robert Freeman
To: Charlie Murphy
Date: 2/25/2005 9:50:08 AM
Subject: Re: Fwd: Open Meeting and FOIL Questions

Hi - -

In brief, a committee or subcommittee consisting of at least two members of a governing body constitutes a "public body" subject to the Open Meetings Law. By means of example, if a county legislature consists of 15 members, its quorum would be 8; if it designates a committee consisting of three of its members, the quorum of the committee would be two. When a quorum gathers to conduct the business of the committee, the gathering would constitute a "meeting" falling within the coverage of the Open Meetings Law.

With respect to minutes or notations, FOIL defines the term "record" to include "any information kept, held, filed produced or reproduced by, with or for an agency....in any physical form whatsoever..." Therefore, the kinds of materials to which you referred would constitute "records" that fall within the scope of FOIL.

I hope that this helps. If you have additional questions, I'll be happy to accommodate.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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>>> Charlie Murphy 2/23/2005 5:45:29 PM >>>
Bob: Can you give me some advice on "sub-committees" and open meetings. If the committee keeps minutes (as well as "notations") are they foilable?

Thanks.
Charlie

>>>
Hi Charlie, we met at the Assoc of Towns meeting in NYC. I am following up on the hypothetical question we discussed concerning sub-committees of elected boards and application of the open meetings law and and FOIL to their processes. The situation posed is that a five member elected board has appointed a sub-committee consisting of two board members to study, analyze and make recommendations to full board on particular subject matters. The sub-committee has no power to make decisions, only to study and recommend. The question is whether meetings of the sub-committee are subject to the open meetings law. Also, are notations of matters discussed and plans re: future study and courses of action subject to FOIL.

Thanks for taking the time to talk with me on Monday, and I appreciate any unofficial thoughts you may have on the above.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO. 3940
FOIL-AO-15172

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

February 25, 2005

Ms. JoAnn Piazzi
[redacted]

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

Dear Ms. Piazzi:

I have received your letter and the materials attached to it. You have raised a series of issues concerning alleged failures by the Windham-Ashland-Jewett Central School District and its Board of Education to comply with the Open Meetings and Freedom of Information Laws.

In an effort to address those issues, I offer the following comments.

First, as you are aware, 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. That law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

As indicated in the language quoted above, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

It has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule or conduct an executive session in advance of or following a meeting. In short, 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.

Second, as indicated earlier, 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.

There is no ground for entry into executive session that generally authorizes closed door discussions of "legal matters." There is, however, a provision that focuses on litigation, §105(1)(d), which permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the description of the general intent of the grounds for entry into executive session suggested in my remarks in the preceding paragraph, i.e., that they are intended to enable public bodies to avoid some sort of identifiable harm. For instance, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost

> certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Section 105(1)(d) would not permit a public body to conduct an executive session based on the 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 could an executive session be properly held under §105(1)(d).

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

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

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

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment,

> promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

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

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

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

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered. Matters of policy that affect personnel, consideration of the budget or the creation or elimination of positions, for example, typically cannot validly be considered in executive session.

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City

> of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

Third, with respect to a claim that honoring a request made under the Freedom of Information Law is "inconvenient", I point out that it has been held by several courts, including the State's highest court, that compliance with that law is a governmental obligation and that the language of that law "imposes a broad duty to make certain records publicly available irrespective of the private interests and the attendant burdens involved" [Gould v. NYC Police Department, 89 NY 2d 267, 279 (1996); see also Doolan v. BOCES, 48 NY 2d 341, 347 (1979)]. As stated in one decision: "An agency's disclosure of information pursuant to a FOIL request is as much a service owed by the agency to the public as the furnishing of police, fire or sanitation services" (Messinger v. Giuliani, Supreme Court, New York County, NYLJ, September 2, 1997).

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

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

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, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, contracts and other records of your interest involving the District's finances are accessible, for none of the grounds for denial of access would be pertinent or applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
John Wiktorko
Dolores Bushemi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15173

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February 25, 2005

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 in which you complained that the New York City Taxi and Limousine Commission failed to respond to your request made pursuant to the Freedom of Information Law. Although the receipt of your request was acknowledged by the Commission's records access officer, there was no indication of when that agency would determine to grant or deny the request.

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

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

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

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

so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 25, 2005

Ms. Diane Knight
[redacted]

The staff of the Committee on 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. Knight:

I have received your letter concerning your request made to the Town of Schodack for a variety of records sought "in order to fight a traffic ticket." Because your request was extensive, involving some twenty-four categories, I will address issues briefly, by referring to principles of law, and in some instances, by considering several categories together.

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."

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, courts fall outside the coverage of the Freedom of Information Law.

The foregoing is not intended to suggest that court records may not be accessible to the public. On the contrary, frequently court records are accessible under other statutes. For instance, in the case of a town justice court, §2019-a of the Uniform Justice Court Act provides, in essence, that records maintained by a justice court are public, unless there is a provision of law that may remove them from rights of access. It is emphasized, however, that the procedural requirements and protections present in the Freedom of Information Law are inapplicable to the courts.

Second, records maintained by the Town, other than those of the court, are subject to the Freedom of Information Law.

Third, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not obliged to create a record in response to a request. If, for example, there is no record indicating the reason that Town Officers are stopping residents in unmarked cars when State Police are using marked cars..." (See Category 20), the Town would not be required to prepare a record or explanation to satisfy your request.

Of possible significance is the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. Based on direction provided by the Court of Appeals, the state's highest court, the extent to which a request meets the standard is often dependent on the nature of an agency's recordkeeping, filing or retrieval systems [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. Insofar as agency records can be located with reasonable effort, I believe that a request would reasonably describe the records. However, if a request involves records that cannot be located except by review of hundreds or thousands individually, the request, in my view, would not meet the requirement that records be reasonably described.

I note, too, that if records had previously been made available to an individual or his or her attorney, an agency is not required to make the records available a second time, unless the person seeking records and his or her attorney can demonstrate that neither any longer has possession of the records [see e.g., Moore v. Santucci, 151 Ad2d 677 (1989)].

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

The first ground for denial of access, §87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." On such statute, §160.50 of the Criminal Procedure Law (CPL), generally requires that records be sealed when charges are dismissed in favor of an accused. Therefore, if, for instance, a charge of speeding is dismissed, records relating to the matter are sealed and beyond the scope of rights of access, irrespective of whether the records are maintained by an agency or a court, [see Johnson Newspapers Corp. v. Stainkamp, 94 AD2d 825, 61 NY2d 958 (1984)]. Similarly, when a criminal action or proceeding results in a conviction for a traffic infraction or violation, §160.55 of the CPL generally requires that records pertaining to the matter be sealed by any governmental agency other than a court.

Other exceptions may be relevant in relation to the Town "policies", if such records exist.

In my view, those kinds of 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.

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 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.

Lastly, the provision dealing with the right to appeal a denial of access to records by an agency 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 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)].

It is reiterated that the preceding commentary concerning the right to appeal a denial of access pertains to agencies; it does not apply to a court.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Justice Court
Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 25, 2005

Mr. Alan P. Kozlowski
Director
Cayuga County Real Property Services
160 Genesee Street - 6th Floor
Auburn, NY 13021

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

Dear Mr. Kozlowski:

I have received your letter in which you sought an opinion "on the issue of Cayuga County [Real Property Services] RPS providing copies of deeds to the public."

You wrote that deeds are "officially recorded and certified copies sold by the County Clerk's Office..." Copies of deed records filed with the County Clerk are made available to other County agencies, as well as towns and cities. According to your letter, the Cayuga County Clerk "has recently asked all government agencies possessing Cayuga County NY deed records to direct the public to obtain all copies exclusively at their office" and "maintains they have the exclusive ownership of deeds after they are filed, and can...require the public to obtain any copy exclusively at their office." You contend, however, that "this violates [y]our obligation to make records of [y]our office available directly to the public..."

In this regard, the County Clerk's claim of ownership is, in my view, inconsistent with law. From my perspective, "ownership" is irrelevant for purposes of the Freedom of Information Law. That statute includes all agency records within its coverage, irrespective of their authorship, origin or function. Specifically, §86(4) of FOIL 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 definition, when deeds or any other documentary materials, regardless of their physical form (i.e., paper or electronic storage media), come into the possession of a government agency in New York, such as a difference county agency or a town, they constitute agency "records" that fall within the requirements of the Freedom of Information Law.

If an agency prepares a record and copies are transmitted by any means to one or more other agencies, any of those agencies in receipt of a FOIL request would be obliged to respond [see e.g., *Muniz v. Roth*, 620 NYS 700 (1994)]. Perhaps most significant for purposes of illustration is a decision rendered by the Court of Appeals, the state's highest court, involving a request made to a state agency for copies of subpoenas issued by a court for that agency's records. To put the matter in perspective, while the Freedom of Information Law includes all state and municipal agencies within its scope, the courts are excluded from the coverage of that law. That being so, the agency denied access, contending that court records in its possession were not covered by the Freedom of Information Law. In *Newsday v. Empire State Development Corporation* [98 NY2d 359 (2002)], the Court of Appeals unanimously disagreed, stating that the records were subject to the Freedom of Information Law, "irrespective of whether they are deemed to have been a mandate of a court and issued for a court." The Court found further that "ESDC, a state public corporation, is undeniably an agency under FOIL. It presently has physical possession of the subpoenas. Thus, in the hands of ESDC, the subpoenas constitute agency records: 'information kept [or] held * * * by * * * agency [i.e., ESDC] * * * in any physical form whatsoever."

In like manner, although deeds or other records may be filed initially and officially with an office of a county clerk, once they come into the possession of another agency, they become records of that agency. Whether an agency in receipt of a request made pursuant to the Freedom of Information Law is the creator of a record or the initial location of filing or, on the other hand, a secondary custodian that received a copy of the original, the responsibility to honor the request is exactly the same.

One of the underlying issues concerning the controversy involves the ability to generate revenue through fees. Section 87(1)(b)(iii) of the Freedom of Information Law pertains to fees and states that an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches or the actual cost of reproducing other records (i.e., records that are larger, or computer tapes or disks, etc.), unless a different fee is prescribed by statute. County clerks charge fees pursuant to a series of statutes (see CPLR, §8019 *et seq.*) that exceed that those that can be assessed under the Freedom of Information Law. Nevertheless, when a copy of a record originally created by or filed with a county clerk is requested from a different agency, that agency must respond and may only charge the fees for copies consistent with the Freedom of Information Law.

Unless and until the State Legislature changes the law, which seems unlikely, the fees charged by towns and other agencies will remain as they have been for years, the responsibility to respond to a request for records will remain with any agency that has possession of the records, and "ownership" will have little significance for purposes of complying with the Freedom of Information Law

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Cayuga County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15176

41 State Street, Albany, New York 12231
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February 25, 2005

Mr. William Cosentini
[redacted]

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

Dear Mr. Consentini:

As you are aware, I have received your note, which is attached to materials relating to your request made pursuant to the Freedom of Information Law to the Town of Smithtown.

As I understand the matter, a request was made to the Town's records access officer on December 11 for records involving work done by the Town's Highway Department during the preceding summer in an area that you described. It appears that the request was transferred to the Highway Department, for in a letter of January 8 directed to the Town Attorney, you referred to a conversation in which she stated that the Highway Superintendent "refused to give [her] the documents [you] requested." You also wrote that the Town Attorney would not confirm that to be so in writing.

You also indicated that the Superintendent later located records falling within your request. Although you offered to obtain them at his place of work, he apparently refused to permit you to do so and refused to forward the records to a location where you could pick them up. He instead sent a letter to you, for which he claimed that you owe $4.42 for mailing this bill to your home, certified receipt mail", $5.57 for mailing 31 photocopies of "foreman reports", and twenty-five cents per photocopy for the copies.

In this regard, I offer the following comments.

First, having reviewed the materials, I point out 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, to the extent the information sought does not exist in the form of a record or records, the Town would not be required to prepare new records on your behalf. I note that in a letter of February 4 addressed to the Highway Superintendent and the Town Attorney, you requested answers to questions, i.e., "Who...Whom...or What government body

authorized the Smithtown Highway Department to do the work...", "Why was the work done", "How much did we the taxpayers pay for this work." While Town officials may choose to respond to your questions, I do not believe that they are required to do so by the Freedom of Information Law. In the future, rather than seeking information by raising questions, it is suggested that you request records.

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

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

In a decision rendered by the Court of Appeals, the state's highest court, 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).

Third, although records may be in the physical possession of the Highway Superintendent, §30(1) of the Town Law states that the Town Clerk is the legal custodian of all town records.

In a related vein, in implementing the Freedom of Information Law, I believe that the Highway Superintendent is required to comply with the direction given by the Town's records access officer. By way of background that §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty

> of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In short, I believe that the Town Board has the overall responsibility for 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, if you are willing to pick up records at a location designated by the records access officer, I do not believe that you may be charged for postage. However, the town may impose a fee of up to twenty-five cents per photocopy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Records Access Officer
Yvonne Liefrig
Edmund F. Lynch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1517

41 State Street, Albany, New York 12231
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February 25, 2005

Mr. Robert Shaver
[redacted]

The staff of the Committee 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. Shaver:

As you are aware, I have received a variety of correspondence relating to your request for records of the Deposit Central School District pursuant to the Freedom of Information Law.

According to the materials, you were employed as a probationary employee by the District. Following the receipt of allegations that you engaged in inappropriate behavior, your employment with the District was terminated. Thereafter, you submitted requests to the District under the Freedom of Information Law fall all information received by the District leading to your termination, the names of those who "witnessed...stares" at female students, the names or relationships of students who entered your apartment, and the names of certain female students. You have contended that you have "a right to all [your] employee files", as well as any complaints, "written or oral."

Although the District provided some of the records, others were withheld.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states that an agency, such as a school district, is not required to create a record in response to a request. Therefore, to the extent that information sought does not exist in the form of a record or records, i.e., oral complaints, the District would not be required to create new records containing the information sought.

Second, although the Freedom of Information Law is based on a presumption fo access, I do not believe that you have a right to gain access to all records or files pertaining to you. In brief, the

Freedom of Information Law authorizes an agency to deny access to records or portions of records that fall within the exceptions to rights of access appearing in paragraphs (a) through (i) of §87(2). In my view, three of the exceptions are applicable in the context of your request.

The first exception, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §4503 of the Civil Practice Law and Rules (CPLR) codifies the attorney-client privilege. To the extent that the records requested include communications between District officials and their attorneys in which legal advice is requested and offered, I believe that such communications would be exempt from disclosure pursuant to §4503 of the CPLR and, therefore, §87(2)(a) of the Freedom of Information Law.

Another statute that exempts records from disclosure is the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g). In brief, FERPA prohibits a school district from disclosing information that is personally identifiable to a student unless a parent consents to disclosure. In the federal regulations promulgated pursuant to FERPA, §99.3, the phrase "education records" is defined to include those records that are:

> "(1) Directly related to a student; and
>
> (2) Maintained by an educational agency or institution or by a party acting for the agency or institution."

In short, a record maintained by or for the District that is personally identifiable to a student would, in my opinion, constitute an education record falling within the coverage of FERPA that cannot be disclosed without parental consent.

The federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

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

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

Also relevant are §§87(2)(b) and 89(2)(b), which permit an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." Assuming that no other ground for denial is applicable, I do not believe that a request made by the subject of a request for records pertaining to him, or by his representative who has obtained a written release authorizing disclosure to the representative, could be denied on the basis of §87(2)(b). As stated in §89(2)(c) of the Freedom of Information Law:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision...
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

In short, you cannot invade your own privacy.

Nevertheless, to the extent that persons other than yourself are identified in records, such as witnesses, there are privacy considerations that arise relative to those individuals. In such situations, identifying details or certain portions of records might be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy with respect to those third parties.

Next, §87(2)(g) applies with respect to communications between or among District officials and employees. 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, assuming that there was no proceeding which led to a final determination involving a finding of misconduct, but rather a termination of your employment as a probationary employee without any such proceeding or determination, I believe that the District would have the authority

to deny public access to some records pertaining to you, including unsubstantiated complaints or allegations. It has been found in various contexts that public officers and employees are required to be more accountable than others, and 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].

When allegations or charges of misconduct have not yet been determined or did not result in a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

I note that even though records pertaining to you may in some instances be withheld pursuant to the Freedom of Information Law, there is generally no obligation on the part of the District to do so. That statute is permissive, and it has been held that even when an agency is authorized to deny access to records, it is generally not required to do so (see Capital Newspapers, supra, 567).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Kraig D. Pritts
Wendy K. DeWind

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1518

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February 25, 2005

E-MAIL

TO: John Kane

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. Kane:

As you are aware, I have received your letter in which you complained concerning a delay in response to your request for records made to the Department of Audit and Control.

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)].

I hope that I have been of assistance.

RJF:tt

cc: Shelley Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1519

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

February 25, 2005

E-MAIL

TO: Elizabeth Logan-Baravelle

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.

Ms. Logan-Baravelle:

I have received your letter pertaining to your request to obtain certain records from the Village of Millbrook. Because the request includes billing records involving the Village's attorneys, you indicated that you were informed that those records must be reviewed and that the request would be "granted or denied within 30 days."

In this regard, I offer the following comments.

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

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

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, 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, 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)].

Most pertinent in my view is the first ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century,

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

In the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.)...
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters being communicated and, consequently, was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might

> be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)"

In short, in Knapp, even though portions of the records containing the time billed and the amount paid for the time, it was determined that other aspects of billing statements indicating "the general nature of legal services performed", as well as certain others, did not fall within the attorney client privilege and were available.

In the other decision dealing with the issue under the Freedom of Information Law, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], the matter involved a request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). While monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.).

Although the County argued that the "description material" is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the CPLR, the court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determines the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications...
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

In my view, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client

privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. As suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

I hope that I have been of assistance.

RJF:tt

cc: Records Access Officer
Mayor, Village of Millbrook

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 25, 2005

Ms. Loueda B. Bleiler
[redacted]

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

Dear Ms. Bleiler:

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

By way of background, you indicated that you serve on the Odessa-Montour Central School District Board of Education and that the District's auditor discussed the District's 2004 audit report "at length" during an executive session. You added the regulations of the Commissioner of Education require a district's treasurer to provide a board of education "with a budget status report at least quarterly", but that the Board "has not received these reports for many months", despite "repeated requests for them." In consideration of those matters, you prepared and read a statement during a Board meeting in which you discussed concerns raised by the audit and the audit process, asked questions, reminded District officials of their responsibilities and offered suggestions. The Superintendent thereafter forwarded your statement to the District's attorney, who submitted his opinion to the Board concerning the propriety of reading your statement in public. You have asked whether the attorney's opinion is confidential and whether you were "in violation of any law when [you] read [your] written statement of concern in a public meeting."

In this regard, I offer the following comments.

First, it does not appear that there was any basis for conducting an executive session during the auditor's presentation to the Board. In short, paragraphs (a) though (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session. From my perspective, a presentation concerning the District's budget or finances would not fall within any of the grounds for entry into executive session.

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

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101(c) of the Civil Practice Law and Rules. In my view, there need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

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

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

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that records consist of legal advice or opinion provided by counsel to the client, i.e., a board of education, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

Lastly, I am unfamiliar with the portion of the Superintendent's contract to which the attorney referred, contending that your statement "clearly violates the Board of Education's

commitment to the Superintendent in the contract to 'promptly and discreetly' refer criticisms and complaints to the Superintendent." Nevertheless, I believe that one of your responsibilities as an elected official involves expressing your views, including criticism, to the public. Moreover, it is questionable, according to judicial decisions concerning the first amendment and free speech, whether the provisions of the contract at issue is consistent with law. In my view, a public body, such as a board of education, may not have the authority to adopt a rule or contractually agree to silence an elected official.

As you are aware, the Open Meetings Law sets forth a procedure for entry into executive session and specifies the subjects appropriate for consideration in executive session. Its statutory companion, the Freedom of Information Law, deals with documents. Both statutes contain permissive rather than mandatory language concerning the ability to discuss a matter in private or deny access to records.

A public body *may* enter into executive session in circumstances prescribed in the Open Meetings Law; it is *not required* to do so. Specifically, the introductory language of §105(1) entitled "Conduct of executive sessions" 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..."

The law clearly indicates that there is no obligation to conduct an executive session; a public body may choose do so, but only upon approval of a motion by a majority vote of its total membership. If a motion to enter into executive session is not approved, a public body is free to discuss the issue in public.

Similarly, although an agency *may* withhold records in accordance with the grounds for denial of access appearing in §87(2) of the Freedom of Information Law, the Court of Appeals has held that an agency is not obliged to do so and may opt 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].

In my view, records may be characterized as "confidential" only when a statute, an act of Congress or the State Legislature, specifies that they cannot be disclosed. As indicated earlier, that circumstance is reflected in §87(2)(a) of the Freedom of Information Law, the first exception to rights of access, which pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 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. The effect is that the Open Meetings Law simply does not apply in those instances.

Both the Court of Appeals and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" (id.).

In like manner, in construing the equivalent exception to rights of access in the federal Freedom of Information Act (5 USC §552), 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.

Since a public body, such as the board of education, 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, because a federal statute prohibits disclosure, 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. 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 a parent of the student consents 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.

I note that in a case in which the issue was whether discussions occurring during an executive session held by a school board could generally 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.

It is emphasized that it has been held by several courts, including the Court of Appeals, that an agency's rules or 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, a local enactment, such as the rule adopted by the Committee, cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with an ethics investigation or proceeding must be disclosed; rather, I am suggesting that those records *may* in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, but that a local enactment cannot confer or require confidentiality; only a statute may do so.

Considering the issue from a different vantage point, based on a decision rendered by the U.S. Court of Appeals for the Second Circuit [Harman v. City of New York, 140 F.3d 111 (2nd Cir. 1998)], it appears that the portion of the contract to which you referred may be unconstitutional. In Harman, the equivalent of a department of social services, 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 were exempted from disclosure by statute and were, therefore, confidential. Nevertheless, the proceeding in Harman was precipitated by commentary that was not identifiable to any particular recipient, 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 information may be characterized as confidential and exempted from disclosure by statute only when a statute forbids disclosure.

While a member of a board of education or other governing body may not be an "employee", I believe that the holding in Harman would be applicable in the instant situation. In creating a "balancing test", it was held in Harman 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).

Moreover, it was stressed by the court that the harm sought to be avoided by means of a restriction on speech must be real, and not merely conjectural. It was determined that:

> "...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).

The admonition in the contract appears to be prospective, for, in the words of Harman, "it chills speech before it happens" and does not focus on any harm that has actually occurred. In short, it may stifle free speech in a manner that has been found to be unconstitutional.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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February 25, 2005

E-Mail

TO: David Douek

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. Douek:

As you are aware, I have received your letter. You have asked whether the New York City Housing Authority "violate[d] [your] rights under the Personal Privacy Protection Law" by introducing a certain record pertaining to you during a proceeding that the Authority initiated against your parents.

From my perspective, the Personal Privacy Protection Law would not have applied. That statute applies only to state agencies. For purposes of its application, §92(1) defines the term "agency" to mean:

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

Because the New York City Housing Authority is a municipal entity, I do not believe that it is subject to the Personal Privacy Protection Law.

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

RJF:jm

FOIL-AO-15182

From: Robert Freeman
To: randy@sandspoint.org
Date: 2/28/2005 10:37:23 AM
Subject: Dear Mr./Ms. Bond:

Dear Mr./Ms. Bond:

I have received your inquiry concerning the ability to assess a fee when providing access to "electronic records in digital form..."

In this regard, §87(1)(b)(iii) of the Freedom of Information Law states that an agency may charge up to twenty-five cents per photocopy, or the actual cost of reproduction relative to records that cannot be photocopied. In the context of your question, it has been advised that actual cost involves computer time, plus the cost of the storage medium to which data is transferred, i.e., a computer tape or disk.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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FOIL-AO-15783

From: Robert Freeman
To: NCBarney@cattco.org
Date: 2/28/2005 9:44:27 AM
Subject: Dear Ms. Barney:

Dear Ms. Barney:

As you are aware, I have received your inquiry concerning disclosure by Cattaraugus County of assessment information that it receives from municipal assessors within the County. During our telephone conversation, you confirmed my understanding that the information received by the county consists of items that are included within an assessment roll, and that members of the public have the right to gain access to those items from the municipalities. That being so, I believe that the County would be required, on request, to disclose the information in question in response to a request made under the Freedom of Information Law. Further, since you asked whether you would "be wrong and doing something unlawful" by disclosing the information, I note that the Freedom of Information Law is permissive; even when an agency "may" deny access to records in accordance with the exceptions to rights of access appearing in that statute, it is not required to do so. The only situation in which an agency must withhold records would involve the application of a statute that forbids disclosure. In this instance, I know of no law that would preclude the County from disclosing or that would make it unlawful to do so.

I hope that I have been of assistance.

Robert J. Freeman
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FOIL-AO-15184

From: Robert Freeman
To: sragan@co.st-lawrence.ny.us
Date: 2/28/2005 9:18:03 AM
Subject: Dear Ms. Ragan:

Dear Ms. Ragan:

I have received your note concerning a request for the County's voter database. In this regard, under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge a fee based on the actual cost of reproduction when duplicating records other than photocopies. In the case of the transfer of data onto a CD, it has been advised that the actual cost involves computer time, plus the cost of the storage medium (the CD). It is suggested that you contact the person seeking data and advise that the fee would be based on the actual cost of reproduction and that you ask whether he/she is willing to pay the requisite amount.

I hope that I have been of assistance.

Robert J. Freeman
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February 28, 2005

E-Mail

TO: William P. Gardner III

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. Gardner:

I have received your letter in which you questioned the length of time that it may take a state agency to compile the records that you requested.

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:jm

STATE OF NEW YORK
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February 28, 2005

E-Mail

TO: Paul Hein

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Hein:

I have received your inquiry in which you asked whom you may contact when a government agency ignores a request made under the Freedom of Information Law.

In this regard, this office, the Committee on Open Government, is authorized to provide advice and opinions pertaining to the Freedom of Information Law. Although 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.

In consideration of the issue that you raised, 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)].

If you have questions concerning rights of access to particular records, please feel free to contact me.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-15187

From: Robert Freeman
To: [redacted]
Date: 3/1/2005 9:38:44 AM
Subject: Dear Ms. Kopka:

Dear Ms. Kopka:

I have received your letter concerning the sale of buildings acquired through foreclosure by a municipality. You have asked whether the "proposals [are] subject to FOIL...after opening by the City but prior to the vote by the City Council." While I am not an expert regarding the process, it appears that the the proposals or offers would, at the time that you indicated, be accessible to the public.

As a general matter, FOIL is based on a presumption of access. Stated differently, government records are accessible, except to the extent that one or more of the exceptions to rights of access appearing in §87(2) may properly be invoked. From my perspective, the only exception relevant in this instance would be §87(2)(c), which authorizes an agency to withhold records insofar as disclosure would "impair present or imminent contract awards or collective bargaining negotiations..." When the deadline for the submission of proposals or offers has been reached and the proposals have been opened, I do not believe that disclosure would impair the ability of a municipality to engage in an optimal price or place any of the offerors at a disadvantage. If that is so, the records in question, in my view, would be available to the public.

Your second question involves the authority of a city's corporation counsel to make determinations concerning the propriety of the offers. In this regard, since the advisory jurisdiction of this office relates to matters involving public access to government information, I have neither the authority nor the expertise to answer. Nevertheless, 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-1518 8

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March 3, 2005

Ms. Julie Penny
NOYAC Citizens Advisory Committee
3662 Noyac Road
Sag Harbor, NY 11963

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

Dear Mr. Penny:

I have received your letter in which you indicated that the NYS Department of Environmental Conservation (DEC) did not make available a certain document that you requested. The document at issue is a copy of a certified copy of a covenant that was or should have been submitted to DEC's Region 1 office in Suffolk County.

In an effort to learn more of the matter, I contacted Nancy Pinamonti, the freedom of information officer at Region 1. In short, she informed me that a search for the record was made, but that it could not be located.

Under the circumstances, you might request a different kind of certification pursuant to §89(3) of the Freedom of Information Law. Specifically, 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) 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
cc: Nancy Pinamonti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1589

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March 3, 2005

Ms. Marie Rendely
[redacted]

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

Dear Ms. Rendely:

I have received your letter concerning your efforts in gaining access to records of the Town of Huntington, particularly "surveillance tapes." Although it appears that the Town agreed to make records sought available, you have raised a series of questions, and I will attempt to address them in the following commentary.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency, such as the Town, is not required to create or prepare a record in response to a request. It is my understanding that some of the records that you have requested were erased or discarded. To the extent that is so, there are no records to disclose or withhold, and the Freedom of Information Law would not apply.

Second, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I point out that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof." The phrase quoted in the preceding sentence indicates that there may be instances in which portions of records might be accessible, while others may be withheld. That being so, when portions of records may be withheld, an agency has the ability to delete or redact them, while providing access to the remainder. In the context of your request, portions of surveillance tapes may be withheld to the extent that the Town may properly assert an exception to rights of access appearing in §87(2).

With regard to rights of access to surveillance tapes, if the locations of surveillance cameras are known to the public and are in plain sight in public places, and if they capture information that could have been seen by those present, I do not believe that records containing that information may

justifiably be withheld. On the other hand, when the locations of cameras are not known to the public, there may be one or more grounds for denial of access. When people do not know that their actions are being filmed, it is possible that cameras may record personal, intimate or embarrassing behavior. In those instances, relevant is §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

Perhaps more significantly, if the location of surveillance cameras is not known to the public, and if the cameras are used to record what may be illegal actions, §87(2)(e)(iv) permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which if disclosed would...reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Pertinent is a decision in which it was held that the purpose of §87(2)(e)(iv):

> "is to prevent violators of the law from being apprised of nonroutine procedures by which law enforcement officials gather information (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572, 419 N.Y.S.2d 467, 393 N.E.2d 463). 'The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe' (id., at 573, 419 N.Y.S.2d 467, 393 N.E.2d 463). '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 [law enforcement] personnel***' (id., at 572, 419 N.Y.S.2d 467, 393 N.E.2d 463 [citations omitted]). Even though a particular procedure may be 'time-tested', it may nevertheless be nonroutine (id., at 573, 419 N.Y.S.2d 467, 393 N.E. 2d 463). Likewise, a highly detailed step-by-step depiction of the investigatory process should be exempted from disclosure" [Spencer v. New York State Police, 591 NYS 2d 207, 209-210, 187 AD 919 (1992)].

In short, if potential lawbreakers are aware of the location of cameras, they may be able to carry out unlawful activity elsewhere, thereby evading effective law enforcement. In that kind of circumstance, I believe that records may be withheld under §87(2)(e)(iv).

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."

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

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

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

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

Fourth, I believe that a person other than an agency's designated "Freedom of Information Officer" may respond to a request. By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

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

In short, I believe that the Town Board has the overall responsibility of ensuring compliance with the Freedom of Information Law and that the records access officer has the duty of coordinating responses to requests.

Section 1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or

(ii) permit the requester to copy those records..."

Based on the foregoing, again, the records access officer must "coordinate" an agency's response to requests. Therefore, I believe that when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

Next, 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, as suggested earlier, 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.

With respect to fees for copies of records, §87(1)(b) of the Freedom of Information Law states:

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

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

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

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute. In the context of the situation to which you referred, if the Town was required to pay a private entity to reproduce the

tapes, the charges that it paid would be included in its actual cost. In that circumstance, I believe that you could be charged accordingly.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jillian Guthman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15190

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March 3, 2005

Mr. Don Hausz
[redacted]

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

Dear Mr. Hausz:

I have received your letter addressed to Janet Mercer of this office. The issue involves the fee that may be charged by the Stony Brook Fire District for photocopying records requested pursuant to the Freedom of Information Law.

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

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

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

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

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in

> some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, 226 AD 2d 339 (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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

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

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

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

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-1519

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March 3, 2005

E-Mail

TO: Gary Hubble

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. Hubble:

As you are aware, I have received your letter concerning the application of the attorney-client privilege in relation to the Freedom of Information Law. You asked "who determines" which records are privileged and whether there is a "waiting period" before they can be made available.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all records of an agency, such as a town. Section 86(4) of that statute defines the term "record' to mean:

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

Based on the foregoing, as soon as the attorney bills, for example, come into the possession of a town, they constitute town records that fall within the coverage of the Freedom of Information Law.

Second, the regulations promulgated by the Committee on Open Government require that the governing body of a municipality (i.e., a town board) must 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. Typically, the records access officer, often after consulting with others, responds to requests and determines whether or the extent to which records may be withheld.

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

The Court of Appeals, the state's highest court, confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

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

In the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.)...
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters being communicated and, consequently, was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)"

In short, in Knapp, even though portions of the records containing the time billed and the amount paid for the time, it was determined that other aspects of billing statements indicating "the general nature of legal services performed", as well as certain others, did not fall within the attorney client privilege and were available.

In the other decision dealing with the issue under the Freedom of Information Law, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], the matter involved a

request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). While monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.).

Although the County argued that the "description material" is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the CPLR, the court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determines the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications...
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

In my view, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, I agree that references identifiable to students may properly be deleted. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15192

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

March 4, 2005

Ms. Emma H. Chapman
Landlords Association of Greater Niagara
1514 Main Street
Niagara Falls, NY 14305

Dear Ms. Chapman:

I have been contacted by the office of Assemblywoman Francine DelMonte in relation to your request made to the Niagara Falls Housing Authority pursuant to the Freedom of Information Law.

A letter addressed to you by Patricia L. Barone, Deputy Executive Director of the Authority indicates that you requested "[a]ny changes made to last year's Hope VI application to HUD, table of content and/or a list of effective pages."

In response, you were informed that the request did not "reasonably describe" the records of your interest and that you were asking that the Authority "prepare records not possessed or maintained by it."

In an effort to provide clarification, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute stated in part that an agency, such as a public authority, is not required to create a records in response to a request. Therefore, if there is no table of contents or list of pages that indicate changes in an application to HUD, the Authority would not be required to prepare new records including the items or information sought to satisfy your request.

It is suggested that you submit your request and ask to inspect last year's application, as well as the preceding version. A review of both would enable you to ascertain whether changes were made. I note that no fee can be charged for the inspection of records available under the Freedom of Information Law.

Second, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when

the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia L. Barone
Hon. Francine DelMonte

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15193

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

March 4, 2005

Mr. Jeffrey Grune
03-A-4374
Fishkill Correctional Services
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. Grune:

I have received your letter in which you asked whether this office has received a copy of your Freedom of Information Law appeal directed to Supervisor Egan of the Town of Bethlehem. You also complained that your request was denied "due to the vagueness of the request."

In this regard, having researched our files, it appears that the Town of Bethlehem did not send a copy of the appeal to this office.

With respect to the denial of your request, the issue appears to 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 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.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Theresa Egan, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15194

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

March 4, 2005

Mr. Darrell Jones
93-A-1836
Bare Hill Correctional Facility Annex
Box 20, Cady Road
Malone, NY 12953

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

Dear Mr. Jones:

I have received your letter in which you asked whether you could file a new Freedom of Information Law request after your Article 78 proceeding was dismissed as untimely due to your failure to appeal the denial of access to records.

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

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

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

With respect to your question concerning the right to appeal the judicial decision rendered by the Supreme Court, I point out that the Committee on Open Government is authorized to provide advice and guidance concerning access to government information, primarily under the Freedom of Information Law. As such, this office has neither the expertise nor the jurisdiction to advise with respect to appeals in judicial proceedings.

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-15195

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

March 4, 2005

Mr. Richard DeGrijze
91-A-3056
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. DeGrijze:

I have received your letter in which you indicated that you requested "consultations" relating to items removed from the commissary. In response to your Freedom of Information Law request, the "FOIL Officer indicated no records of said consultation exist." You asked for an advisory opinion on "whether said 'consultation' affecting inmates should be available under FOIL."

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

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-1596

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

March 4, 2005

Mr. Timothy Williams
03-A-2602
Box 119, Route 96
Romulus, NY 14541

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

Dear Mr. Williams:

I have received your letter in which you indicated that after waiting six months for a response to your Freedom of Information Law request directed to the New York County District Attorney's office, you appealed. In response to your appeal, Gary J. Galperin, Assistant District Attorney, remanded it to the Department's records access officer for reconsideration. In that determination, Mr. Galperin wrote that the records access officer shall "make a substantive determination herein" within two weeks. As of the date of your letter to this office, you had received no response from the records access officer.

Based upon its clear language, that determination, in my view, is inconsistent with the Freedom of Information Law. 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**" (emphasis added).

As I understand the foregoing, an agency in receipt of an appeal has two options: within ten business days of its receipt, the agency must either fully explain its reason for further denial or make the records available. Delaying disclosure by remanding it to the records access officer for a determination represents a failure to comply with law.

In an effort to enhance compliance with law, I have forwarded a copy of this letter to Mr. Galperin.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Gary J. Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3950
FOIL-AO-15197

41 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 7, 2005

Mr. Kris Thompson
Records Access Officer
New York Temporary
State Commission on Lobbying
Suite 1701, 2 Empire State Plaza
Albany, NY 12223-1254

The staff of the Committee 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. Thompson:

As you are aware, I have received your letter in which you asked that I confirm the opinions expressed during our conversation pertaining to a request made pursuant to the Freedom of Information Law. The request involves "copies of the minutes of the most recent meeting of the lobbing commission, the draft 2004 annual report and the 2004 annual report." You indicated that various elements of the draft report were discussed in public by the Commission, and that a final report was approved by the Commissioner.

In this regard, I offer the following comments.

First, the Open Meetings Law provides direction concerning the content of minutes of meetings of public bodies and the time within which they must be prepared and disclosed. Section 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 meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session. ..."

Based on the foregoing, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, minutes of open meetings must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member of a public body. Further, that statute requires that minutes be prepared and made available within two weeks of meetings. While many public bodies approve their minutes, I 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. If it is the practice or policy of a public body to approve its minutes but it has not done so within two weeks of a meeting, it has been suggested that the minutes be prepared and made available within that time and that they be marked "unapproved", "draft", "preliminary", for example. By so doing, a recipient of the minutes would have the ability to ascertain generally what occurred at a meeting; concurrently, he or she would be given notice that the minutes are subject to change.

Second, with respect to rights of access to 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. Both the draft and the final reports fall within the scope of §87(2)(g). Although that provision may potentially serve 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.

With respect to the draft, those portions consisting of statistical or factual information must be disclosed pursuant to §87(2)(g)(i). Insofar as it consists of recommendations or opinions that were not later adopted or approved by the Commission, those portions may be withheld, except to the extent that the recommendations or opinions were discussed and, therefore, effectively disclosed at one or more open meetings of the Commission. In short, I believe that portions of the draft report that might otherwise be withheld under §87(2)(g) must be disclosed if they were essentially made public during an open meeting or meetings. Public discussion of a recommendation or opinion would, in my view, effectively constitute a waiver of the ability to withhold a record containing the same or equivalent information.

Lastly, it is my understanding that the final report is being printed, and that printed copies will be available to the public. If that report now exists, although not in the form in which it will be distributed, I believe that it must be disclosed. It is assumed that the content of the existing report is the same as the report that will be disseminated to the public. Further, since it has been adopted by the Commission, I believe that it may be characterized as a final agency determination or statement of policy that is accessible under §87(2)(g)(iii).

If I have misinterpreted your remarks, please feel free to contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15198

41 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 7, 2005

Captain William J. McNamara
Putnam County
Office of the Sheriff
Three County Center
Carmel, NY 10512

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

Dear Captain McNamara:

I have received your letter and appreciate your kind words.

You wrote that in September of last year, the Putnam County Sheriff initiated disciplinary charges against a Department investigator who is "a statutory public officer." Charges were served upon the officer pursuant to §75 of the Civil Service Law and departmental rules and regulations. Two months later, a complaint was filed charging the officer with a crime "connected to acts alleged in the disciplinary charges." In December, the officer admitted to some of the departmental charges, and the remainder were withdrawn. Based on the officer's admission, the hearing officer recommended that the officer be discharged for cause, and you indicated that "that result is anticipated."

"With the final disposition of the disciplinary matter in sight", you wrote that the Sheriff seeks to be "as forthcoming with the public...as well as the law will allow, while also respecting the privacy rights that the law affords the former officer." Consequently, you offered an analysis of rights of access to records pertinent to the matter, and you have sought my views concerning that analysis.

In this regard, as you are aware, a key issue involves the application of §50-a of the Civil Rights Law. That statute provides, in brief, that personnel records pertaining to police and correction officers that are "used to evaluate performance toward continued employment or promotion" are confidential; those records cannot be disclosed absent the consent of the officer who is the subject of the records or a court order.

In consideration of its legislative history and intent, it has been advised that §50-a does not apply when the subject of a record is no longer employed as a police officer. I am mindful of the

decision rendered in Guzman v. City of New York in which the court held to the contrary, that the application of §50-a continues after an individual no longer is employed as a police officer [91 Misc. 2d 270, 271 (1977)]. Nevertheless, Guzman was decided only one year after the enactment of §50-a. Since that time, other courts, including the Court of Appeals, have provided direction concerning its application. Specifically, in considering the legislative history leading to its enactment, the Court of Appeals found that §50-a "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination"[Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

In short, if a police officer was involved in an arrest or investigation and is called to testify regarding the arrest or investigation, personnel records relating to an officer's performance cannot be used to harass or embarrass the officer in the context of that litigation. Again, the bar to disclosure imposed by §50-a deals with personnel records that "*are used to evaluate performance toward continued employment or promotion.*" When a person has retired or is no longer employed as a police officer, there is no issue involving continued employment or promotion. That being so, in my opinion, the rationale for the confidentiality accorded by §50-a is no longer present, and that statute no longer is applicable or pertinent.

In short, the holding in Guzman, which preceded the issuance of decisions concerning §50-a rendered by the Court of Appeals, has, in my view, been supplanted based on the direction offered by the state's highest court.

Further, in an advisory opinion rendered by the Committee on Open Government, FOIL-AO-12423, it was opined, for reasons expressed above, that §50-a does not apply when a person no longer is employed as a police officer. In that opinion, it was advised at its start that "I do not believe that §50-a is applicable if an individual is no longer employed as a police officer." The Supreme Court in Village of Brockport v. Calandra made specific reference to that opinion, characterizing the opinion as "instructive" [748 NYS2d 662, 668 (2002)]. While the court did not find a need to focus on that aspect of the opinion specifically, certainly it could have expressed disagreement if it saw fit to do so. The Appellate Division could also have done so, but it chose to unanimously affirm (305 AD2d 1030 (2003)]. I would conjecture that the tacit approval of the advisory opinion suggests agreement with its content.

Next, assuming that the officer in question has been terminated or has resigned, you have contended that the records at issue "relate not to the officer's continued employment but, rather, to his discharge from duty." Based on the holding in Village of Brockport, if the records did not "evaluate [the officer's] performance or contemplate his continued employment" (id., 669), I would agree that §50-a of the Civil Rights Law would not apply. If that is so, some elements of the records would , in my opinion, be accessible while others could be withheld.

Although §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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

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

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

In consideration of the foregoing, I believe that portions of records involving charges that were sustained must be disclosed, for they are clearly relevant to the officer's duties. Additionally, they would constitute an agency's final determination that would be available under §87(2)(iii).

On the other hand, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d

460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Lastly, the records might identify witnesses or persons other than the officer charged. In that circumstance, those portions might properly be denied pursuant to §§87(2)(b) or 89(2)(b) on the ground that disclosure would constitute an unwarranted invasion of personal privacy of those persons, or perhaps pursuant to §87(2)(f). That provision authorizes an agency to withhold records insofar as disclosure could reasonably be expected to "endanger the life or safety of any person."

If I have inaccurately construed any of your remarks, please do not hesitate to call me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-15199

From: Robert Freeman
To: kelly@csseainc.org
Date: 3/8/2005 4:41:37 PM
Subject: Dear Mr. Kelly:

Dear Mr. Kelly:

I have received your letter in which you asked whether certain public benefit corporations 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 include any public corporation. A public benefit corporation is a kind of public corporation (see General Construction Law, §66) and, therefore, clearly falls wtihin the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

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

FOIL-AO-15200

From: Robert Freeman
To: DCiccone@schoolmatters.com
Date: 3/9/2005 8:46:06 AM
Subject: Dear Mr. Ciccone:

Dear Mr. Ciccone:

I have received your letter concerning the FOIL. "If a resident sends a letter questioning the public behavior of a member of the School District's Board of Education to SED Commissioner Mills, and copies the Superintendent of Schools and the entire Board of Education", you asked whether that document "can....be made public under FOIL."

Without knowledge of the specific content of the letter, I cannot offer unequivocal guidance. However, it is likely that personally identifiable details regarding the resident could be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see FOIL, §87(2)(b)]. Since you referred to the "public behavior" of a board member, it does not appear that there would be basis for withholding commentary regarding his or her behavior.

It is emphasized that FOIL is permissive. Although records or portions of records *may* be withheld by a school district in accordance with the exceptions to rights of access appearing in §87(2) of that statute, there is ordinarily no obligation to do so. The only instances in which agencies must withhold records would involve those cases in which statutes other than the Freedom of Information Law forbid disclosure. For example, under federal law, to the extent that records maintained by a school district identify a student, they cannot be disclosed to the public without the consent of a parent. Assuming that the letter to which you referred does not include personally identifiable information regarding a student, I believe that the district *may* disclose the record in its entirety, even if it has the authority to withhold portions of the letter.

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-15201

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

March 9, 2005

Mr. James Wolfe
Hedgerow House
994 Route 67
Ballston Spa, NY 12020

Dear Mr. Wolfe:

I have received your letter of March 6 in which you indicated that you wrote to this office more than two months ago and did not receive a response. Please be advised that a search of our files indicates that you letter did not reach this office.

It appears that your correspondence involves a request for a budget proposal prepared by Hedgerow House in Ballston Spa. In this regard, I would conjecture that Hedgerow House is not required to disclose its budget proposal. 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."

In short, the Freedom of Information Law pertains to records of government agencies; it does not apply to private or not-for-profit entities.

Nevertheless, you wrote that Hedgerow House has a relationship with the Office of Alcoholism and Substance Abuse Services (OASAS). Insofar as OASAS maintains records pertaining to Hedgerow House, those records would be subject to the Freedom of Information Law. If you believe that OASAS may possess records of your interest, a request may be directed to the records access officer at 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-15202

41 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 9, 2005

Mr. Karsem Williams
95-A-6745
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. Williams:

I have received your letter in which you complained that your Freedom of Information Law requests for "a file from Internal Affairs of a deceased city correction officer" pertaining to an investigation of that correction officer had not been answered as the date of your letter to this office.

In this regard, I offer the following comments.

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

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

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

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

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

Second, as you are aware, when a person has ended his or her service as a correction officer, the protection accorded by §50-a of the Civil Rights Law ends. 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 §50-a exempts records from disclosure when a request is made in a context relating to litigation. More specifically, in a case brought by a newspaper, it was found that:

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

It was also found that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568).

In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

If the subjects of the records are no longer correction officers or are deceased, I do not believe that §50-a would be applicable. In short, the rationale for confidentiality accorded by that provision would no longer be present.

The foregoing is not intended to suggest that all records identifying a correction officer who is now deceased must be disclosed, for other grounds for denial may be applicable. Of significance is §87(2)(g) of the Freedom of Information Law, 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.

In terms of the judicial interpretation of the Freedom of Information Law, it is emphasized that in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell v. Village Board of Trustees, 372, NYS 2d 905 (1975); Geneva Printing Co. And Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); and Sinicropi v. County of Nassau, 76 AD 2d 838 (1980)]. Three of the decisions cited above, Powhida, Farrell and Scaccia involved police officers, and in each case, the names of the officers and the penalties imposed were determined to be public.

In contrast, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

I hope that 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-15203

41 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 9, 2005

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 letter in which you wrote that you are interested in obtaining statistical information from the Office of Special Narcotics concerning convictions and acquittals relating to the criminal sale of a controlled substance for the years 2002 and 2003. You also indicated that you would like the fee to be waived due to your indigency.

In this regard, I offer the following comments.

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

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

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held some fifteen years ago that "[i]nformation is increasingly being stored in computers and access to such

data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

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

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

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

Lastly, under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy or the actual cost of reproduction. 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)].

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-15204

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

March 9, 2005

Mr. James McNulty
00-A-4139
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. McNulty:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records from the facility parole officer. As of the date of your letter to this office, you had not received any response to your Freedom of Information Law 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:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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-15205

41 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 9, 2005

Mr. Mujahid Farid
79-A-0362
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. Farid:

I have received your letter in which you complained that you have been constructively denied access due a failure by the Division of Parole to respond to your Freedom of Information Law requests. You indicated that you asked for "the identity of a fourth signatory whose name appears scratched over" on your "Administrative Appeal Decision Notice." As of the date of your letter to this office, you had not received a response.

In this regard, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request.

In short, officials of the Division in my view would not be obliged to provide information by answering questions or preparing new records in an effort to be responsive. However, if there is a separate record identifying the four signatories, I believe that it would be available under the 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-15206

41 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 9, 2005

Mr. Michael Coleman
02-R-1824
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601-0168

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

Dear Mr. Coleman:

I have received your letter in which you asked whether you can gain access under the Freedom of Information Law to copies of documents pertaining to yourself that were "sealed upon termination of criminal action in favor of the accused."

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The initial ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is §160.50 of the Criminal Procedure Law (CPL).

Specifically, subdivision (1) of §160.50 states in relevant part that:

> "Upon the termination of a criminal action or proceeding against a person in favor of such person...the record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding has been sealed. Upon receipt of notification of such termination and sealing...

> (c) all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency..."

Assuming that a court in which a proceeding was heard has not directed otherwise, typically when charges are dismissed in favor of an accused, records of or relating to the charges would be sealed in conjunction with the provisions quoted above. If the records in question were sealed pursuant to §160.50, they would be exempt from disclosure to the general public. However, paragraph (d) of subdivision (1) of §160.50 provides in relevant part that "such records shall be made available to the person accused..." That being so, it is suggested that a request might be made to the court in which the proceeding was dismissed, citing §160.50(1)(d) and providing proof of your identity.

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-15207

41 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 10, 2005

Mr. Andrew Brown
95-A-3248
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 asked under what section of the Freedom of Information Law a request for a waiver of fees for records may be made.

In this regard, under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy. 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)].

With respect to your questions concerning the Personal Privacy Protection Law, enclosed is a copy of "You Should Know", an explanatory brochure concerning 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

FOIL-AO-15208

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

March 10, 2005

E-MAIL

TO: John F. Murphy

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. Murphy:

As you are aware, I have received a variety of material from you concerning your attempts to obtain real property transfer forms from the City of Yonkers. The correspondence indicates that a provision of the Yonkers City Code, according to the City's Freedom of Information Officer, "makes the release of such forms or the information they contain a misdemeanor and imposes a fine of up to one thousand dollars for violation of this section."

From my perspective, due a change in the law, real property transfer forms must be disclosed. Consequently, I do not believe that the provision of the City Code requiring that those records be confidential is valid or enforceable. 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 first ground for denial of access, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." For several years, §574(5) of the Real Property Tax Law stated that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall not be made available for public inspection of copying except for purposes of administrative or judicial review of assessments in accordance with rules promulgated by the state board."

The forms referenced in §574(5) are usually "EA 5217" forms, the real property transfer forms that include the price of a parcel when real property is sold. When §574(5) as quoted earlier was in effect, I agreed that real property tax forms were exempt from disclosure, unless they were sought for the purpose of administrative or judicial review of assessments.

However, §574(5) was amended in 1993, and since the effective date of the amendment, July 1, 1994, it has required that:

> "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall be made available for public inspection or copying in accordance with rules promulgated by the state board."

Based on the foregoing, the forms or reports indicating transfers of real property that had been exempt from disclosure to the public have been accessible to the public since July of 1994.

Second, it has been held by several courts, including the Court of Appeals, the state's highest court, that a state agency's regulations or the provisions of a local enactment, such as a city code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment cannot confer, require or promise confidentiality. That being so, I do not believe that the provision of the City Code referenced earlier can require that records be kept confidential when a state statute requires that the same records be accessible to the public.

In an effort to enhance understanding of the matter, a copy of this response will be forwarded to the City of Yonkers Freedom of Information Officer.

I hope that I have been of assistance.

RJF:tt

cc: Kevin Crozier

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15209

41 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 10, 2005

Mr. Antonio Oppenheimer
94-A-5337
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

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

Dear Mr. Oppenheimer:

I have received your letter and the correspondence attached to it. It appears that you believe that you have not been given access to all of the records pertaining to you concerning a particular indictment number. You indicated that some of the records may have been erroneously sealed under a different indictment number.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The initial ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is §160.50 of the Criminal Procedure Law (CPL).

Specifically, subdivision (1) of §160.50 states in relevant part that:

> "Upon the termination of a criminal action or proceeding against a person in favor of such person...the record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding has been sealed. Upon receipt of notification of such termination and sealing...

> (c) all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency..."

Assuming that a court in which a proceeding was heard has not directed otherwise, records of or relating to the charges that have been dismissed would be sealed in conjunction with the provisions quoted above. If the records in question were sealed pursuant to §160.50, they would be exempt from disclosure to the general public. However, paragraph (d) of subdivision (1) of §160.50 provides in relevant part that "such records shall be made available to the person accused..." That being so, it is suggested that a request might be made to the court in which the proceeding was dismissed, citing §160.50(1)(d) and providing proof of your identity.

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-15210

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

March 10, 2005

Mr. Douglas Lopez
02-B-2178
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. Lopez:

I have received your letter in which you indicated that you requested records from the Chemung County District Attorney's Office but that you were not informed of your right to appeal in the response to 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..."

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)].

In an effort to enhance compliance with law, I have forwarded a copy of this letter to 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 R. Trice

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15211

41 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 10, 2005

Mr. German Rios-Davila
03-A-3078
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. Rios-Davila:

I have received your letter in which you asked whether your appeal addressed to the New York City Police Department that has not been answered would constitute a "constructive denial of [your] appeal."

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

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

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

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

It has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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-1521 2

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

March 11, 2005

Mr. Paul Jimenez
#310709
Walker Correctional Institute
1153 East St. South
Suffield, CT 06080

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

Dear Mr. Jimenez:

I have received your letter in which you complained that you have encountered difficulty in receiving telephone records from the Verizon Telephone Company requested under the Freedom of Information Law.

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

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

Since the Verizon Telephone Company is not a state or municipal entity, but rather a private company, it would not be subject to the Freedom of Information Law and would not be required to respond to requests made under 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

FOIL-AO-15213

41 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 11, 2005

Mr. Darrell 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 asked "if the department of probation can make such a representation to the Court that [you] refused to be interviewed shouldn't there be a record of [your] refusal?"

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning access to government information, primarily under the state's Freedom of Information Law. This office is not empowered to make a judgement concerning whether an agency should or must maintain a record with respect to the situation that you described.

I note, however, 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15214

41 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 11, 2005

Ms. Francine Cosme
97-G-1449
Bayview Correctional Facility
550 West 20th Street
New York, NY 10011-2878

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

Dear Ms. Cosme:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from the New York City Chief Medical Examiner. It appears that you were denied access to your husband's records because you were prosecuted for his death.

Relevant to the matter is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." In this regard, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts records from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994]. I note that in Mitchell, the court found that autopsy reports and related records maintained by the Medical Examiner were 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 the records in question would be dependent upon your capacity to demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

I hope that 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-15215

41 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 11, 2005

Mr. Norman Schachter
02-A-3134
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. Schachter:

As you are aware, I have received your letter in which you indicated that you requested records under the Freedom of Information Law. In response to your request, it was indicated that the agency received your request and "was working on it." As of the date of your letter to this office, you had received no further response.

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

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

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

I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility

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

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, as in this instance, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15216

41 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, 2005

Mr. Kenneth Moss
81-B-0836
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642

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

Dear Mr. Moss:

I have received your letter concerning complaints filed against a person that you did not identify by name or by title. In order to offer a definitive response, I would need to obtain additional information, particularly the title or function of the person who is the subject of the complaints.

If, however, you are referring to complaints made against a correction officer, judicial decisions indicate that those records are exempt from disclosure.

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

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that

could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered 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 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 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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15217

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

March 18, 2005

Mr. James Cheeseman
West Gate Landscaping, Inc.
166 Route 59
Suffern, NY 10901

Dear Mr. Cheeseman:

As you are aware, I have received your letter of December 24, and I apologize for the delay in response. You referred to an advisory opinion prepared on December 16 that did not focus on two elements of your correspondence. The first involved "copies of Vollmer Associates billing back-up data for a specific area of the Nauraushaun Brook" and the second, "contracts, change orders, billing back up data, and expenditures....by Vollmer Associates related to work performed by Vollmer Associates in the area of the Nauraushaun Brook..."

In this regard, in an effort to learn more of the matter, I contacted the Office of the County Attorney of Rockland County and was informed that the County Finance Department located the records relative to the first category of records described above and made them available to you in January. I was also informed that most if not all of those records had previously been made available to you. The records described in the second category referenced above were, according to the attorney, made available to you within the thirty-three boxes of material that you reviewed and copied. In short, he emphasized that you have copies of all of the records falling within the scope of your requests that the County maintains in its custody.

In consideration of the foregoing, I believe that the County has satisfied its obligations in relation to your requests for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Thomas Simeti

FOIL-AO-15218

From: Robert Freeman
To: David Van Pelt
Date: 3/18/2005 3:24:08 PM
Subject: Re: Another question for you about the Freedom of InformationAct.....

Years ago, it was held that records accessible under the NY FOIL are equally available "to any person, without regard to status or interest." In short, even though you are Canadian, you have the same rights under FOIL as any citizen of New York.

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 - 15219

From: Robert Freeman
To: David Van Pelt
Date: 3/18/2005 3:27:00 PM
Subject: Re: Another question for you about the Freedom of InformationAct.....

FOIL does not apply to the courts. However, other statutes generally grant access to court records. When court records are maintained by an agency subject to the FOIL, those records become agency records that fall within the coverage of the FOIL. That holding was clearly expressed by the state's highest court in *Newsday v. Empire State Development Corporation*, 98 NY2d 746 (2002).

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-15220

From: Robert Freeman
To: Susman, Thomas M.
Date: 3/23/2005 12:15:06 PM
Subject: Re: Disclosure of trade secrets under NY FOIL

Hi Tom - -

If the record is maintained by an entity of local government, there is no restriction regarding the ability of that entity to disclose, even if an exemption may appropriately be invoked. However, if the record was submitted to a state agency, §89(5) of FOIL offers a degree of protection. In brief, when a commercial enterprise submits records to a state agency, it may at the time of submission earmark those elements of the records that it believes fall within §87(2)(d), the so-called "trade secret" exception. From there, if a request is made, the agency is required to notify the commercial enterprise, which then has the opportunity to explain 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 seeking the records may appeal to the head of the agency. If the appeal is denied, the person denied access may seek judicial review. In such a proceeding, the agency has the burden of proof. On the other hand, if the agency disagrees with the contention of the commercial enterprise, the enterprise may appeal. If on appeal, the agency head finds that the records cannot be withheld under §87(2)(d), the enterprise has fifteen days to go to court to attempt to block disclosure. In that circumstance, it has burden of demonstrating that the records would, if disclosed, cause substantial injury to its competitive position.

I hope that this helps.
Bob
>>> "Susman, Thomas M." <Thomas.Susman@ropesgray.com> 3/23/2005 11:47:03 AM >>>
Bob-- I fully understand the law relating to the NY FOIL trade secret etc. exemption. But I can't find any parallel in NY law to 18 USC 1905, which at the federal level turns exemption 4 into a withholding requirement rather than a nondisclosure permission. I've perused your opinions to no avail. What's to keep a NY agency from using discretion to disclose my confidential commercial information even if clearly covered by 87(2)(d)?

Tom

Thomas M. Susman
Ropes & Gray LLP
One Metro Center
Suite 900
700 Twelfth Street, N.W.
Washington, DC 20005-3948
(work) 202-508-4620
(fax) 202-508-4650
(home) 202-882-3490
(cell) 202-365-1291

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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FOIL-AO-15221

FROM: Robert Freeman
TO: David Van Pelt
DATE: March 23, 2005

Dear Mr. Van Pelt:

The statute that generally deals with access to court records in New York is §255 of the Judiciary Law. Other statutes may pertain to particular courts, i.e., §2019-a of the Uniform Justice Court Act concerning town and village courts; §2501 of the Surrogate's Court Procedure Act. Court records are generally available, and it has been advised that requests for court records be made to the clerk of the appropriate court, citing an applicable statute as the basis for the request. I note that some court records may be confidential, such as those involving the details of matrimonial proceedings (see Domestic Relations Law, §235) and those involving the dismissal of criminal charges in favor of an accused (Criminal Procedure Law, §160.50).

I am unaware of the number of agencies in New York City. However, every agency must maintain a list, by category, of the kinds of records that it maintains to comply with §87(3)(c) of the FOIL. Additionally, the Department of Records and Information Services (DORIS) prepares schedules regarding the retention and disposal of City agency records. The schedules often provide a reasonable description of the kinds of records maintained by an 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/cooq/coogwww.html

FOIL-AO-15222

From: Robert Freeman
To: [redacted]
Date: 3/23/2005 12:03:18 PM
Subject: http://www.dos.state.ny.us/coog/ftext/f14159.htm

http://www.dos.state.ny.us/coog/ftext/f14159.htm

Hi - -

For reasons described in the attached opinion, I do not believe that a town may require a person seeking records to do only on its prescribed form. In short, any written request that reasonably describes the records sought should suffice.

With respect to fees, as the governing body, I believe that the Town Board may require payment of a fee of twenty-five cents per photocopy, irrespective of the number of copies requested.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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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-1523

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

March 23, 2005

Mr. Howard Ayers
93-A-2932
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

Dear Mr. Ayers:

I have received your letter concerning the "section of F.O.I.L." that you might use to request records from the office of a district attorney, a supreme court, and your former attorney.

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

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

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

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

Based on the foregoing, it is clear that the office of a district attorney constitutes an "agency" that falls within the requirements of the Freedom of Information Law. To seek records from an agency, a request may be made, citing the Freedom of Information Law and without reference to any particular section, to the agency's designated "records access officer." The records access officer has the duty of coordinating an agency's response to requests.

The courts are not subject to the Freedom of Information Law. However, court records in many instances are available pursuant to other provisions of law (see e.g., Judiciary Law, §255). A request for court records should be made to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

Lastly, private attorneys or law firms fall beyond the coverage 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-15224

41 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 24, 2005

Mr. Derrick McFadden
03-R-5838
Bare Hill Correctional Facility
Caller Box 20
Malone, NY 12953

Dear Mr. McFadden:

I have received your letter in which you requested "the new official time calculation sheet." It is assumed that the record in question involves the calculation of time served.

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

When seeking records, a request should be made to agency most likely to possess the records of your interest. In this instance, I would conjecture that the Department of Correctional Services would maintain the record. Consequently, it is suggested that a request be made to the proper person associated with the Department. When records are maintained at a correctional facility, the Department's regulations indicate that a request may be made to the facility superintendent or his designee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15225

41 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 24, 2005

E-Mail

TO: Stephen P. Moulton

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. Moulton:

I have received your letter in which you asked whether records of "the Attorney Grievance system" are subject to the Freedom of Information Law.

In this regard, I offer the following comments.

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

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

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

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

As such, the Freedom of Information Law excludes the courts from its coverage.

Second, with respect to the discipline of attorneys, §90(10) of the Judiciary Law states that:

> "Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Therefore, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable. I note, too, that a different entity, one that also performs a function on behalf of the Appellate Division in relation to §90 of the Judiciary Law, was found to exercise a judicial function, is part of the judiciary and, therefore, is outside the coverage of the Freedom of Information Law [see Pasik v. State Board of Law Examiners, 102 AD2d 395 (1984)].

I hope that I have been of assistance.

RJF:jm

FOIL-AO-15226

From: Robert Freeman
To: bjmannion@syr.edu
Date: 3/24/2005 3:00:01 PM
Subject: Dear Mr. Mannion:

Dear Mr. Mannion:

I have received your letter regarding CENTRO.

From my perspective, it is clearly a governmental entity subject to the Freedom of Information Law. I do not know the specific nature of your request, but I note that FOIL pertains to existing records, and that an agency is not required to create a record in response to a request. That being so, it has been suggested that applicants should not seek list or totals, for example, because those records might not exist. Rather, requests might be made for records that contain .....(the items or information of your interest). With respect to complaints, it has been advised that the substance of a complaint is generally accessible, but that identifying details pertaining to the complainant may be withheld to protect that person's privacy. You might indicate in a request that you recognize that to be so, but that you want the remainder that describes the nature of the complaint.

I note that our website (the address appears below) includes a great deal of information that may be useful, including our basic guide, "Your Right to Know."

If I can provide further assistance, 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-15227

41 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 24, 2005

E-Mail

TO: Judith Schurmacher

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. Schurmacher:

I have received your letter in which you wrote that you requested "back up of possible budget cuts that the school district is proposing." In response, the request was denied on the ground that the documentation constitutes "intra-agency" material. You added that "those cuts were in the public budget hearings."

In this regard, I offer the following comments.

First, insofar as the contents of records were divulged during public meetings or hearings, I believe that an agency, such as a school district, would effectively have waived its ability to deny access to those portions of the records.

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

One of the exceptions, §87(2)(g), pertains to the ability to withhold "inter-agency or intra-agency material." Nevertheless, due to the structure of that provision, it often requires substantial disclosure. Specifically, §87(2)(g) permits an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

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

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

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

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

> to 'objective' information and there no apparent necessity for such a limitation" (id. at 449).

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

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

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

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

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

In short, even 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).

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."

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15228

41 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 25, 2005

Chae S. Sone, Ph.D.
[redacted]

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

Dear Dr. Sone:

I have received your letter in which you sought assistance in obtaining records from the Office of the Professions in the State Education Department relating to your allegations involving a "falsely sworn affidavit" by a person licensed by the Department.

In this regard, although the Freedom of Information Law provides broad rights of access, I do not believe that the records at issue are accessible to the public.

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

Relevant in this instance is §87(2)(a), the first ground for denial of access. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute." In other words, when a statute other than the Freedom of Information Law specifies that certain records cannot be disclosed, those records are inaccessible to the public. One such statute is §6510 of the Education Law concerning proceedings relating to professional misconduct. Subdivision (8) of §6510 states that:

> "The files of the department relating to the investigation of possible instances of professional misconduct, or the unlawful practice of any profession licensed by the board of regents, or the unlawful use of a professional title or the moral fitness of an applicant for a professional license or permit, shall be confidential and not subject to disclosure at the request of any person, except upon the order of a court in a pending action or proceeding. The provisions of this

> subdivision shall not apply to documents introduced in evidence at a hearing held pursuant to this chapter and shall not prevent the department from sharing information concerning investigations with other duly authorized public agencies responsible for professional regulation or criminal prosecution."

Based on the foregoing, I believe that the records of your interest are exempted from disclosure.

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

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

March 25, 2005

Mr. John Quenell
[redacted]

Dear Mr. Quenell:

I have received a copy of a letter of March 4 addressed to you by Kareen Tyler, Village Clerk of the Village of Saranac Lake. As I understand her remarks, your request for "crew dispatch records" concerning fire protection and rescue services was denied on the ground that disclosure would result in "an unwarranted invasion of personal privacy" and, therefore, may be withheld pursuant to §87(2)(b) of the Freedom of Information Law. She added that you could appeal that decision to me and that the Village would make the records available if I indicate that the Village "must allow you access to these records."

In this regard, it is emphasized at the outset that this office, the Committee on Open Government, is authorized to provide advice and opinions concerning the Freedom of Information Law. Neither the Committee nor myself is empowered to require that an agency, such as the Village, must grant or deny access to records. Further, §89(4)(a) of that statute indicates that a denial of a request may be appealed the Village Board of Trustees or to a person or body designated by the Board. Specifically, that provision states in relevant part that:

> "...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."

With respect to the substance of the matter, access to the dispatch records, 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. Further, the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. That phrase quoted in the preceding sentence indicates that a single record or report may contain both accessible and deniable information. Moreover, that phrase in my opinion imposes an obligation upon agencies to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Relevant is the provision to which reference was made by the Village Clerk, which states that an agency may withhold records or portions thereof that:

> "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article..."

In addition, §89(2) lists a series of examples of unwarranted invasions of personal privacy, the first two of which pertain to:

> "i. disclosure of employment, medical or credit histories or personal references or applicants for employment;
>
> ii. disclosure of items involving the medical or person records of a client or patient in a medical facility..."

From my perspective, a record of a medical emergency call consists in part of what might be characterized as a medical record or history relating to the person needing care or service [see Hanig v. NYS Department of Motor Vehicles, 79 NY2d 106 (1992)].

In my opinion, portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, for disclosure of a name coupled with those details in my view represents a personal and somewhat intimate event in the individual's life. However, I believe that other aspects of the records, such as the locations of calls or addresses, should be disclosed. In my view, an emergency call, particularly when sirens or flashing lights are used, is an event of a public nature. When a fire truck or ambulance travels to its destination, that destination is or can be known to those in the vicinity of the event. In essence, I believe that event is of a public nature and that disclosure of an address or a brief description of an event would not likely constitute an unwarranted invasion of personal privacy. Nevertheless, the personally identifiable details described earlier could in my view be withheld.

A copy of this opinion will be forwarded to the Village Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kareen Tyler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15230

41 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 25, 2005

Mr. Paul Priore
[redacted]

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

Dear Mr. Priore:

I have received your letter and the materials attached to it. You have sought guidance concerning a request made under the Freedom of Information Law to the New York City Police Department. You requested:

> "1) All records revealing the names of the individuals who were murdered, raped, robbed, assaulted, or who committed suicide, in Flushing Meadows-Corona Park during the years 2001 to 2004.
>
> 2) All investigative reports, memoranda, letters, E-mails, and forms issued by NYPD regarding such crimes or suicides that occurred at Flushing Meadows-Corona Park during the years 2001 to 2004.
>
> 3) All written complaints, and all tapes and transcripts of telephone complaints, regarding any aspect of such crimes or suicides that occurred at Flushing Meadows-Corona Park during the years 2001 to 2004.
>
> 4) All investigative reports, memoranda, letters, E-mails, and forms issued by NYPD regarding the aforementioned written complaints, or tapes and transcripts of telephone complaints."

In response, the Department's records access officer wrote that he "must deny access...on the basis that your request is too broad and does not describe a specific document."

In this regard, I offer the following comments.

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 Department, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. However, I would conjecture that much of your request, if honored, would involve searches through hundreds or perhaps thousands of records in an effort to locate those of your interest. To the extent that is so, I do not believe that the request would have met the requirement that the records sought be reasonably described.

Lastly, I note that one aspect of your request involves rapes, and that §50-b of the Civil Rights Law specifies that records identifying victims of sex offenses are confidential and cannot be disclosed to 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: Lt. Daniel Gonzalez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15231

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

March 28, 2005

Mr. George Krahl
New York State Council of
Genealogical Organizations
98 Deseyn Drive
Canadaigua, NY 14424

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

Dear Mr. Krahl:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. You referred to the fees assessed when genealogical records are requested and asked whether those records may be inspected at no cost and copies obtained for twenty-five cents each under the Freedom of Information Law.

In this regard, the Freedom of Information Law authorizes inspection of records at no charge and a fee of up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute." In the context of your question, a different statute authorizes the assessment of the fees to which you referred in your letter. Specifically, subdivision (3) of §4174 of the Public Health Law, which was amended in 2003, refers to searches for and the fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., a registrar designated in a city, town or village. That provision states that:

> "For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of twenty dollars for each hour or fractional part of an hour of time for search, together with a fee of two dollars for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

In short, the fees envisioned by the Freedom of Information Law are not applicable with respect to requests for genealogical records.

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-15232

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

March 29, 2005

E-MAIL

TO: Joseph Castiglione

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. Castiglione:

I have received your letter in which you asked "whether tax returns submitted by a specific tax preparer could be obtained under FOIL." You indicated that "[a]ll personal and financial information in the returns could be redacted."

From my perspective, the Department of Taxation and Finance is prohibited from disclosing any portion of a return or report submitted by a taxpayer to the public.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 that statute governs, an agency is required to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. In this instance, however, I believe that a different statute governs and removes the records of your interest from the coverage of the Freedom of Information Law.

Pertinent is the initial ground for denial of access, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §1146 of the Tax Law, which in subdivision (a) states in relevant part that:

> "Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the tax commission, any tax commissioner, any officer or employee of the department of taxation and finance, any person engaged or retained by such department on an independent contract basis, or any person who in any manner may acquire knowledge of the contents of a return or report filed with the

> tax commission pursuant to this article, to divulge or make known in any manner any particulars set forth or disclosed in any such return or report."

In short, the provision quoted above in my view forbids the Department of Taxation and Finance from disclosing any portion of a return to the public, absent a court order. I note, too, that the Court of Appeals, the state's highest court, has held that "the statutory authority to delete identifying details as a means to remove records from what would otherwise be an exception to disclosure mandated by the freedom of information law extends only to records whose disclosure without deletion would constitute an unwarranted invasion of personal privacy, and does not extend to records excepted in consequences of specific exemption from disclosure by state or federal statute" [Short v. Board of Managers, 57 NY2d 399, 401 (1982)].

Lastly, while I am not an expert regarding the federal Freedom of Information Act in relation to the Internal Revenue Code, I believe the outcome of such a request made to a federal agency would be similar to that suggested above under New York law.

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

March 31, 2005

E-Mail

TO: Hon. Julie Carney

FROM: Robert J. Freeman

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

Dear Ms. Carney:

As you are aware, I have received your letter concerning your right to obtain records requested under the Freedom of Information Law in an electronic form. Specifically, you asked whether "a public employee [can] be compelled to provide an electronic version of FOILable documents..."

In my view, if a record is not stored electronically, an agency in most instances would not have the ability to make the records available in electronic form. However, when a record is maintained electronically and the agency does have the ability to do so with reasonable effort, I believe that it is required to do so.

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

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

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law. Further, the definition of

"record" includes specific reference to computer tapes and discs, and it was held more than twenty years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disc.

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, particularly if that effort involves less time and cost to the agency than engaging in manual deletions, I believe that an agency must follow the more reasonable and less costly and labor intensive course of action.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

In another decision which cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

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, 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. However, if a request is to have a record emailed, such a request does not involve asking that the records be made available in a particular information storage medium; rather, it would involve a request that it be *transmitted* to 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. An agency may choose to make records available via that method of transmission, but there is no *obligation* to do so. In short, an agency's responsibility under §§87(2) and 89(3) involves making records available for inspection and copying, and to make copies of records available upon payment of the appropriate fee.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15234

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

March 31, 2005

Deann Nelson, Ed.D.
[redacted]

Dear Dr. Nelson:

I have received your letter in which you wrote that you serve as a member of the Jamestown Board of Education. You indicated that certain records were destroyed following an investigation by a unit of the State Education Department, and you sought an opinion "concerning the destruction of public documents within days upon submitting the results of an investigation."

In this regard, the Freedom of Information Law does not include provisions concerning the destruction of records. However, the matter of retention and disposal of records is governed by law. Specifically, §57.05 of the Arts and Cultural Affairs Law provides that the Commissioner of Education is empowered:

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

The provision quoted above is implemented by a different unit within the State Education Department, the State Archives. To ascertain whether the records at issue were properly destroyed, it is suggested that you contact the State Archives.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert P. Waxman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 31, 2005

Ms. Roberta Grogan
[redacted]

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

Dear Ms. Grogan:

As you are aware, I have received your letter concerning your ability to obtain certain records from the Seaford School District. Specifically, you wrote that you requested "student profiles (absent the personally identifiable information) which were filled out by special education teachers...in order to determine potential student placement..." You were informed, however, that the District's attorney "advised that FERPA prohibits the release of such information." You indicated that you do not believe that to be so.

In this regard, I offer the following comments.

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

Second, the initial ground for denial, §87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, as suggested by the District's attorney, is the federal Family Educational Rights and Privacy Act (20 USC §1232g), which is often known as "FERPA." FERPA prohibits a school district from disclosing education records to the public to the extent that the records include personally identifiable records pertaining to a student, unless a parent consents to disclosure.

The federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

"(a) The student's name;
(b) The name of the student's parents or

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

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld from the public in order to comply with federal law. In some instances, the deletion of a student's name may be adequate to ensure that disclosure of the remainder of the record would not render "the student's identity easily traceable." In others, however, particularly when unusual or unique characteristics are associated with a certain student, disclosure of one or more of those characteristics might render the student's identity easily traceable, even after a name is deleted.

In short, insofar as any item within a record would make the student's identity easily traceable, I believe that the District would be required to deny access in order to comply with FERPA. Conversely, however, following the deletions of those portions of the record, the District must, in my view, disclose the remainder.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Assistant Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
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March 31, 2005

Mr. William S. Hecht
[redacted]

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

Dear Mr. Hecht:

As you are aware, I have received your letter concerning data collected by the Cargill Corporation pertaining to a salt mine that is owned by the State of New York. You indicated that much of the data that you have requested has been made available to the Department of Environmental Conservation ("DEC").

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) defines the term "record" 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 in possession of an agency, such as DEC, or those that are kept or produced *for* an agency, fall within the coverage of the Freedom of Information Law, irrespective of where they are physically located. Insofar as the records of your interest were prepared by Cargill for its purposes and not for an agency and which are not in possession of an agency, I do not believe that the Freedom of Information Law would apply. However, insofar as the records of your interest were prepared for or are in the possession of an agency, I believe that they would fall within the coverage of the Freedom of Information Law.

To the extent that your request involves 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. It appears that two of the grounds for denial may be pertinent to an analysis of rights of access.

Section 87(2)(d) permits an agency to withhold records or portions thereof that:

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

Further, when a commercial entity is required to submit records to a state agency, pursuant to §89(5), it may request, at the time of submission, that the records or portions thereof be kept confidential in accordance with §87(2)(d).

In my opinion, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

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

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

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the

> business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

From my perspective, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

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

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

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise."

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421).

I do not have sufficient knowledge to suggest that §87(2)(d) would or would not be applicable. It is noted that under §89(5) of the Freedom of Information Law, when a commercial enterprise seeks a guarantee that the agency to which its records are submitted will not disclose the records, and the agency agrees to do so following an appeal by a person whose request for the record has been denied, the agency has the burden of proof in its defense of the denial in an ensuing judicial proceeding commenced for review of the denial. Stated differently, to continue the protection accorded by §89(5), and agency must believe that it can prove to a court that disclosure would, in fact, cause substantial injury to the competitive position of the commercial enterprise that submitted the record. If the agency does not believe that it can meet that burden proof or does not have sufficient knowledge or information to ascertain the merits of the commercial entity's contentions, I believe that it should indicate that the request to the person seeking the record will be granted, in which case, following the exhaustion of administrative remedies, the commercial entity that submitted the record has fifteen days to commence a proceeding for the purpose of demonstrating to a court that disclosure would cause substantial injury to its competitive position.

As indicated earlier, agency records are presumptively available under the Freedom of Information Law, including those submitted to an agency by a commercial enterprise. In my opinion, while §89(5) provides additional protection to commercial enterprises that are required to submit records to state agencies, its terms preserve the presumption of access and place the burden of defending secrecy either on a state agency based on its belief that disclosure would cause substantial injury to the competitive possession of a commercial enterprise, or on the commercial enterprise.

The other exception of possible significance is §87(2)(f), which authorizes an agency to deny access to the extent that disclosure "could endanger the life or safety of any person." Again, I am unaware of the extent to which that may be so. I note, however, that §87(2)(f) may be relevant in relation to matters involving "critical infrastructure." That phrase is defined in §86(5) to mean:

> "...systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy."

I note that relatively recent amendments to the Freedom of Information Law authorize a commercial entity to seek the procedural protection accorded by §89(5) when it submits records

regarding critical infrastructure to a state agency. I am not suggesting that those records are exempt from disclosure, but rather that they may be subject to the procedure prescribed in §89(5).

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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March 31, 2005

Ms. Molly Roach
[redacted]

The staff of the Committee on 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. Roach:

I have received your letter and the correspondence attached to it. In response to a request made to the Riverhead Central School District, the Superintendent wrote that "the contents of personnel files are not to be disclosed to anyone under any circumstances in the community," and that "[i]t is a violation of federal law under Rights of Privacy to disclosed any of the contents."

There is no such law of which I am aware, and there are various aspects of personnel files pertaining to public employees that are clearly public.

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

Second, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another and from one employee to another. Neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

Third, based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties

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

There numerous instances in which portions of personnel records are available, while others are not. By means of example, items within a record indicating a public employee's gross pay would be accessible, but items involving charitable contributions, alimony, deductions and the like would be exempt; those latter items are unrelated to the performance of one's official duties. Attendance records indicating time in and out, days and dates of leave claimed have been found to be accessible (see Capital Newspapers, supra), but portions of those records indicating an employee's medical condition could be withheld.

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.

In an effort to enhance understanding of and compliance with law, a copy of this opinion will be sent to the Superintendent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Paul R. Doyle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15238

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March 31, 2005

Ms. Carolyn Horowitz
[redacted]

Dear Ms. Horowitz:

I have received your letter in which you sought an opinion "about being barred from inspecting unsealed court records" by the Village of East Hills. Additionally, you wrote that you were "banned from public property" and "denied access" to the Village Hall.

In this regard, the advisory jurisdiction of the Committee on Open Government relates to the Freedom of Information and the Open Meetings Laws, neither of which is generally applicable in the situation that you described.

I point out that the Freedom of Information Law pertains to agency records and that §86(3) of that statute defines the term "agency" to mean:

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

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

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts. Nevertheless, other statutes frequently grant broad rights of access to court records. For instance, §255-b of the Judiciary Law states that "A docket-book, kept by a clerk of a court, must be kept open, during the business hours fixed by law, for search and examination by any person." In addition, section 2019-a of the Uniform Justice Court Act, which applies to town and village courts, entitled "Justices' criminal records and docket", provides in relevant part that: "The records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Michael Fobbny
Hon. Arthur Goldberg
Mary Alice Ponzo
William Barton

STATE OF NEW YORK
DEPARTMENT OF STATE
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March 31, 2005

Ms. Donna Suhor
Capital District Coalition
for Accessible Transportation
P.O. Box 685
Troy, NY 12181-0685

The staff of the Committee on 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. Suhor:

I have received your correspondence concerning requests made pursuant to the Freedom of Information Law to Albany County. You asked whether I can "stop them from asking for a form."

In this regard, the Committee on Open Government is not empowered to "stop" an agency from engaging in an activity. However, the Committee is authorized to prepare opinions concerning the Freedom of Information Law. While the opinions are not binding, it is our hope that they are educational and persuasive. With that goal, I offer the following comments.

First, by way of background, an agency may, pursuant to §89(3) of the Freedom of Information Law, require that a request be made in writing. The same provision states that an applicant must "reasonably describe" the records sought. Consequently, a request should include sufficient detail to enable agency staff to locate and identify the records. It also provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Second, 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, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that it unnecessarily serves to delay a response to or deny a request for records.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. Thomas Clingan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 1, 2005

E-Mail

TO: Lynn Jennings

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. Jennings:

I have received your letter concerning your request for records involving a matter occurring in 1974 in which the agency has indicated that the records are lost. You have asked "what can be done" in that kind of situation.

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 regret that I cannot be of greater assistance.

RJF:jm

FOIL-AO-15241

From: Robert Freeman
To: [redacted]
Date: 4/1/2005 8:28:00 AM
Subject: Dear Mr. Bowman:

Dear Mr. Bowman:

I have received your letter in which you expressed interest in knowing the number of citations issued by the DEC regarding a particular air quality regulation "and then how many of those were dismissed by the court."

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 or prepare a record in response to a request. If, for example, statistical compilations containing the information sought have been prepared, I believe that those compilations would be accessible. However, if no such statistics exist, the Department would not be required to review its records for the purpose of creating new records on your behalf.

Second, the same provision requires that an applicant "reasonably describe" the records sought. It has been held, in brief, that if an agency can locate and identify the records requested with reasonable effort, the applicant has reasonably described the records. On the other hand, if an agency's effort would involve the review of hundreds or thousands of records individually to locate those falling within the scope of the request, the request would not meet the standard of reasonably describing the records. Often, whether or the extent to which a request meets that standard is dependent on the nature of an agency's filing, recordkeeping or retrieval systems. If all citations are recorded chronologically, for example, and all would have to be reviewed to locate those involving only the regulation that you cited, it is doubtful that the request would reasonably describe the records.

I note, too, that your request is open-ended in terms of time and location. If it is intended to include all citations since the regulation become effective, it may be relatively easy to locate recent citations but difficult to locate those issued years ago. It is also unrestricted in terms of location. If the request is intended to include the entire state, other issues may arise, for the DEC operates out of 11 regional offices, and each may have records falling within the scope of your inquiry. Further, there may be no series of records or compilations indicating the number of those that might have been dismissed by a court.

It is suggested that you contact the Department's Division of Air Resources, Bureau of Compliance Monitoring and Enforcement in an effort to learn whether and the manner in which the information of your interest is maintained. That office can be reached at (518)402-8404.

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-15242

From: Robert Freeman
To: brown@stlawu.edu
Date: 4/5/2005 8:45:30 AM
Subject: Dear Ms. Brown:

Dear Ms. Brown:

I have received your inquiry concerning the status of the "NYPA" under the Freedom of Information Law. It is assumed that the abbreviation is intended to refer the New York Power Authority.

If that is so, there is no doubt that the Power Authority is subject to the Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to include all entities of state and local government in New York, except the courts and the State Legislature. Further, the definition specifically includes public corporations, and all public authorities in New York are public corporations.

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

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

FOIL-AO-15243

From: Robert Freeman
To: [redacted]
Date: 4/5/2005 9:15:28 AM
Subject: Dear Mr. Varno:

Dear Mr. Varno:

I have received your letter concerning access to "a transcript or recording...of a police department's communications between officers and dispatch."

In this regard, in brief, there is no doubt that the transcript or recording constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. However, the content of the record and the effects of disclosure would serve as the factors considered in determining rights of access. While the kind of record of your interest might be accessible in some instances, it might be deniable in whole or in part in others. Disclosure in some cases might interfere with an investigation, include personally identifiable medical or other information that may be withheld based on considerations of privacy, or the communications might include an expression of opinion or opinion that may be withheld. On the other hand, if it is merely an expression of fact (i.e., "there is a motor vehicle accident at the intersection of First and Main"), I believe that the record would be accessible.

In short, again, the content of the record would determine whether or the extent to which it would be be accessible. If you would like additional detail regarding the possibilities, please inform me so that I can prepare a more expansive review within an advisory opinion.

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-1524

41 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 5, 2005

E-Mail

TO: Diane Crosser

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. Crosser:

I have received your inquiry in which you sought "clarification of the time permitted for the issuing of school district info to a private citizen" and asked whether it is "5 days or 10".

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which an agency, such as a school district, must respond to a request. In short, an agency must respond in some manner within five business days of the receipt of a request. More specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of 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-15245

41 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, 2005

Mr. Joe Guarneri
05-B-0213
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

Dear Mr. Guarneri:

I have received your correspondence, which is characterized as an appeal concerning a request for records.

In this regard, I point out that 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 a denial of access to records by an agency, §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."

Since the matter appears to involve a request for court records, it is emphasized that the Freedom of Information Law does not apply to the courts. That statute applies to agency records, and §86(3) defines the term "agency" to mean:

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

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

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

Based on the foregoing, again, courts fall outside the coverage of the Freedom of Information Law.

This is not intended to suggest that court records are not public. On the contrary, other statutes may provide broad rights of access to those records (see e.g., Judiciary Law, §255). To seek court records, it is suggested that a request be made to clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

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

From: Robert Freeman
To: info
Date: 4/6/2005 4:09:48 PM
Subject: Re: http://www.dos.state.ny.us/coog/ftext/f11827.htm

If records are sealed, as in the case of records concerning situations in which charges against an accused are dismissed in his or her favor under §160.50, they remain sealed uniess and until a court orders their disclosure. With respect to family court records, §166 of the Family Court Act, entitled "Privacy of records", states that family court records "shall not be open to indiscriminate public inspection", but that a court has the discretion to permit the inspection of records.

I hope that I have been of assistance.

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

>>> "info" <info@mackandassociates.net> 4/6/2005 11:50:34 AM >>>
Gov.

Yeah I understood that....what about the sealed records? Also, what about family court records such as restraining orders? Thanks for all of your help.

Dave

David Mack and Associates Inc.
Private Investigative and Research Services
Po Box 24633 Rochester NY 14624
P 585-225-6970 F 585-225-3119
www.MACKANDASSOCIATES.NET
Serving Western NY and the Southern-tier
----- Original Message -----
From: Robert Freeman
To: info@mackandassociates.net
Sent: Wednesday, April 06, 2005 10:48 AM
Subject: http://www.dos.state.ny.us/coog/ftext/f11827.htm

http://www.dos.state.ny.us/coog/ftext/f11827.htm

Attached is an opinion concerning probation records that I hope will be useful to you.

As for the news article, from my perspective, it's not news. The article describes the law as I have always understood it. If a person is charged with a felony and it's pleaded down to a misdemeanor, the plea involves a conviction, and the record of the conviction is public.

Hope all is well.
Bob Freeman

Robert J. Freeman
Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3962
FOIL-AO-15247

41 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, 2005

Ms. Naomi Rubin
[redacted]

Dear Ms. Rubin:

As you are aware, your letter addressed to Comptroller Hevesi 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 pertaining to the Open Meetings Law. You have asked whether a "not for profit entity that obtains funding from the State for some of its programs is required" to comply with that statute.

In this regard, the Open Meetings Law is applicable to public bodies, and the phrase "public body" is defined in §102(2) of that law to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, the Open Meetings Law applies to governmental entities, such as city councils, town boards, boards of education and the like. It does not generally apply to meetings of not-for-profit or other private organizations.

I note, however, that the companion of the Open Meetings Law, the Freedom of Information Law, may be of utility to you, for its coverage is more expansive. That statute applies to agencies, and §86(3) defines "agency" to include:

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

The provision quoted above indicates that all units of state and local government in New York fall within the scope of the Freedom of Information Law. Perhaps more importantly, that law includes all agency records, irrespective of their origin or function. The term "record" for purposes of the Freedom of Information Law is defined to mean:

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

When a not-for-profit or other organization receives funding from or has a relationship with an agency, the records maintained by the agency concerning the not-for-profit or other entity fall within the coverage of the Freedom of Information Law. In short, that law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Enclosed for your consideration is "Your Right to Know", which summarizes the provisions of both the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

OML-AO- 3961
FOIL-AO-15248

From: Robert Freeman
To: MULLEN, VICTORIA
Date: 4/8/2005 8:18:42 AM
Subject: Re: GUESS WHO NEEDS HELP

Good morning - -

It doesn't seem that the request should be difficult to answer. The budgets are clearly available, as are the minutes of open meetings. With respect to executive sessions, when a public body, such as a town board, conducts an executive session and merely discusses an issue but takes no action, there is no requirement that minutes be prepared. If action is taken during an executive session, the minutes must merely consist of an indication of the nature of the action taken and the vote of each member. Further, §106(2) of the Open Meetings Law provides, in essence, that minutes of executive seesions need not include information that may be withheld under the Freedom of Information Law.

The provision to which you were alluding, §87(2)(c) of the Freedom of Information Law, states that an agency may withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." Again, minutes of open meetings would clearly be accessible, and I would conjecture that minutes of executive sessions, if they exist at all, would be brief and would not include a great deal of detail. If that is so, it would be doubtful in my view that disclosure would "impair" the collective bargaining process.

I hope that this will be of help to you.

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

>>> "MULLEN, VICTORIA" <VMULLEN@oswego.org> 4/8/2005 8:03:51 AM >>>
Robert.....hello hope you are well!...

When it rains it pours

I have a letter requesting information. It comes from the Teamsters negotiator. We are at stand still with contract negotiations. His letter says

..."This is a request pursuant to the New York State Freedom of Information Law.

This requests copies of the Town Budget for the years 2003,2004,2005. This request includes a request for minutes of the town board of any meetings where the line item for employee salaries, benefits and /or other compensation was discussed. If you claim that any of this request, either

in whole or in part is exempt from public disclosure, please set forth with particularity the basis for your claimed exemption along with the legal authority for withholding such information.

I am requesting this information in as expeditious manner as possible, but in no event later than ten days from the date of your receipt of this request."

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15249

41 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 11, 2005

Ms. Hillary Hunter
Mr. Kay Hilsberg
[redacted]

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

Dear Ms. Hunter and Mr. Hilsberg:

I have received your letter and the materials attached to it. It is my understanding that the City of Syracuse has made available to you all records in its possession that fall within the scope of your requests, with one exception. Although it appears to be your belief that records exist in addition to those disclosed to you and the one record to which access has been denied, my conversation with Assistant Corporation Counsel Bergh indicates that is not so.

In this regard, with respect to the record that has been withheld, the City indicated that §87(2)(g) served as the basis for denial. That provision authorizes an agency, such as the City of Syracuse, to withhold records that:

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

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

appropriately be asserted. Concurrently, those 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 access is denied, the applicant may appeal the denial in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

Lastly, although reference is made in the correspondence to a certification regarding the existence of records or the inability to locate them, it is unclear whether a certification was requested or prepared. In short, 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 have not already done so and 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: Joseph Francis Bergh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15250

41 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 11, 2005

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 facts presented in your correspondence.

Dear Mr. Berman:

I have received your letter of April 4 in which you expressed an understanding that a copy of an advisory opinion prepared at your request will be sent to the agency that is the subject of your correspondence.

You raised a series of questions and issues in your letter of January 24. While some of them can be addressed, others likely cannot. However, in effort to provide guidance, I offer the following comments.

First, as you may be aware, the Freedom of Information Law in §89(3) requires that an applicant "reasonably describe" the records sought. In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals in Konigsberg v. Coughlin [68 NY2d 245 (1986)] may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system.

While I am unfamiliar with the record keeping systems of the 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, if records sought cannot be located with reasonable effort, I do not believe that a request would meet that standard. For instance, if the Nassau County telephone directory telephone is an agency record that falls within the coverage of the Freedom of Information Law and a request is made for the listings for those people whose last name is Berman, the request would reasonably the records, irrespective of the number of Bermans listed. In short, the listings appear by last name alphabetically. In contrast, if a request is made for all of the listings pertaining to persons whose first name is Gary, the request would not reasonably describe the records, despite its specificity and the knowledge that some of the listings include reference to people whose first name is Gary, for locating those items would involve a review of each listing individually.

Second, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

Since you referred to a decision rendered in Michigan, I point out that each state has enacted a law dealing with public access to government records. Each such law is different, and the law in other states has little if any influence concerning rights of access to records in New York.

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

Third, with respect to the discipline of a public employee, two of the grounds for denial are pertinent to an analysis of rights of access.

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

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

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

iii. final agency policy or determinations; or

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

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

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

Next, you inquired with regard to recommendations by the Superintendent concerning the hiring of coaches. As suggested above, those portions of inter-agency or intra-agency materials consisting of recommendations, advice or opinions may be withheld.

Lastly, you inquired "about the providing of false information by district employees." Certainly, providing accurate information should be a goal of government agencies. However, the issue under the Freedom of Information Law when a request is made involves whether or the extent to which one or more of the grounds for denial of access may properly be asserted. If a record indicates that two plus two equals five and there is no basis for denying access, an agency must disclose. In short, the Freedom of Information Law does not deal directly with the accuracy of the content of records, but rather with disclosure and the ability of an agency to deny access to records in accordance with the exceptions appearing in the law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Superintendent, Valley Stream Central High School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15251

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

April 13, 2005

Mr. Wayne Barrett
The Village Voice
36 Cooper Square
New York, NY 10003-7118

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

Dear Mr. Barrett:

As you are aware, I have received a variety of materials from you and your staff relating to a request for records of the Port Authority of New York and New Jersey (hereafter "the Authority").

The following commentary will not focus on the status of the Authority under the New York Freedom of Information Law (hereafter "FOIL"). Nevertheless, by way of background, in a decision involving the application of that statute 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." Although I know of no judicial decision involving the status of the Authority under the FOIL, based on the assumption that the same conclusion would be reached concerning the Authority, it has been advised that the Authority likely is not required to comply with that statute.

Notwithstanding the likelihood that it may not be subject to the FOIL, the Authority adopted a policy which, as I understand it, is intended to be based on and largely consistent with the FOIL. A review of the policy indicates that several portions are analogous to and essentially verbatim recitations of provisions in the New York statute. You referred, however, to a response to a request which, in my view, is clearly inconsistent with the direction offered by FOIL. Specifically, you were informed that the Authority's policy:

> "...provides that if a search for records requested requires more than one-person hour, a fee will be charged for that research. It is estimated that it will take 32 hours of staff time at a composite rate of $119.00 per hour for a total of $3,808.00 to search for material

> responsive to items 1, 2, 4, 9, portions of 10, 11, 14 and 18 of your request."

The policy itself is inconsistent with the FOIL, and the response to your request appears to reflect an extreme implementation of the policy. Subdivision (d)(3) of the policy states that:

> "In the event a search for records requested requires more than one person hour, or in the event a search of computer records requires programming which would take more than one person hour, a fee will be charged at the rate of not less than five dollars per hour, or any part thereof, per person assigned to such search or programming."

The charge sought to be assessed in this instance appears to be excessive, even in consideration of the Authority's policy.

When FOIL governs, the only fee that may be charged involves the duplication of records; no fee may be assessed for search, research or personnel time. Section 87(1)(b)(iii) refers to the obligation of an agency to promulgate rules and regulations to implement the law that are consistent with the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) that pertain to:

> "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, an agency may charge up to twenty-five cents for photocopying a record up to nine by fourteen inches; no fee may be charged for search time or other personnel related costs. I point out that in considering the reproduction of records that are not or cannot be photocopied (i.e., computer tapes, audio tape recordings, etc.), the Committee's regulations state that the fee in those instances "shall not exceed the actual reproduction cost which is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries" [21 NYCRR §1401.8(c)(3)].

It is also noted that although compliance with the FOIL involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

In sum, I believe that the Authority's policy and procedure concerning the ability to charge a search fee or any fee other than that assessed for reproducing records is inconsistent with the FOIL.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Kathleen P. Bincoletto

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15252

41 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 14, 2005

E-Mail

TO: Bill Landers

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. Landers:

I have received your letter in which you asked whether the Freedom of Information Law applies only "to government matters."

In this regard, that statute applies to agency records, and §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."

Based on the foregoing, the Freedom of Information Law is applicable to entities of state and local government in New York.

I point out that the law includes all government records within its coverage, for §86(4) defines the term "record" to include:

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

If I understand your comments correctly, records maintained by agencies that include personally identifiable information are subject to rights granted by the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Therefore, whether or the extent to which records identifiable to individuals would be available is based on the content of the records and the effects of their disclosure. For instance, intimate personal information ordinarily may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §89(2)(b)].

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15253

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

April 15, 2005

Mr. Kevin Sheils
99-A-5444
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12953

Dear Mr. Sheils:

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

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. 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."

Second, you have appealed a denial of access to a shirt. According to Allen v. Strojnowski [129 AD2d 700, motion for leave to appeal denied, 70 NY2d 871 (1989)], items such as clothing, do not constitute "records." That being so, the Freedom of Information Law would not apply in the context of that aspect of your appeal.

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15254

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

April 15, 2005

Ms. Lianne Hong
Stony Brook University
400 Circle Road, Greeley 254
Stony Brook, NY 11790

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

Dear Ms. Hong:

I have received your letter in which you referred to a request made pursuant to the Freedom of Information Law for records of the State University at Stony Brook. You were told that the materials of your interest are not maintained on paper but are stored in a computer and must be printed out for you to gain access. The staff person with whom you spoke indicated that the fee would be twenty-five cents per printed page and, in your words, "that photocopies and print outs are basically the same thing."

In my opinion, the Freedom of Information Law distinguishes between fees for photocopies of records and the fees that may be charged for records made available by means other than photocopying. Specifically, §87(1)(b)(iii) pertains to the rules and regulations that must be adopted regarding fees, and refers to:

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

The foregoing clearly indicates that agencies may charge up to "twenty-five cents *per photocopy*." The quoted phrase pertains only to photocopying . Information stored in a computer that is printed out does not involve photocopying, and fees in that instance must be based upon the actual cost of reproduction. In most instances in which materials are printed out, the actual cost of reproduction involves computer time, which ordinarily is minimal, and the cost of an information medium, i.e., computer tape, a disk, or in this instance, paper.

In an effort to offer clarification and to enhance compliance with law, a copy of this response will be forwarded to the staff person to whom you referred.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eileen Ippolito

FOIL-AO- 15255

From: Robert Freeman
To: Ann Leber
Date: 4/15/2005 11:54:53 AM
Subject: Re: FOIL Request

Hi Ann - -

I have heard from one other clerk regarding the request, and you are likely correct in your assumption that other municipalities have received the same request.

Because I did know the nature of the data requested, I contacted the Office of Real Property Services (ORPS). I was told that the request involves an extract of certain data from the tax roll that can be used to create tax bills. Further, once disclosed in form requested, the recipient, according to ORPS, could manipulate the data. An analogy was made to counterfeiting, whereby a person has the plates to print the money, and then asks for and receives the paper.

If I am understanding the situation correctly, it appears that §87(2)(i) of the Freedom of Information Law may be asserted to deny the request. That provision is relatively new and 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 indeed disclosure would enable a recipient of the data to print tax bills or manipulate your data, the exception cited above, in my view, could be asserted to deny access.

I hope that I have been of assistance.
>>> "Ann Leber" <ALEBER@northcastleny.com> 4/14/2005 9:58:39 AM >>>
Dear Bob,

The Town of North Castle has received a FOIL request from Primary FOIL Services, LLC, in Tarrytown, NY, requesting "an electronic extract of all 2005 Town and County Tax RPS160D1 files created by our county for its local municipalities and an actual copy of a tax bill...."

I believe other municipalties have also received the same request. PFOIL claims it is using the "data to provide duplicate tax bill services to businesses throughout the country."

It sounds to me like the information requested would be used for commercial purposes such as solicitation. In that case, I don't believe we must supply the data. Please advise. (If you would like me to fax a copy of the letter to you, please send me your fax number.)

Thanks, as always, for your help.

Sincerely,
Ann Leber

Ann Leber, Town Clerk
Town of North Castle
15 Bedford Road
Armonk, NY 10504
(914) 273-3321 phone
)914) 273-4176 fax

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-15256

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

April 18, 2005

Mr. David Brooks
95-A-2405
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

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

Dear Mr. Brooks:

I have received your letter in which you indicated that you have been denied access to records under the Civil Rights Law, §50-b. You wrote that your daughter falsely testified at your sex offense trial and has now admitted that to be so. You asked if your daughter can give permission to release the records to you.

In this regard, §50-b(2) of the Civil Rights Law states that:

> "The provisions of subdivision one of this section shall not be construed to prohibit disclosure of information to...
>
> (c) Any person or agency, upon written consent of the victim or other person legally responsible for the care of the victim, except as may be otherwise required or provided by the order of a court."

As such, it appears that, unless otherwise ordered by a court, your daughter, if she was the alleged victim of a sex offense, could give written consent to have the records released to you.

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 - 15257

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

April 18, 2005

Mr. Ruben Slacks
92-A-6182
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. Slacks:

I have received your letter in which you wrote that you requested records from the Office of the Queens County District Attorney and that its response to you indicated that "within sixty days" a determination would be made concerning your request. After more than sixty days passed, you wrote again and were told that an additional sixty days would be needed.

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

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

It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added]. In the context of your correspondence, it appears that approximate dates have been given, but that the agency has repeatedly gone beyond those dates.

In a case that described an experience similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89 (3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming.
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the agency "is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law, §89(4)(a)."

Based on the foregoing, I believe that your requests have been constructively denied and that you may appeal the denials pursuant to §89(4)(a). That provision states in relevant part that:

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

Alternatively, based on the holding in Bernstein, it appears that you could seek judicial review of the denials now. I suggest, however, that you appeal in an effort to avoid the time and cost of litigation.

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

I hope that I have been of assistance.

Sincerely,

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-15258

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

April 18, 2005

Mr. Angel Alvarado
93-A-8360
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Dear Mr. Alvarado:

I have received your letter in which you requested "copy/copies of the New York State Department of Correctional Services Minimum Standards Guide Rules of Directives and the City of New York Correctional Services Facility Minimum Standard Guide Rules."

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

When seeking records, a request should be made to agency most likely to possess the records of your interest. In this instance, the New York State Department of Correctional Services would maintain some of the materials of your interest. Consequently, it is suggested that a request be made to the proper person associated with the Department. When records are maintained at a correctional facility, the Department's regulations indicate that a request may be made to the facility superintendent or his designee.

With respect to records concerning New York City Department of Corrections, a request should be made to Thomas Antenen, Records Access Officer, Department of Corrections, 60 Hudson Street, 6th Floor, New York, NY 10013.

Also, as indicated on our letterhead, the Committee is now located at a different address from that appearing in your letter.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

OML-AO-3907
FOIL-AO-15259

From: Robert Freeman
To: Jill Warner
Date: 4/20/2005 5:05:27 PM
Subject: Re: Thruway Authority

Hi Jill - -

Let me offer congratulations on your appointment. I hope that you will feel free to call or write if ever you believe that I can offer guidance.

With respect to your first area of inquiry, you or, in fact, anyone may tape record an open meeting of a public body. Clerks, secretaries and others frequently do so for the reason to which you referred, to ensure the accuracy of minutes. It has also been held that others who attend meetings may tape or video record the meetings, so long as the use of the recording device is not disruptive or obtrusive. As for the ability to erase the tape after minutes have been prepared, I note that there are provisions in the Arts and Cultural Affairs Law, Article 57, that deal with the retention and disposal of records. In brief, state agencies are required to preserve their records until a minimum retention period established by the Commissioner of Education (through the State Archives) has been reached. I am unaware of whether a retention schedule has been established in this instance, and it is suggested that you might confer with the Authority's records manager or contact the State Archives. I believe that the person to speak with is Tom Ruller, who can be reached at 474-5561.

Section 106 of the Open Meetings Law pertains to minutes. In brief, if the Board enters into executive session and merely discusses one or more topics but takes no action, there is no requirement that minutes of the executive session be prepared. It is noted that a public body may take action during a proper executive session, so long as the vote is not to appropriate public moneys. If action is taken, the law requires that minutes be prepared within one week indicating the nature of the action taken and the vote of each member. The minutes would have to be available to the public to the extent required by the Freedom of Information Law. In most cases, as a matter of practice, public bodies do not take action during executive sessions; rather, they discuss an issue in private and vote in public when the executive session ends and they return to open session.

I hope that I have been of assistance.

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

>>> "Jill Warner" <jill_warner@thruway.state.ny.us> 4/20/2005 3:56:59 PM >>>
Hi Bob,
I am the "new" Board Secretary and have two questions with regard to Board Meeting Minutes. Is there any issue with taping the meetings on a mini recorder to ensure accurate notes are taken and then erasing the tapes after the official Minutes are written up?

Also, we do not currently take Minutes on Executive Session discussions - is this something we should start doing? If a vote is taken in public session on an Item that was discussed in Executive Session that is reflected in the current version of the minutes, but that is all.

I appreciate your guidance on these issues.

Jill Warner

FOIL-AO- 15260

From: Robert Freeman
To: Gurnett, Kate
Date: 4/22/2005 9:14:20 AM
Subject: RE: Larry Sombke FOIL

Good morning again - -

I would advise that you follow up with hard copy. There is a provision of law that few know about, section 305(1) of the State Technology Law, which states in part that state agencies "are authorized and empowered, but not required, to produce, receive, accept, acquire, record, file, transmit, forward, and store information by use of electronic means." In consideration of that statute, while the recipients of your requests made by email may choose accept the requests, they are not required to do so. To be certain that your requests are appropriate, again, it is suggested that printed copies be sent to the records access officers.

I hope that this will be helpful.

Bob

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15201

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

April 22, 2005

E-Mail

TO: William O'Connor

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. O'Connor:

I have received your letter and would like to express regrets concerning your loss.

You indicated that your nephew was killed in Queens on October 11, 2003 and that 911 calls were made relating to the incident. You have asked for guidance concerning your ability to gain access to transcripts or tapes of the calls.

In this regard, first, it is emphasized that the Freedom of Information Law pertains to existing records. I am unaware of the length of time that transcripts or tapes of 911 calls are kept, and it is possible that those records might have been destroyed. If that is so, the Freedom of Information Law would not apply.

Second, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and a request should be made to that person. The records at issue, if they continue to exist, would likely be maintained by the New York City Police Department. A request can be directed to Lt. Daniel Gonzalez, Records Access Officer, NYPD, Room 110C, One Police Plaza, New York, NY 10038.

Third, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records. Therefore, when seeking records, sufficient detail, such as dates, times, locations, descriptions of events, etc., should be included to enable Department staff to locate and identify the records sought.

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. That being so, the content of records and the effects of disclosure serve as key factors in determining rights of access.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15262

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

April 22, 2005

[redacted]

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

Dear Mr. [redacted]

I have received your letter in which you sought an advisory opinion concerning your request for records relating to your daughter's "denial for membership into the Taconic Hills Central School Chapter of the National Honor Society."

According to the materials attached to your letter, based on the by-laws of the National Honor Society, 48 teachers completed evaluation forms pertaining to students found to be eligible for membership. You requested records indicating the names of the "5 primary and 2 alternate members of the National Honor Society Selection Committee", the "evaluation form distributed to teachers", the evaluation form used by the Selection Committee, the "completed evaluation forms" prepared by teachers pertaining to your daughter, and notes and minutes take at meetings of the Selection Committee. You wrote that you were informed that the advisor to the National Honor Society, Ms. Tonya Frickey removed "all notes, works in progress and evaluations...from the school", took them to her home and burned them. Additionally, you wrote that "School officials indicated that they were following the by-laws of the national organization and said that the by-laws took precedent over state and federal laws."

In this regard, I offer the following comments.

First, the by-laws of the National Honor Society are not law. In my view, insofar as any such by-laws or guidelines are inconsistent with the laws of New York or federal law, they are invalid and should be deemed superseded.

Second, the Freedom of Information Law pertains to all existing records maintained by or for an agency, such as a school district, and defines the term "record" expansively to include:

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

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

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

In another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Further, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property

but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

In short, in her capacity as an advisor for a District sponsored activity, any records prepared or acquired by Ms. Frickey or any other District officer or employee would in my view 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.

With regard to your request, insofar as a record or records include the names of the Selection Committee, I believe that they must be disclosed. There is nothing intimate or personal about their identities, and in my view, it could not justifiably be contended that disclosure would constitute an unwarranted invasion of personal privacy [see §87(2)(b)]. I believe that blank evaluation forms would also be accessible, for none of the grounds for denial of access would be applicable.

Next and perhaps most significant is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "FERPA". In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. 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 other school official 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 "disclose" 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 records (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, a teacher or other official 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.

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 affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could

appropriately be asserted. Concurrently, those 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.

Lastly, the statutes to which reference has been made, the Freedom of Information and FERPA, pertain to existing records. If records have been destroyed, there may be few, if any, to be disclosed. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

It is emphasized government agencies and their employees cannot destroy records at will. 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..."

In view of the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and school district officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. The provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
David A. Paciencia
Tonya Frickey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 22, 2005

Ms. Natalie Okin
[redacted]

The staff of the Committee on 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. Okin:

As you aware, I have received a variety of materials from you concerning your request made under the Freedom of Information Law to the Nassau County Civil Service Commission. The request involves the "title, grade, salary, class, exam score, Dept. termination date or resignation date, hire date or dates" pertaining to named individuals. In response, you were informed that the "information as kept contains confidential material on other employees." Later, however, you received information reflective of the names of five employees; the titles, salaries and dates of employment were included with respect to three; an exam score was given with respect to one; only a title was given in relation to a former employee; and you were informed that the information sought was already disclosed to you concerning a fifth employee.

From my perspective, each of the items that you requested must be disclosed to comply with the Freedom of Information Law. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the grounds for denial of access that follow. The phrase quoted in the preceding sentence indicates that there are instances in which a single record might include both accessible and deniable information and that an agency is required to review records that have been requested in their entirety to determine which portions, if any, may justifiably be withheld. In short, even if records include information that may properly be withheld, it does not follow that they may be withheld in their entirety; on the contrary, even though portions of records may be redacted, the remainder must be disclosed.

Second, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ

from one agency to another and from one employee to another. Neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). The contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

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

There 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 would be exempt; those latter items are unrelated to the performance of one's official duties. Attendance records indicating time in and out, days and dates of leave claimed have been found to be accessible (see Capital Newspapers, supra), but portions of those records indicating an employee's medical condition could be withheld.

In my view, each of the items that you requested, including the dates of initial employment, resignation or termination, as well as the dates on which employees were rehired, are clearly relevant to the duties of public employees and, therefore, are accessible. I note, too, that Department of Civil Service regulations have long required that eligible lists identifying persons who passed civil service exams with their grades, be made available (see §71.3).

Lastly, in affirming the Appellate Division decision in Capital Newspapers, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, again, it is clear in my view that the items at issue must be disclosed under the Freedom of Information Law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Karl Kampe
Ruth Markovitz, Deputy County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 28, 2005

Mr. Antoine D. Smith
01-B-1894
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. Smith:

I have received your letter of April 11 and the materials attached to it. You requested an advisory opinion concerning your request for a chronological listing of all documents in your file under the Freedom of Information Law that was directed to the Erie County Supreme Court.

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.

Lastly, I point out that the Erie County Supreme Court may not maintain a "chronological listing" of all the documents in your file and it is suggested that you request particular documents.

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
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April 28, 2005

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 information presented in your correspondence.

Dear Mr. TerBorg:

As you are aware, I have received your letter concerning your unsuccessful attempts to gain access to a record indicating why the Monroe County Public Defender's Office could not represent you in the past due to a "conflict of interest", but can represent you now. Although you wrote that you enclosed copies of your requests, none were enclosed.

In this regard, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, County officials in my view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive. In short, in the future, rather than seeking information or raising questions, it is suggested that you request existing records.

Insofar as a request involves 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..."

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

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

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

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April 28, 2005

E-Mail

TO: Elisha Tomko

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. Tomko:

I have received your inquiry in which you asked whether school districts fall within the coverage of the Freedom of Information Law.

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

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

A school district clearly is a municipal governmental entity. Further, it is a public corporation. Consequently, it is clear that school district constitute agencies that are required to comply with the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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April 28, 2005

Mr. Robert M. Wesolowski
95-A-2405
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

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

Dear Mr. Wesolowski:

I have received your letter in which you indicated that you have encountered difficulty in obtaining a variety of records from your correctional facility. The records requested were audio/video recordings of particular housing units which are recycled after fifteen days, misbehavior reports concerning other inmates, lawsuits filed against your correctional facility, telephone numbers and e-mail addresses of employees, as well as disciplinary records concerning employees of your facility. You also asked whether you have to pay twenty-five cents per photocopy as required by the Freedom of Information Law, or whether you may copy the records at your facility library at a lower cost.

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

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

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

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

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

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

Second, I do not believe that an agency can destroy or dispose of a record that has been requested pursuant to the Freedom of Information Law. The record must, in my view, be preserved during the pendency of any request or appeal.

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

From my perspective, two of the grounds for denial are pertinent to an analysis of rights of access. The extent to which they may properly be asserted is, in my opinion, dependent on the nature of the depictions on the videotapes.

Relevant are §87(2)(b), which authorizes an agency to withhold records when disclosure would constitute " an unwarranted invasion of personal privacy", and §87(2)(f), which enables an agency to withhold records to the extent that disclosure "could endanger the life or safety of any person."

In a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

> "...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution. Moreover, respondents' regulations require disclosure to news media

> of an inmate's 'name *** city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7 NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff under §87(2)(f).

Further, in a case involving videotapes of events occurring at a correctional facility, in the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. However, other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy and endanger life and safety [see 174 AD2d 212 (1992)].

In short, based on the language of the Freedom of Information Law and its judicial interpretation, I believe that the Department is required to review the videotapes falling within the scope of your request to attempt to ascertain the extent to which their contents fall within the grounds for denial appearing in the statute.

Second, with respect to your request for misbehavior reports of other inmates, two statutes, the Freedom of Information Law and the Personal Privacy Protection Law (respectively Articles 6 and 6-A of the Public Officers Law), are pertinent to the matter. Due to the language of those statutes, they must be construed together and in relation to one another.

The Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of that statute, the term "record" is defined to mean "any item,

collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

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

I note that a similar issue was reviewed in Kavanagh v. Department of Correctional Services (Supreme Court, Albany County, April 22, 1986). In brief, in that case, a district attorney requested misbehavior reports and their final dispositions pertaining to particular inmate, and it was held that the reports, which included allegations that were not substantiated, could be withheld on the ground that disclosure would result in "personal hardship" to the inmate and constitute "an unwarranted invasion of personal privacy" pursuant to §89(2)(b)(iv) of the Freedom of Information Law.

On the other hand, however, if an inmate was found to have engaged in a violation or misconduct, a final determination reflective of such a finding would, in my view, be accessible. In numerous contexts, it has been advised that records relating to unsubstantiated charges, complaints or allegations may be withheld to protect the privacy of the accused. But when there is a determination indicating misconduct with respect to public employees (with the exception of those employees subject to §50-a of the Civil Rights Law, which will be discussed later), licensees and others, it has consistently been advised that the determination is accessible, for there is a finding or admission of wrongdoing, and disclosure in those instances would constitute a permissible rather than an unwarranted invasion of personal privacy.

The regulations promulgated by the Department of Correctional Services appear to bolster such a conclusion. In 7 NYCRR §5.21(a), public rights of access are conferred with respect to a variety of items relating to inmates, including commitment information and "departmental actions regarding confinement and release." Frequently a departmental action based on a finding of misconduct will result in placement in a special housing unit or in solitary confinement. In Bensing v. LeFevre, the issue involved a request for a list of inmates held in a special housing unit, "an area primarily used for housing inmates who have been segregated from the general population for punitive reasons", and the court rejected contentions under both the Freedom of Information and Personal Privacy Protection Laws that disclosure would constitute an unwarranted invasion of personal privacy [506 NYS2d 822, 823 (1986)]. As such, the court confirmed that the names of those found to have engaged in misconduct, as well as the sanction, placement in a segregated unit, must be disclosed.

In sum, I believe that records involving unsubstantiated allegations may be withheld, but that final determinations reflective findings of misconduct must be disclosed.

Fourth, with respect to your request for records indicating lawsuits filed against your correctional facility, although the Freedom of Information Law does not apply to the courts and court records, such records are generally available under other provisions of law [see e.g., Judiciary Law, §255]. From my perspective, if the records sought are publicly available from a court, they would also be available under the Freedom of Information Law from your facility.

Next, you have questioned the propriety of a denial concerning records indicating telephone numbers and email address of correctional facility employees. While I am unaware of the factual basis for the denial, there are instances, particularly those associated with law enforcement activities, in which a denial of access may be justifiable. It is noted, too, that some phone numbers may relate to fax machines.

In some circumstances, fax lines may be dedicated to certain uses. If those lines were to become tied up by an outsider and could not be used as intended, an agency could be precluded from carrying out its duties in a manner in which the public would be adequately served or protected. For example, if a telephone or fax number is used by the correctional facility to engage in law enforcement functions or emergency communications, and if the facility cannot transmit or receive information due to incoming faxed transmissions that tie up the line, I believe that §87(2)(f) would likely serve as a basis for a denial of a request. Again, that provision authorizes an agency to withhold records when disclosure "could endanger the life or safety of any person." In sum, insofar as there is a possibility that disclosure of phone or fax numbers could endanger life or safety, based on judicial decisions, I believe that §87(2)(f) could properly be asserted.

A similar contention might be made with regard to the disclosure of e-mail addresses. While I am not an expert in computer technology, it has become widely known due to events that became international in their effects that e-mail and the use of an e-mail address can transmit viruses that can cripple an electronic information or communication system or obliterate information stored electronically. A virus attached to a single e-mail address can be transmitted to every other e-mail address that has been contacted. That being so, again, it might be contended that a wholesale disclosure of e-mail addresses, which in turn could result in an inability to carry out critical governmental functions, could jeopardize the lives and safety of members of the public, as well as government employees.

Moreover, §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." Via disclosure of email addresses, viruses could be transmitted or other incursions might occur that could result in the harm sought to be avoided by the new provision cited above.

With respect to disciplinary charges filed against employees of your correctional facility, the first ground for denial, §87(2)(a), may be applicable. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the

Civil Rights Law. In brief, 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 your inquiry pertains 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 an 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 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.

Lastly, you complained that you are not allowed to photocopy records you received for inspection under the Freedom of Information Law at your facility law library. You indicated that the library charges eight cents per photocopy instead of the twenty-five cent fee required by the Freedom of Information Law.

In my view, a rational distinction may be made between the treatment of library materials intended to be used, borrowed or copied by patrons, and those records acquired from your facility that are located separate from library materials. Based upon the distinction, it is my view that the facility may validly choose to prepare photocopies of records obtained under the Freedom of Information Law and charge at the rate of twenty-five cents per photocopy.

As requested, enclosed are copies of the advisory opinions.

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-15268

41 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, 2005

E-Mail

TO: Allen Livermore

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. Livermore:

I have received your inquiry in which you asked whether a school district is an "agency" that falls within the coverage of the Freedom of Information Law.

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

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

A school district clearly is a municipal governmental entity. Further, it is a public corporation. Consequently, it is clear that school district constitute agencies that are required to comply with the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

There is
no
1014. A0-15269

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 15270

41 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, 2005

Mr. Mark J. Chmiel
[redacted]

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

Dear Mr. Chmiel:

I have received your correspondence and apologize for the delay in response. You described a situation in which you requested records from the Starpoint Central School District but received no response. The records sought involve the nature, use and operation of "an environmental control unit" in place at a school at the time that an event occurred resulting in a need for medical treatment of thirty-one students.

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

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

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

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

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, insofar as the kinds of records that you requested exist and are maintained by or for the District, they must be disclosed, for none of the grounds for denial of access would be pertinent or applicable.

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

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR

> depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

In 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.

Lastly, the records sought in this instance would appear to be maintained in the ordinary course of business; they would not have been prepared solely for or in anticipation of litigation. If that is so, again, I believe that they are accessible to the public under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15271

41 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, 2005

Ms. Suzanne McSherry
[redacted]

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

Dear Ms. McSherry:

I have received your correspondence and apologize for the delay in response. You referred once again to difficulties involving requests for records made to the Town of North Elba, particularly in relation to your ability to obtain a certification that certain records sought do not exist or could not be found.

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

Second, with respect to the responsibility to ensure compliance with the Freedom of Information Law, I note by way of background that §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to

> records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In short, I believe that the Town Board, as the governing body of a public corporation, 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.

Third, §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.
> (5) Upon request, certify that a record is a true copy.
> (6) 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."

Based on the foregoing, again, the records access officer must "coordinate" an agency's response to requests. In this instance, I believe that part of the Town Clerk's duty to "coordinate" includes responsibility to direct the appropriate staff person to prepare the certification that you requested.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Hon. Barbara Whitney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15272

41 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, 2005

Hon. Julia Guerrieri, RMC
Geneva Town Clerk
3750 County Road 6
Geneva, NY 14456

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

Dear Ms. Guerrieri:

I have received your correspondence and apologize for the delay in response. You referred to a memorandum in which you requested a copy of a check and the invoice relating to it in order to correct an abstract. In response, it was written that "you don't usually have copies of checks, is there some reason for this request..."

In this regard, first, from my perspective, the foregoing does not involve a request made under the Freedom of Information Law; rather, it appears to have been made in the performance of your duties as Town Clerk. While a person other than yourself may have physical possession of the records at issue, I do not believe that he or she has legal custody or control of the records. As you are likely aware, subdivision (1) of §30 of the Town Law states that the town clerk "[s]hall have the custody of all the records, books and papers of the town." Therefore, irrespective of where in the Town records may be kept, I believe that they are in your legal custody as Town Clerk. Moreover, a failure to share records or to inform you of their existence may effectively preclude you from carrying out your duties as Clerk, as records management officer, as well as your responsibilities if you have been designated as records access officer for purposes of responding to requests under the Freedom of Information Law.

Second, considering the matter from a different vantage point, the Freedom of Information Law in my opinion 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, when it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a

request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a Town official should not generally be required to resort to the Freedom of Information Law in order to seek or obtain Town records.

In this instance, I believe that the records that you requested would be accessible to any member of the public, irrespective of the reason for which a request might be made. That being so, even if you were not seeking the records in the performance of your duties as Clerk, they would be accessible to you, in my opinion, as a member of the public.

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-15273

41 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, 2005

E-MAIL

TO: Allen Livermore

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. Livermore:

I have received your letter and thank you for your kind words. You have asked whether the Berkshire Farm Center and Services for Youth is an "agency" required to comply with 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, an "agency" is an entity of state or local government in New York.

Having acquired information concerning the Berkshire Farm Center and Services for Youth, I learned that it is a not-for-profit organization. That being so, I do not believe that it constitutes an "agency" that is subject to the Freedom of Information Law.

Assuming that the organization has relationships with agencies of state or local government, any records maintained by those agencies pertaining to the organization would fall within the coverage of the Freedom of Information Law. If that assumption is accurate, the public may acquire records pertaining the organization from those agencies.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15274

41 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, 2005

Mr. Timothy Regan
01-B-0262
Cayuga Correctional Facility
Route 38 A, 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. Regan:

I have received your letter in which you indicated that you have encountered difficulty in obtaining a copy of your daughter's birth certificate from Monroe County. In your correspondence, you indicated that you only know the mother's first name and the approximate date of your daughter's birth. The County Clerk, Mr. Richard Mackey, denied your request on the ground that the "request does not provide enough information to 'reasonably describe' the information sought."

In this regard, I offer the following comments.

As suggested by Mr. Mackey, §89(3) of the Freedom of Information Law requires that a request must reasonably describe the records of interest. Therefore, a request should include sufficient detail to enable agency staff to locate a record. Since you do not know the last name of your child or the birth date, in my opinion, your request did not reasonably describe the records sought. As such, I believe that Mr. Mackey's response to you was appropriate.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:tt

cc: Mr. Richard Mackey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15225

41 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, 2005

Mr. Eric Freudenberg
04-A-1848
Woodbourne Correctional Facility
P.O. Box 1000
Pine City, NY 12788-1000

Dear Mr. Freudenberg:

I have received your letter in which you indicated that you have made requests under the Freedom of Information Law to various agencies. As of the date of your letter to this office, you had not yet received any responses 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, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states that an agency is not required to prepare or create a record in response to a request. Therefore, if no records exist responsive to your request, agencies would not be obliged to create them.

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-15276

41 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, 2005

Mr. Joseph White
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

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

Dear Mr. White:

I have received your letter in which you complained that as of the date of your letter to this office, you had not received any response to your Freedom of Information Law request directed to the Albany Police Department.

In this regard, I offer the following comments.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, in my opinion, the Police Department should have responded in accordance with the previous commentary or forwarded your request to John Marsolais, Albany City Clerk, who is the records access officer for the City of Albany. The records access officer has the "duty of coordinating agency response" to requests and assuring that agency personnel act appropriately in response to requests (21 NYCRR §1401.2).

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 Marsolais

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3968
FOIL-AO-1527

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

April 29, 2005

E-Mail

TO: Megan O'Neil-Haight

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. O'Neil-Haight:

I have received your letter and apologize for the delay in response. You described meetings during which the Superintendent of the Corning-Painted Post School District appears to have been authorized by the Board of Education while in executive session to "purchase an option to buy" on several occasions. You expressed the view that those actions by the Board should have been taken in public.

Having conducted legal research and conferred with an expert concerning school law, I believe that the Board's acts in which authority was conferred upon the Superintendent to purchase options to buy real property should have occurred during public portions of the Board's meetings. In this regard, I offer the following comments.

First, it appears that discussions by the Board concerning certain parcels could justifiably have been conducted during executive session. Section 105(1)(h) of the Open Meetings Law permits a public body, such as a board of education, 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."

If premature disclosure of information concerning the purchase of real property and the resultant publicity would likely preclude the District and/or the Board from engaging in an optimal agreement or price, I believe that the provision quoted above would have been applicable.

Second, however, I also believe that any action taken by the Board to authorize the Superintendent to purchase or exercise an option to buy property may only occur by means of an affirmative vote of a majority of the Board's total membership, and that any such vote must occur during an open meeting. By way of background, the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

The provision quoted above 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 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, assuming that the direction given to the Superintendent is reflective the exercise of a "power, authority or duty" of the Board, such direction could only have been conferred by means of an affirmative vote of a majority of the Board's total membership.

Lastly, only in rare instances may a board of education take action during an executive session. As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see

United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote.

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student.

In short, I believe that the actions at issue were required to have been taken in public. This is not intended to suggest that motions made in public or minutes of meetings would be required to include detailed information, i.e., the location or potential price of a particular parcel; rather, the motions and minutes must in my view indicate that action was taken by the Board to authorize the Superintendent to engage in certain activities on its behalf. Further, the records reflective of such action must indicate the manner in which each member cast his or her vote [see Freedom of Information Law, §87(3)(a)].

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

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May 2, 2005

E-MAIL

TO: Dee Alpert

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. Alpert:

I have received your letter and apologize for the delay in response. You have sought an advisory opinion relating to responses to your requests for records by the New York City Department of Education. Specifically, you referred to a report of the Auditor General of the New York City Board of Education, the predecessor of the Department, stating that the office of Auditor General "performed audits of attendance in various high schools", and you requested those audits, as well as others "performed thereafter", and any such audit focusing on District 75. You were informed that there have been no audits of attendance concerning District 75, and that "[t]here are no releasable documents" concerning the remainder of your request. You later requested the Department's subject matter list.

In this regard, I offer the following comments.

First, since the Department's response indicates that there is no audit pertaining specifically to District 75, but that there are no "releasable copies" of the other audits requested, the inference is that other audits exist and were withheld in their entirety. If that is so, I believe that the denial of access by the Department is overbroad and inconsistent with law.

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

The only basis for denial of apparent relevance is §87(2)(g). That provision permits an agency to withhold records that:

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

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

Because the provision cited above refers to "external audits", it has been contended that internal audits, such as those that are the subject of your request, may be withheld in their entirety. Nevertheless, there is nothing in the language of the Freedom of Information Law that pertains specifically to internal audits or that exempts them form disclosure. The fact that external audits must be disclosed does not suggest other records, such as internal audits, are exempt, in their entirety, from disclosure. On the contrary, as stated earlier, all records are presumed to be available, and silence in the law concerning a certain kind of record does not confer confidentiality, but rather a presumption of access. In this instance, an internal audit constitutes "intra-agency" material that is accessible or deniable, in whole or in part, based on its contents.

The paragraph quoted above, other than the first sentence, was quoted in full in Gannett Co. v. Rochester City School District [684 NYS 2d 757, 759 (1998)], and the court agreed with my opinion that portions of internal audits consisting of "statistical or factual tabulations or data" must be disclosed pursuant to subparagraph (i) of §87(2)(g).

I note, too, that the Court of Appeals, the state's highest court, dealt with a similar contention relating to a different aspect of §87(2)(g). In Gould et al. v. New York City Police Department [89 NY2d 267 (1996)], the agency denied access on the basis of §87(2)(g)(iii), which grants access to "final agency policy or determinations", on the ground that the records sought were not final and did not relate to any event whose outcome had been finally determined. As in Ganett, in which the agency contended that because external audits are accessible, internal audits can be withheld in their entirety, the New York City Police Department argued that because final determinations are public, records other than final may be withheld in their entirety. The Court of Appeals rejected that argument 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); emphasis added by Court].

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 brief, insofar as the records sought consist of statistical or factual information, I believe that the Department is obliged to disclose.

It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

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

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

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. 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.).

Based on the language of the law and especially its judicial interpretation, again, those portions consisting of statistical or factual information, in my view, must be disclosed.

Lastly, 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 matter list." 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.

RJF:tt

cc: Susan Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 2, 2005

Mr. Victor Preston
[redacted]

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

Dear Mr. Preston:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

You referred to letters addressed to the Mayor of Canisteo in which you requested "the minutes for Jan, Feb & March 1999 of the Board meetings, and all publications" for that period, as well as a copy of "local law 1, 1999."

The Mayor responded, indicating that he was unsure of which records you wanted, but he expressed the belief that you were seeking information concerning Chapter 105 of the Village Code. He added that he would send background information to you concerning the Village's local laws with a few days. Nevertheless, you wrote that you had no further contact from the Mayor or other Village officials.

In this regard, I offer the following comments.

First, I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should be sufficiently clear and detailed to enable the staff of an agency, such as a village, to locate and identify the records. In my view, a request for minutes of meetings involving a certain time period would meet the standard of reasonably describing the records. However, a request for "publications" without additional detail would not, in my opinion, reasonably describe the records of your interest.

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

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

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

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

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

If you have not already done so, it is suggested that you contact the Mayor or the Village Clerk to discuss the matter. The Clerk prepares minutes of meetings and is the custodian of Village records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. James F. McGee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 2, 2005

E-MAIL

TO: Amy Fuller

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. Fuller:

I have received your letter and apologize for the delay in response.

You wrote that you "would like to get information on some court cases", but that you do not know how to do so.

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, 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.

The statute that deals generally with court records is §255 of the Judiciary Law, which provides that:

> "...[A] clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

In my view, §255 requires a court clerk to search for records and provide copies at a rate "allowed to a county clerk for a similar service"

However, in order to perform a search, I believe that you must know or provide certain details, such as the names of the parties, the approximate date of a judicial proceeding, etc. When seeking court records, it is suggested that a request be made to the clerk of the appropriate court, citing an applicable provision of law, (i.e., Judiciary Law, §255), and that you include sufficient detail to enable the clerk to locate and identify the records of your interest.

I am unaware of whether court records are accessible as yet via the internet.

I hope that I have been of assistance.

RJF:tt

From: Robert Freeman
To: aleber@northcastleny.com
Date: 5/2/2005 4:04:12 PM
Subject: http://www.dos.state.ny.us/coog/ftext/f8407.htm

http://www.dos.state.ny.us/coog/ftext/f8407.htm

Hi - -

Attached is an opinion that cites the DEC regulations dealing with the DEIS. Based on the regulations, it is clear that the DEIS is accessible to the public and that the Town must must make it available for inspection and copying. It is also clear that you may charge a fee for copying, which may be up to twenty-five cents per photocopy up to nine by fourteen inches. With respect to oversized records, such as large maps, it has been suggested that they may be duplicated by means of "cutting and pasting" or by use of a digital camera. Often members of the public seeking those kinds of records can be accommodated by enabling them to use cameras to make copies of large documents.

I hope that this helps.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 2, 2005

Ms. Kathleen Chamberlain
Peconic Asset Planning, Inc.
53 Lake Avenue
Riverhead, NY 11901

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

Dear Ms. Chamberlain:

I have received your letter, as well as the correspondence relating to it. Please accept my apologies for the delay in response. The matter involves a request made under the Freedom of Information Law to the Mattituck-Cutchogue Union Free School District and the District's reply. In short, based on the District's policy, you were informed that you must complete the District's form, "at least ten days in advance." The policy also states that the District charges "50 cents...per sheet run of records."

In this regard, first, I note that the policy that you sent refers to the Freedom of Information Law as enacted in 1974. That statute was repealed in 1977 and replaced with a new statute that became effective in 1978. That being so, the policy is outdated and inconsistent with the current Freedom of Information Law.

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

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

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

is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

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

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

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

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

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

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

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

Third, I do not believe that an agency can require that a request be made on a prescribed form. As indicated previously, §89(3) of the law, as well as the regulations promulgated by the Committee (21 NYCRR §1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Neither the law nor the regulations refers to, requires or authorizes the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

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

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

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

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

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

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

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (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)].

Lastly, it appears that the record sought is a written opinion prepared by the District's attorney at the request of the Board of Education "as to whether funding only a boy's lacrosse team is a violation of Title IX." From my perspective, a record of that nature may be withheld.

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

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101(c) of the Civil Practice Law and Rules. In my view, there need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

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

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

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that record consists of legal advice or opinion provided by counsel to the client, such a record would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the record in question consists of an expression of opinion. If that is so, it could be withheld under §87(2)(g).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Kenney W. Aldrich

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15283

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May 5, 2005

Mr. Walter L. Gaj
[redacted]

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

Dear Mr. Gaj:

As you know, I have received your correspondence. I apologize once again for the delay in response.

You referred to a request made under the Freedom of Information Law to the Town of Chatham involving the name or names of the person or persons in the cab of a Town truck involved in snowplowing during a particular time period, as well records indicating the "job duties and supervision of employees by the Town Supervisor and Town Highway Superintendent..." The Town Attorney denied the request, contending that disclosure would result in "an unwarranted invasion of privacy."

Based on the language of the Freedom of Information Law and judicial interpretations of that statute, I respectfully disagree with the Town Attorney. In this regard, I offer the following comments.

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

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).

Insofar as records exist indicating the identity or identities of Town employees who performed their duties for the Town at a particular time or location, or who carried out a certain function, I believe that they must be disclosed. That being so, if there is a record identifying the Town employee or employees in the Town truck during the period to which you referred, I believe that it must be disclosed.

Records describing the duties and supervision of public employees also, in my view, must be disclosed. Again, disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy. Further, although those kinds of records fall within a different exception, due to its structure, that provision often requires disclosure. Specifically, §87(2)(g) permits an agency to withhold records that:

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

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

A description of job duties and the means by which employees are supervised would appear to constitute factual information available under subparagraph (i) of §87(2)(g), as well as Town policy that would be available under subparagraph (iii).

Lastly, you referred to the apparent absence of any official designation of an access officer or an appeals officer by the Town. 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 Town, and that the governing body would be the Town Board. If that is so, the Town Board was required to promulgate appropriate uniform rules and regulations applicable to entities within County government consistent with those adopted

by the Committee on Open Government and with the Freedom of Information Law within sixty days of January 1, 1978, the effective date of the law.

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

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

When a request is denied, it may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

Further, the regulations promulgated by the Committee state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Tal G. Rappleyea

FOIL-AO-1584

State of New York
COMMITTEE ON OPEN GOVERNMENT
MEMORANDUM

TO: Karen Legenbauer May 5, 2005

FROM: Bob Freeman

SUBJECT: School Incident

You may have difficulty obtaining the information of your interest, even if names are withheld. The applicable provision in the situation that you described is the federal 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.

The potential difficulty is that, even if names or other details are deleted, you or others might nonetheless have the ability to identify particular students. If that is so, if those students' identities would be "easily traceable", the school district would be authorized by federal law to withhold the records. On the other hand, insofar as the identities of individual students would not be easily traceable following the deletion of personally identifiable information, I believe that you would have a right to gain access to the kinds of materials that you described.

I hope that this helps.

RJF:jm

FOIL-AO-15285

From: Robert Freeman
To: Whitney Clark
Date: 5/6/2005 9:57:01 AM
Subject: Re: Vetere Foil

Good morning - -

No sample or model "certificate" has been developed concerning the situation that you described. It is suggested, however, that a staff person prepare a certification in the nature of an affidavit in which it is asserted the response included all of the records falling within the scope of the request and that the records made available are true copies.

I hope that I have been of assistance.
>>> Whitney Clark 5/6/2005 9:43:18 AM >>>
Good morning Bob:

Margaret Vetere, the FOIL requestor who we discussed last week, has opted to accept a mailed copy of the records. She would, however, like to be provided with a certificate that the records provided represent all of the records contained in the Department's file. Do you have a sample certificate that you could e-mail me?

Thanks.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3972
FOIL-AO-15286

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May 6, 2005

Ms. Sharon L. Brin
[redacted]

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

Dear Ms. Brin:

I have received your letter and apologize for the delay in response. You have raised a variety of questions and issues relating to the Town of East Greenbush. In consideration of your remarks, it is emphasized that the functions of the Committee on Open Government pertain to the Freedom of Information and Open Meetings Laws; this office has neither the jurisdiction nor the expertise to offer advice or commentary concerning conflicts of interest or compatibility of offices. That being so, I offer the following remarks.

First, the Freedom of Information Law is expansive in its coverage, for it pertains to all records of an agency, such as a town, and §86(4) defines the term "record" to include:

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

Based on the foregoing, when records are maintained by or for the Town, irrespective of the physical location of the records, I believe that they fall within the scope of the Freedom of Information Law.

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

Next, you referred to "pre-town meetings." If my understanding accurate, pre-town meetings are held by the Town Board prior to its regular or "official" meeting. In this regard, from my perspective, the "pre-town meetings" must be conducted in public in accordance with the Open Meetings Law. I point out the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

Based upon the direction given by the courts, when a majority of the Town Board is present to discuss Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, because a "pre-town meeting" is a "meeting", it must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15287

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May 6, 2005

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 information presented in your correspondence.

Dear Mr. Atkins:

I have received your letter and apologize for the delay in response. You referred to charges made on a credit card issued by the City of Oswego. You have asked whether you have the right to "view these expenditures, even though they were, supposedly, reimbursed to the city", as well as the records (i.e., "personal check or cash receipt") "to confirm the date of the payment and that the reimbursement was made." You also questioned whether a government credit card should be used to purchase goods or services unrelated to city business.

In this regard, first, the functions of this office relate to statutes involving public access to government information. That being so, I have neither the jurisdiction nor the expertise to offer advice concerning the use of a credit card issued by the City for personal transactions.

With respect to review of the records reflective of the use of the credit card, as suggested in previous correspondence, notably an opinion addressed to you on October 7, in general, items pertaining to public officers or employees that relate to their duties are accessible, for disclosure in those instances would constitute a permissible invasion of personal privacy; conversely, those items that are unrelated to their duties may generally be withheld under §87(2)(b) of the Freedom of Information Law on the ground that disclosure would result in an unwarranted invasion of personal privacy.

The opinion of October 7 focused on telephone bills, and it was advised that the bills must ordinarily be disclosed, but that "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...be justifiably deleted." However, portions of records reflective of the use of the telephone, including the time and duration of calls, would be accessible. Similarly, in the context of your latest inquiry, I believe that portions of a credit card bill indicating the fact that the credit card was used, including the dates of its use and the amounts billed,

must be disclosed. Nevertheless, as in the case of personal phone calls for which reimbursement was made, portions of the records describing the purchase of goods or services for personal use may in my view be withheld when reimbursement was made to the City.

Lastly, records indicating payments or reimbursements to the City must, in my opinion, be made available. Absent disclosure, there would be no accountability or proof that the purchases were not made at taxpayers' expense. If, for example, payment was made by personal check, I believe that the account number or home address could be deleted to protect privacy prior to disclosure of the remainder indicating the date and the amount of reimbursement.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeanne C. Berlin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 6, 2005

E-Mail

TO: Peggy L. Mousaw

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. Mousaw:

I have received your letter and apologize for the delay in response.

You wrote that you are a member of a board of education and that you "have not been allowed access to information through the Board process." Consequently, you requested records pursuant to the Freedom of Information Law. You were told, however, that the materials would not be made available and that disclosure to you must be preceded by vote to do so by the Board of Education. It is your view that the Board "does not have this right."

In this regard, first, one of the one of the functions of a public body, such as a board of education, involves acting collectively, as an entity. A board of education, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

Second, when a request is made pursuant to the Freedom of Information Law, 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)]. Because that is so, I do not believe that your status as a member of the Board can serve enable the Board or the District to

deny access to records that you seek that are available to any member of the public, or to delay responding to a request or denying a request in a manner inconsistent with the Freedom of Information Law. In short, insofar as the policy or procedure that you described contravenes your rights as a member of the public seeking records under the Freedom of Information Law, I believe that it is invalid.

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 6, 2005

Mr. Albert F. Cushman, Jr.
[redacted]

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

Dear Mr. Cushman:

I have received your letter and the correspondence attached to it. You referred to a request made under the Freedom of Information Law to the Division of Housing and Community Renewal. As I understand the situation, more than four hundred pages of the documents requested are kept at the Division's Albany offices, and the Division offered to make them available to you for inspection in Albany at no charge. The remaining documents, which consist of thirty-nine pages, are kept in the Division's New York City offices. You were told that those records would be mailed to you or made available in Albany following payment of twenty-five cents per photocopy.

In my opinion, the Division's response was appropriate and consistent with law. Certainly the public has the right to inspect records accessible under the Freedom of Information Law at no charge at the location where the records are ordinarily maintained. For that reason, you have the right to inspect records in Albany without payment of any fee. However, when records are kept in a different location, there is no obligation imposed upon an agency to transfer the records to a location convenient to the person seeking to inspect those records. In that circumstance, the applicant for the records has two options that may be exercised to gain access: he or she may travel to the location where the records are kept and inspect them at no charge; or, alternatively, if he or she does not want to travel to that location, that person may request copies of the records. In that event, §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: David Diamond

FOIL-AO-15290

From: Robert Freeman
To: mkrisel@rvcny.us
Date: 5/6/2005 2:39:46 PM
Subject: RE: http://www.assembly.state.ny.us/leg/?bn=A06714&sh=t

Hi - -

I think you have the right attitude regarding the amendment, and I agree that it often will encourage staff to be more efficient in responding to FOIL requests.

As for the "continuing request", it has been advised that requests that are prospective in nature need not be honored. Technically, because the FOIL pertains to existing records, an agency can neither grant nor deny access to records that do not exist. An applicant can be informed that he or she can make periodic requests, but that the agency is not required to agree to disclose records that do not yet exist.

I hope that this helps.

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

>>> kriselm@optonline.net 5/6/2005 2:37:13 PM >>>
Here's what we already do; we either give a document, say we don't have a document, say we have a document but it's not foilable or say that we will respond within two weeks or thirty days, depending on the request (sometimes multiple documents need to respond). So the amendment is no skin off my nose and it actually helps me gain cooperation from my department heads, etc. I already drafted a threatening memo. New topic: how do you feel about continuing demands under FOIL (for example, an applicant asks for a document and then writes, "Please consider this a continuing request under FOIL." Would you recommend honoring it as such?

From: Robert Freeman [mailto:RFreeman@dos.state.ny.us]
Sent: Friday, May 06, 2005 2:13 PM
To: mkrisel@rvcny.us
Subject: http://www.assembly.state.ny.us/leg/?bn=A06714&sh=t

http://www.assembly.state.ny.us/leg/?bn=A06714
<http://www.assembly.state.ny.us/leg/?bn=A06714&sh=t%20> &sh=t

Here's the bill. It won't hurt 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-15291

From: Robert Freeman
To: Maryjo@edenny.org
Date: 5/9/2005 12:39:47 PM
Subject: I have received your inquiry, and from my perspective, the the abstract of audited vouchers is acces

I have received your inquiry, and from my perspective, the the abstract of audited vouchers is accessible under the Freedom of Information Law before the claims are approved and the abstract becomes final. In short, I do not believe that any of the exceptions appearing in §87(2) of the Freedom of Information Law could be properly asserted to deny access. Further, §119 of the Town Law states in part that "The claims shall be available for public inspection at all times during office hours", and it is clear in the context of that section that the claims are accessible prior to any approval by the Town Board.

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-15292

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

May 9, 2005

Ms. Sharon L. Brin
[redacted]

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

Dear Ms. Brin:

I have received your most recent correspondence. If I understand your comments accurately, you are objecting to a certification prepared by the Town Clerk of the Town of East Greenbush indicating that certain records could not be found because she did not personally make the search for the records in question.

In this regard, the Court of Appeals, the state's highest court, has determined that the Freedom of Information Law does not specify the manner in which an agency must certify that records cannot be located. Further, the Court held that neither a detailed description nor a personal statement by the person who actually conducted a search for records is required [see Rattley v. New York City Police Department, 96 NY2d 873 (2001). Based on that decision, I believe that the Clerk could validly have prepared the certification, even if she did not personally conduct a search for the records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Joan Whipple

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15293

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

May 9, 2005

MEMORANDUM

TO: Board of Education and Kenney W. Aldrich

FROM: Robert J. Freeman, Executive Director RJF

SUBJECT: Compliance with Freedom of Information Law

According to correspondence sent to this office, William and Kathleen Chamberlain sent an appeal made pursuant to the Freedom of Information Law on March 25 to Ms. Beverly Wowak, President of the Board of Education. Based on a search of our files, the Board has not sent to this office a copy of either the appeal or its determination as required by law. Specifically, §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. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

This communication is intended to request a copy of the determination of the appeal.

Thank you for your cooperation.

RJF:jm

cc: William and Kathleen Chamberlain

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3974
FOIL-AO-15294

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

May 9, 2005

Ms. Pat Smouse
DeRuyter Central School District
711 Railroad Street
DeRuyter, NY 13052

Mr. Joseph B. Fallon
[redacted]

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

Dear Ms. Smouse and Mr. Fallon:

I have received a variety of materials from you concerning your efforts in gaining access to certain information from the DeRuyter Central School District. As I understand the matter, some of the materials have been disclosed. However, the District Clerk wrote that "[p]ersonal information such as certification, years in a position and other application information are protected under sub division 2 of section 87 and 89 of the Public Officer's [sic] Law."

From my perspective, which is based on the judicial interpretation of the Freedom of Information Law, the records that have been withheld must be made available in great measure, if not in their entirety. In this regard, I offer the following comments.

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

The only ground for denial significant to an analysis of rights of access is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more

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

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

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

Certainly the number of years employed in a particular position is relevant to an employee's duties. Again, therefore, disclosure would constitute a permissible, not an unwarranted invasion of personal privacy. I note that §87(3)(b) has long required that a record that includes the name, public office address, title and salary of every officer or employee of an agency be maintained and made available to the public. That being so, the identity of a teacher and his or title or position is simply not secret.

Next, it has been held that many aspects of applications or resumes are accessible. The Appellate Division has held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Most significantly, 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 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, since the correspondence refers to minutes of executive sessions, I point out that only in rare instances may a board of education take action during an executive session. As a general rule, a public body, such as a school district, may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote.

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Tim Decker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15295

41 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, 2005

Mr. Joseph Guarneri
05-B-0213
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

Dear Mr. Guarneri:

I have received your letter in which you requested various records relating to your incarceration at the Attica Correctional Facility.

In this regard, the Committee on Open Government is authorized to provide advice concerning the New York Freedom of Information Law. The Committee does not have possession or control of records generally, and this office does not maintain possession of any of the records of your interest.

When seeking records, a request should be made to the agency that has custody of the records sought. In this instance, it is suggested that requests be made to the proper officials at the facility. I note, too, that your request cited the federal Freedom of Information and Privacy Acts. Those statutes apply to federal agencies; they do not apply to state agencies. In the context of your request, the Freedom of Information Law of New York is applicable to records of state and local government agencies, and §18 of the Public Health Law pertains to access to medical records. When seeking medical records, it is recommended that they be requested pursuant to that provision of the Public Health Law. Finally, while there are provisions concerning the waiver of fees under the federal Act, the New York Freedom of Information Law contains no such provision, and it has been held that an agency may charge its established fees for copying, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15296

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 11, 2005

Ms. Dorothy Borgus
[redacted]

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

Dear Ms. Borgus:

I have received your letter and apologize for the delay in response. You have asked whether a Town of Chili employee directory that includes the names of Town officers and employees, their Town departments of employment, home addresses, home phone numbers and business phone numbers can be characterized as "confidential."

From my perspective, portions of the directory may be withheld. In this regard, I offer the following comments.

First, §89(7) of the Freedom of Information Law has long provided that nothing in that statute "shall require the disclosure of the home address of an officer or employee, former officer or employee or of a retiree of a public employees' retirement system..." Based on that provision, it is clear that the home address of a present or former public officer or employee need not be disclosed under the Freedom of Information Law.

Second, with respect to other aspects of the directory and government records generally, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 home telephone number, one of the grounds for denial of access is §87(2)(b), which enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne

Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Conversely, however, items that are irrelevant to the performance of one's official duties ordinarily would result in an unwarranted invasion of personal privacy if disclosed [see Seelig v. Sielaff, 201 AD2d 298 (1994)]; Matter of Wool (Supreme Court, Nassau County, NYLJ, November 22, 1977) and Minerva v. Village of Valley Stream (Supreme Court, Nassau County, May 20, 1981)]. In my view, one's home telephone number is irrelevant to the performance of his or her official duties and may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

The other items in the directory, i.e., the names, departments of employment and business phone numbers are, in my opinion, relevant to one's duties. Therefore, I believe that those portions of the directory are accessible, for disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15297

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

May 11, 2005

Mr. John L. Parker
[redacted]

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

Dear Mr. Parker:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

In a request made to the Town of Mamakating Planning Board on behalf of your clients, you sought records "with respect to a Final Environmental Impact Statement or that may refer to such a Final Environmental Impact Statement for the Yukiguni Maitake Manufacturing Company of America", including "records from Lanc & Tully Engineering and Surveying, Alan Sorenson, and any and all records from Fire Chief Richard Dunn." In denying the request in its entirety, the attorney for the Planning Board contended that "correspondence and recommendations between the Planning Board and its Engineer and/or Planner would be classified as intra-agency materials." He added that "less clear...is the applicability of the intra-agency exemption to your request for the a copy of the draft FEIS prepared for the benefit of the Planning Board by the applicant", and he expressed the belief that the draft FEIS prepared by the applicant also constitutes intra-agency material that may be withheld.

From my perspective, records prepared for an agency by its employees or consultants constitute intra-agency materials that should likely have been disclosed in part. I disagree with the contention that records submitted by or on behalf of an applicant may be characterized as intra-agency materials. On the contrary, I believe that they are accessible. In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase

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

The Court of Appeals confirmed its general view of the intent of the Freedom of Information Law most recently in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

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

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

While §87(2)(g) potentially serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

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

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

The same kind of analysis would apply with respect to records prepared by consultants for agencies, for the Court of Appeals has held that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty

> Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency.

It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

Therefore, a record prepared by a consultant for an agency or, for example, by the Town's Fire Chief, would be accessible or deniable, in whole or in part, depending on its contents.

I note that in Gould, supra, one of the contentions was that certain intra-agency materials could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

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

In short, that records are characterized as "draft" or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access.

Second, it is reiterated that Xerox, supra, dealt with reports prepared "by outside consultants retained by agencies" (id. 133). In such cases, it was found that the records prepared by consultants should be treated as if they were prepared by agency staff and should, therefore, be considered intra-agency materials. 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. In the context of the Xerox decision, I believe that a consultant would be a person or firm "retained" for compensation by an agency to provide a service.

Neither the applicant nor the applicant's agent's representatives or agents would be retained for compensation or paid by the Town to provide advice or recommendations. That being so, the records prepared by or for the applicant, in my opinion, could not be characterized as "intra-agency materials" that fall within the scope of §87(2)(g). Further, because that exception would not apply, considerations concerning the status of records as drafts or in relation to finality are irrelevant. In short, I believe that those records must be made available in their entirety, for none of the exceptions to rights of access may properly be asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board
Ira J. Cohen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15298

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

May 16, 2005

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 information presented in your correspondence.

Dear Mr. Fland:

I have received your letter in which you asked whether "computer records used to develop a school budget [are] considered the same as hard copy worksheets which should be available to the public."

Based on the language of the Freedom of Information Law and judicial decisions, information stored in a computer is available to the same extent as paper records containing equivalent information.

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

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

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

In what may have been the first decision rendered under the Freedom of Information Law concerning records stored electronically, it was held that the format in which the records are maintained does not impact upon rights of access (Szikszay, id.). 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.

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.

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-15299

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

May 16, 2005

Mr. John Whitfield
88-A-5197
Sing Sing correctional Facility
354 Hunter Street
Ossining, NY 10562

Dear Mr. Whitfield:

I have received your letter in which you requested "FOIL materials that will assist [you] in acquiring case law regarding access to court records/documents..."

Please be advised that the Freedom of Information Law does not apply to the courts. That statute pertains to agency records, and §86(3) defines the term "agency" to mean:

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

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

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

As you requested, enclosed is the latest supplement to the annual report of the Committee on Open Government. The supplement includes summaries of judicial decisions, and an index to opinions rendered under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15300

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 17, 2005

Mr. Richard A. Adamiak
Blooming Grove Volunteer Ambulance Corps
7 North Street
Washingtonville, NY 10992

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

Dear Mr. Adamiak:

I have received your letter and apologize for the delay in response. You have asked whether the Blooming Grove Volunteer Ambulance Corp. (BGVAC) is required to comply with the Freedom of Information Law. You wrote that BGVAC is a not-for-profit corporation that "signs a yearly contract with the 'Town of Blooming Grove Ambulance District #1...for the purpose of providing emergency medical service and general ambulance service...within the special improvement district."

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

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

Based on the foregoing, the Freedom of Information Law generally pertains to records maintained by entities of state and local government.

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:

> "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)].

Due to the similarity between the facts in that case and those that you presented, I believe that the BGVAC would be found to constitute an "agency" and that its records would fall within the coverage 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-15301

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

May 17, 2005

Ms. Mary Anne Kowalski
[redacted]

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

Dear Ms. Kowalski:

As you are aware, I have received your correspondence. Please accept my apologies for the delay in response. The issue raised involves the propriety of a denial of access to substantial portions of complaints made to the Department of Agriculture and Markets relating to the Pet Dealer Licensure Law. You indicated that some of the complaints were made by humane organizations, veterinary hospitals and other entities.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I note that the introductory language of §87(2) refers to 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 pertains to the protection of privacy, and §87(2)(b) permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In the context of your inquiry, it has generally been advised that those portions of a complaint or other record which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of a member of the person who made the complaint is often irrelevant to the work of the agency, and in most circumstances, I believe that identifying details may be deleted. If the deletion of personally identifying details is insufficient to ensure that the identity of complainant will not become known, other portions of the complaints may, in my view, be withheld.

Since you referred to complaints by organizations, rather than natural persons, it is noted that the provisions dealing with the protection of privacy pertain to records identifiable to natural persons. I do not believe that they would apply to records identifiable to entities, such as humane organizations and other entities. In those instances, the identities of those entities could not, in my opinion, justifiably be deleted.

Next, 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 may often be 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. When accessible and deniable information appear on the same page, preparing a redacted copy and charging the established fee for a copy, in my opinion, is proper (see VanNess v. Center for Animal Care and Control, Supreme Court, New York County, January 28, 1999).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Ruth A. Moore
Jessica A. Chittenden

FOIL-AO-1530 2

From: Robert Freeman
To: [redacted]
Date: 5/17/2005 12:50:25 PM
Subject: http://www.findarticles.com/p/articles/mi_m3601/is_n37_v44/ai_20905846#continue

http://www.findarticles.com/p/articles/mi_m3601/is_n37_v44/ai_20905846#continue

Dear Ms. Bohannon:

I have received your note concerning your ability to obtain information relating to the Harbor Ridge Continuing Care Retirement Community.

Attached is an article pertaining to that entity that might be useful. I note that the Freedom of Information Law is applicable to records maintained by government agencies in New York. Therefore, a private company is not required to comply with that statute. However, when a government agency, such as a town or a county, maintains records pertaining to a private company, those records fall within the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

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

FOIL-AO-15303

From: Robert Freeman
To: [redacted]
Date: 5/17/2005 4:48:24 PM
Subject: I have received your letter concerning rights of access to complaints directed to the New York City

I have received your letter concerning rights of access to complaints directed to the New York City 311 system. Although no written opinion has been prepared dealing directly with the issue, it has been advised in other contexts that the substance of complaints generally must be disclosed, but that identifying details pertaining to complainants may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

With respect to the maintenance of those records, I would conjecture that they are or should be subject to schedules establishing minimum retention periods applicable to NYC records. Those schedules are developed by the Department of Records and Information Services.

Lastly, to meet the requirement that a request must "reasonably describe" the records sought, it is often necessary to obtain information indicating the means by which the records are kept, filed, retrieved or generated. When that information is acquired, a request can be made that is consistent with and applicable to the agency's recordkeeping and retrieval system.

I hope that I have been of assistance.

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

FOIL-AO-15304

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

May 18, 2005

Mr. Leo F. Boland
[redacted]

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

Dear Mr. Boland:

I have received your correspondence and apologize for the delay in response. The materials pertain to your complaint concerning an alleged assault reported to a state trooper and your ensuing request for records relating to the incident. In brief, you were informed by the Fulton County District Attorney that there was insufficient evidence to "justify or authorize an arrest or and successful prosecution", and the Division of State Police denied your request on the ground that disclosure would constitute an unwarranted invasion of personal privacy, presumably the privacy of the accused. Additionally, a Division attorney referred to §160.50(3)(i) of the Criminal Procedure Law as a basis for denying the request.

You have asked whether you "have any recourse." From my perspective, there is likely none. In this regard, I offer the following comments.

First, a person denied access has four months from an agency's final determination to initiate a challenge to the determination in court. That time has expired, and in my view, you would be barred from initiating a lawsuit to seek review of the denial of your request by the Division of State Police.

Second, by way 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. In this instance, I believe that several of the grounds for denial are pertinent.

Section 87(2)(a) concerns records that "are specifically exempted from disclosure by state or federal statute." One such statute is §160.50 of the Criminal Procedure, which states, in brief, that when a criminal action is dismissed in favor of an accused, the records become sealed. The provision to which the attorney for the Division referred, paragraph (i) of subdivision (3) 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 person." In short, if that provision is applicable, which appears to be so, the records of your interest would be exempted from disclosure by statute.

With respect to privacy, it has been advised in many contexts that when a complaint is made but there is no charge, arrest, admission of guilt or conviction, that an agency may withhold records on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law.

Next, since you requested communications between a trooper and the office of the District Attorney, also pertinent is §87(2)(g), which authorizes an agency to withhold records that:

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Louise K. Sira
Darren O'Connor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15305

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

May 18, 2005

Ms. Joan Gronowski
[redacted]

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

Dear Ms. Gronowski:

I have received your letter and apologize for the delay in response. You have sought my views concerning a response to your request made to the City of Yonkers for records indicating payments to an attorney and a law firm, as well as the "total amount" expended by the City in relation to certain litigation. You were informed that your request would be granted or denied in whole or in part within sixty business days from its receipt.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed

to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

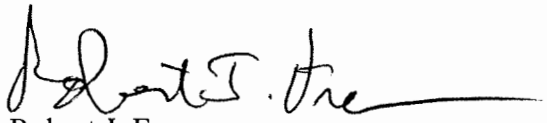
initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

Lastly, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. If the City maintains a record indicating the "total amount" of expenses incurred in relation to a certain lawsuit, I believe that such a record must be disclosed. However, if there is no "total", the City would not be required to prepare a new record containing a total on your behalf. In the future, rather than seeking a total, it is suggested that you request records of expenditures in relation to a certain lawsuit, or something similar to that.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Sean P. McDermott

FOIL-AO-15306

From: Robert Freeman
To: MULLEN, VICTORIA
Date: 5/18/2005 2:26:50 PM
Subject: Re: HELPPPPPPPPPP

Hi - -

I haven't seen the article. Is it in today's paper?

With respect to your question, the issue does not involve specificity; rather, it deals with the manner in which the Town maintains and can retrieve its records. If the telephone book is a town record and a request is made for all of the listings for people whose last name is Mullen, the request would be proper and would "reasonably describe" the records as required by §89(3) of the Freedom of Information Law. Even there were ten thousand Mullens, the request would be proper because they could easily be found. If, however, a request is made for all of the listings for those whose first name is Victoria, the request would be specific and there would be Victorias within the list. Nevertheless, to locate them would involve a line by line review of each page of the phone book. In that situation, the request would not reasonably describe the records, despite its specificity. Again, the issue involves the ability to locate the records with reasonable effort, and often the nature of a filing or recordkeeping system will bear on the ability to do so.

I hope that this helps.

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

>>> "MULLEN, VICTORIA" <VMULLEN@oswego.org> 5/18/2005 12:53:20 PM >>>
Hi there....read a nice article about you.(my friend) in the syracuse paper...

question....can someone foil something saying...i want every time .....was mentioned. or...do they have to be specific as to what documentation they want..

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15307

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 18, 2005

Mr. Peter Pirnie
[redacted]

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

Dear Mr. Pirnie:

I have received your letter and the materials attached to it. You complained that your request for records made to Region 7 of the Department of Environmental Conservation had not been answered.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed

to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

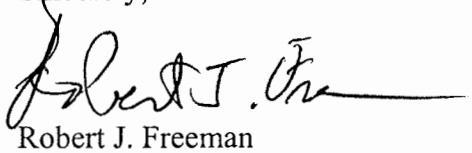
In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth Lynch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15308

41 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 18, 2005

Ms. Michele A. Tow
[redacted]

The staff of the Committee on Open 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 concerning a series of delays by the City of North Tonawanda in responding to your request for records made pursuant to the Freedom of Information Law.

In this regard, although a similar situation has been previously addressed, it is reiterated that with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed

to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Jaccarino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15309

41 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 18, 2005

Ms. Julia Widdowson
[redacted]

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

Dear Ms. Widdowson:

I have received your letter concerning a request for records directed to the Village of Millbrook on February 23 that has not yet been answered.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed

to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

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-1530

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

May 20, 2005

Ms. Denise Diehl
[redacted]

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

Dear Ms. Diehl:

I have received your letter and the materials attached to it. You have sought assistance in gaining access to a City of Peekskill police report concerning the death of your son. Based on a review of the materials, it appears he died as the result of a heroin overdose. In response to your request, the Chief of Police told you, in your words, that you "did not need it."

In this regard, I offer the following comments.

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

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

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Eugene Tumulo

FOIL-AO-15311

From: Robert Freeman
To: [redacted]
Date: 5/23/2005 10:00:04 AM
Subject: Dear Mr. Rabideau:

Dear Mr. Rabideau:

I have received your inquiry concerning your ability to obtain "information on the number of complaints a school district has about verbal abuse by teachers towards students without being specific to an individual person or situation so as not to invade right to privacy."

From my perspective, there are two issues.

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. If, for instance, there is no record indicating the number of complaints relating to verbal abuse by teachers involving a particular time period, the district would not be required to prepare a record containing the number of such complaints. It is suggested, therefore, that a request should not involve a total or the number of number of complaints, but rather that you might requests records of such complaints, following the deletion of personally identifying details.

Second, the same provision requires that an applicant must "reasonably describe" the records sought. Whether or the extent to which a request meets that standard often is dependent on the nature of an agency's filing or record keeping system. If a district maintains all records concerning complaints of verbal abuse by teachers in one file, or if those records can be located with reasonable effort, I believe that a request for the information sought would reasonably describe the records, and when found, the district could make the appropriate deletions to protect privacy. However, if there is no method of locating the complaints of your interest without reviewing hundreds or perhaps thousands of records (i.e., through a review of every teacher's personnel file), individually, such a request, depending on the size of the district, might not reasonably describe the records.

I hope that I have been of assistance.

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

FOIL-AO-15312

From: Robert Freeman
To: [redacted]
Date: 5/23/2005 9:39:36 AM
Subject: Dear Mr. Duncan:

Dear Mr. Duncan:

I have received your inquiry. In short, once a person has obtained records made available in response to a request made pursuant to the Freedom of Information Law, he or she may use or disseminate the records without limitation. There is nothing in the law that would preclude you from posting those records on your 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-1513

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

May 23, 2005

E-mail

TO: James Ayers

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. Ayers:

I have received your letter concerning access to death records.

In this regard, although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, 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. In brief, §4173 of the Public Health Law permits the disclosure of birth records by a registrar only upon issuance of a court order, or to the subject of the birth record or the parent or other lawful representative of a minor. Similarly, §4174 of the Public Health Law limits the circumstances under which the Commissioner of the Department of Health or registrars of vital records may disclose death records and specifies that those records are not subject to the Freedom of Information Law. As such, birth and death records are generally confidential and exempt from the disclosure requirements found in the Freedom of Information Law.

The Public Health Law includes provisions that deal directly with genealogical records. Specifically, subdivision (3) of §4174 refers to searches for and the fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., a registrar designated in a city, town or village. That provision states that:

> "For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time

> for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

Further, the Commissioner of Health has promulgated "Administrative Rules and Regulations" pertaining to genealogical research indicating that birth records need not be disclosed unless the subject of the birth record is known to have been deceased prior to 1924; death records need not be disclosed regarding deaths occurring after 1949.

To obtain additional information concerning the records at issue, it is suggested that you review the information on the NYS Department of Health website, <www.health.state.ny.us> or that you speak with a representative in the Department's vital records unit.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3981
FOIL-AO-15314

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

May 23, 2005

E-Mail

TO: Debra Cohen

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. Cohen:

I have received your letter and apologize for the delay in response. You asked, first, whether the requirement in §106(3) of the Open Meetings Law that minutes be made available within two week "simply refer[s] to when the minutes must be finalized or does it relate to when they must be accessible to the public.

From my perspective, it is clear that minutes must be prepared and made available to the public within two weeks of the meetings to which they relate, irrespective of whether they are "finalized."

Section 106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

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

Significantly, 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.

You referred to a situation in which the City Council of the City of Yonkers authorized the Mayor to execute a certain lease agreement, and you asked whether "the lease agreement that is the subject of this resolution [is] a part of the official record of the meeting and therefore should be produced along with the resolution if requested." In this regard, unless the action taken expressly required that the lease agreement must be incorporated into the minutes, the agreement would not have to be part of the minutes. However, that record would clearly be accessible pursuant to the Freedom of Information Law. That being so, to obtain the records of interest, I believe that a proper request would involve minutes of a meeting during which action was taken, which, again, must be made available within two weeks of the meeting, as well as the full text of the resolution, and the lease agreement executed or signed by the Mayor.

Lastly, you wrote that meetings of the City Council are "recorded on videotapes that serve as the official minutes." While an audio or video recording would likely contain the elements of minutes, I believe that minutes should nonetheless be reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, a municipality often might need a permanent written record readily accessible to its officials who must refer to or rely upon the minutes in the performance of their duties. I point out, too, that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

I note that the State Archives and Records Administration, pursuant to provisions of the Arts and Cultural Affairs Law, develops schedules indicating minimum retention periods for various kinds of records. The retention schedule indicates that tape recordings of meetings must be retained for a minimum of four months. However, the schedule also indicates that minutes of meetings must be kept permanently. Because audio and video recordings cannot be preserved permanently, it would be inappropriate in my opinion to consider them as "official" minutes of City Council meetings.

I hope that I have been of assistance.

RJF:jm

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 15315

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

May 23, 2005

Mr. Edward Sayad
[redacted]

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

Dear Mr. Sayad:

I have received your letter and note that you referred to the enclosure of additional documentation. That material, however, was not included with your letter.

As I interpret your comments, you are an employee of the New York City Transit Authority, and you have attempted to gain access to personnel files pertaining to you, without success. In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed

to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Julian Williams

FOIL-AO-15316

From: Robert Freeman
To: [redacted]
Date: 5/24/2005 11:08:09 AM
Subject: Dear Mr. Isselhard:

Dear Mr. Isselhard:

Section 89(7) of the Freedom of Information Law, Article 6 of the Public Officers Law, specifies that the home address of a present or former public officer or employee need not be disclosed. While a municipality could choose to disclose the home addresses of public officers or employees, it is not required to do so.

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- 15317

41 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, 2005

Mr. Michael Ebron
97-A-0195
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

Dear Mr. Ebron:

I have received your letter that you characterized as an appeal concerning an unanswered request that you sent to the Albany County Clerk.

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. When the Freedom of Information Law is applicable, a person denied access may appeal pursuant to §89(4)(a), which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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 do not believe that the Freedom of Information Law is applicable in the context of your request. As I understand it, the request involves court records. The Freedom of Information Law pertains to agency records, and §86(3) defines the term "agency" to mean:

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

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

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

Based on the foregoing, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records may not be public. Often those records are accessible pursuant to other provisions of law. Nevertheless, those provisions doe not include reference to the right to an administrative appeal.

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1531 8

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 25, 2005

E-MAIL

TO: Charles Lane

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. Lane:

I have received your letter and apologize for the delay in response. You referred to a report issued by the State Comptroller indicating that twelve employees of a state agency "were terminated because they turned out to have criminal records." You requested records identifying those persons and indicating the crimes that they committed. The request was denied based on a claim that they are confidential. It is your view, however, that the public should have the right to know why public employees were terminated from their employment and that their crimes "are a matter of public interest."

In this regard, although I believe that the denial of your request by the Office of the State Comptroller was proper, it is likely that other records containing the information sought must be disclosed. In this regard, I offer the following comments.

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

The initial ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." As indicated in the response to your request, one such statute is §845-b of the Executive Law, which deals with situations in which state agencies conduct criminal history record checks in order to carry out their duties and request those records from the Division of Criminal Justice Services. Subdivision (7) of §845-b states in relevant part that "Any criminal history information provided by the division....is confidential and shall not be available for public inspection..." Moreover, subdivision (3) states in part that "Any person who willfully permits the release of any confidential criminal history information....shall be guilty of a misdemeanor."

Therefore, again, I believe that the denial of your request was consistent with law.

While the Office of the State Comptroller may be prohibited from disclosing criminal history records that it receives from the Division of Criminal Justice Services, I would conjecture that the agency that employed the twelve persons who committed crimes has a variety of records that would contain the information of your interest, and it is suggested that you request records from that agency.

Most pertinent in consideration of rights of access to records maintained by the agency is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

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

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

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

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

In 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].

I would conjecture that the employing agency maintains records indicating that twelve of its employees were terminated due to their records of convictions. If that is so, I believe that those records would be accessible. Similarly, if there are records indicating the nature of the convictions that are separate from those acquired from the Division of Criminal Justice Services, I believe that those portions of the records would be accessible. It is also noted that data regarding persons incarcerated in state correctional facilities is available on the Department of Correctional Services website and that a person's conviction history that includes reference to convictions occurring anywhere in this state is available from the Office of Court Administration upon payment of a fee of fifty-two dollars.

I hope that I have been of assistance.

RJF:tt

cc: Shelly Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3984
FOIL-AO-15319

41 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 2, 2005

E-Mail

TO: Leo Lubke

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. Lubke:

I have received your letter in which you asked whether the "Cornell Cooperative Extension of Erie County Board [is] subject to the Sunshine Law."

From my perspective, a county cooperative extension board is required to comply with the Freedom of Information Law, as well as the Open Meetings Law. In this regard, I offer the following remarks.

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

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

According to §224(8)(b) of the County Law, a county extension service association is a "subordinate governmental agency" whose organization and administration are "approved by Cornell University as agent for the state." As such, I believe that the Cooperative Extension is an "agency" required to comply with the Freedom of Information Law, for it performs a governmental function for the State and, in this instance, Erie County.

Similarly, I believe that the board of a county cooperative extension agency is subject to the Open Meetings Law. That statute pertains to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Again, due to the direction provided by §224(8)(b) of the County Law, the board of a cooperative extension agency performs a governmental function for the state and a public corporation, Erie County.

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 that law. In like manner, the Open Meetings Law requires that meetings of public bodies be conducted in public, unless there is a basis for entry into an executive session, and paragraphs (a) through (h) of that statute specify and limit the grounds for entry into executive session.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-15320

From: Robert Freeman
To: C.B.Smith
Date: 6/2/2005 1:02:37 PM
Subject: Re: question

Hi - -

The initial issue in my view involves the terms of the agreement between the town and the prime contractor. As you are aware, the definition of "record" refers not only to documentary materials maintained by an agency, but also those maintained *for* an agency. If the contract indicates that the prime contractor is required to maintain or acquire certain records for the town to meet its contractual obligations, I believe that those records would fall within the coverage of the FOIL, even though they may not be in the physical possession of the town. On the other hand, if there is no such direction or inference in the contract, it is unlikely, in my opinion, that FOIL would apply.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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>>> "C.B.Smith" [redacted] > 6/2/2005 12:50:22 PM >>>
Hi Bob

Hope you are well!

Have a question , just general guidance.

A town awards a contract. Contract in some cases requires state approved supplies, concrete, blacktop etc.
A contractor is awarded the contract and he hires sub contractors for various supplies.

I want to FOIL the invoices for some of the sub contractors.
(To see how much money they got and whether state approved supplies were provided)
Is the town in constructive possession of these sub contrator invoices even though they do not have them on file in town offices? Theses purchases were generated because of the town's contract with the prime contractor and ultimately paid for with public funds.

Kind of similar to your ruling years ago involving the RCIDA attorney bills which were kept in his law office and not county building??

Thanks

Chas

FOIL-AO-15321

From: Robert Freeman
To: Maryjo@edenny.org
Date: 6/2/2005 12:33:43 PM
Subject: Hi - -

Hi - -

I have received your letter and apologize for the delay in response. From my perspective, a record indicating that there has been a violation of law (a building code violation in this instance) is public. In short, I do not believe that any of the grounds for denying access could properly be asserted to withhold a record of that nature.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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Albany, NY 12231
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FOIL-AO-15322

From: Robert Freeman
To: [redacted]
Date: 6/6/2005 9:31:46 AM
Subject: Dear Ms. Keane:

Dear Ms. Keane:

I have received your letter concerning individuals' ability to "FOIL their own medical records."

In this regard, the Freedom of Information Law (FOIL) pertains to records maintained by government agencies in New York; it does not apply to private hospitals or physicians. However, a different provision of law, §18 of the Public Health Law, has long required providers of medical services in New York to disclose medical records to the subjects of those records. Concurrently, it generally forbids disclosure of those records to third parties, unless the subjects of the records consent to disclosure. I note that a provider of medical services may charge up to 75 cents per photocopy when making those records available.

I hope that I have been of assistance.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15323

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

June 6, 2005

Mr. Kenneth L. Dresser, Jr.
[redacted]

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

Dear Mr. Dresser:

I have received your letter concerning a delay in response to your request for records of the Town of Lodi.

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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15324

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

June 6, 2005

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 information presented in your correspondence.

Dear Mr. Fitzgerald:

I have received your correspondence concerning a request for records maintained by the State Education Department. It appears that the response by the Department is consistent with law, for it involves records pertaining to the investigation of professional misconduct.

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 §6510(8) of the Education Law. That provision states in relevant part that:

> "The files of the department relating to the investigation of possible instances of professional misconduct, or the unlawful practice of any profession licensed by the board of regents, or the unlawful use of a professional title or the moral fitness of an applicant for a professional license or permit, shall be confidential and not subject to disclosure at the request of any person, except upon the order of a court in a pending action or proceeding."

Assuming that the records sought fall within §6510(8), I believe that they would be exempt from disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael A. Colon

FOIL-AO-15325

From: Robert Freeman
To: ltras@dmv.state.ny.us
Date: 6/8/2005 4:47:06 PM
Subject: Good afternoon:

Good afternoon:

Section 89(7) of the Freedom of Information Law specifies that that statute does not require the disclosure of the home address of a current or former public officer or employee. Consequently, the home address of a public employee may be redacted prior to disclosure of a record.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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Albany, NY 12231
(518) 474-2518 - Phone
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Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-15326

From: Robert Freeman
To: [redacted]
Date: 6/9/2005 12:29:34 PM
Subject: Dear Ms. Kearsing:

Dear Ms. Kearsing:

I have received your inquiry concerning your ability "to foil for a sewer district receivable and payable accounts."

From my perspective, a sewer district is clearly an "agency" that is subject to the Freedom of Information Law. In brief, that statute is based on a presumption of access. Stated differently, all agency records are available to the public, except those records or portions thereof that fall within a series of grounds for denial of access listed in §87(2). In my opinion, the kinds of records in which you are interested would be accessible under the law, for none of the grounds for denial of access would be applicable.

I hope that I have been of assistance.

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

FOIL-AO-15327

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

June 9, 2005

E-MAIL

TO: Judah Prero

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. Prero:

I have received your inquiry concerning a request "for all of the agency's records on a certain topic" and whether a request of that nature "reasonably describes" the records as required by §89(3) of the Freedom of Information Law.

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

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

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

> (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

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

While I am unfamiliar with agencies' record keeping systems, 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. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If an agency can locate the records sought with a reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that an agency maintains its records in a manner that renders its staff unable to locate and identify the records with reasonable effort would a request have failed to meet the standard of reasonably describing the records. Stated differently, if agency staff needs to search through the haystack for the needle, I do not believe that it would be required to do so, even if it is known that the needle is there.

I hope that I have been of assistance.

RJF:tt

From: Robert Freeman
To: [redacted]
Date: 6/9/2005 12:45:34 PM
Subject: Dear Mr. Isseks:

Dear Mr. Isseks:

I was a pleasure to meet you and I appreciate your kind words.

You have asked whether you are "entitled to the settlement papers from the lawsuit against the Middletown School District by the child who was allegedly abused by [y]our former superintendent."

In this regard, as you are aware, the Freedom of Information Law is based on a presumption of access. Stated differently, all agency records are available, except those records or portions thereof that fall within the grounds for denial of access appearing in paragraphs (a) through (i) of §87(2).

The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g). In brief, FERPA prohibits a school district from disclosing information that is personally identifiable to a student under the age of eighteen to the public, unless a parent consents to disclosure. Therefore, to the extent that disclosure of the settlement agreement would make the student's identity known or easily traceable, I believe that the records at issue must be withheld, absent consent to disclose given by a parent. However, following the deletion or redaction of personally identifying details pertaining to the student, I believe that the remainder of the documentation would be accessible.

You have not indicated that you know the identity of the student. Irrespective of whether that is so, it is suggested that you should not name the student in a request. Rather you might seek documentation indicating the terms of any settlement between the District and its former superintendent relating to allegations of misconduct made by a student, specifying that you recognize that any identifying details pertaining to a student may properly be deleted.

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-15329

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

June 9, 2005

E-MAIL

TO: Howard Schuman

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. Schuman:

I have received your letter in which you asked whether you may obtain records pursuant to the Freedom of Information Law in a "computer generated file."

In this regard, the Freedom of Information Law has been construed expansively in relation to matters involving records stored electronically. 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.

In Szikszay, one of the first decisions rendered under the Freedom of Information Law concerning records stored electronically, it was held that the format in which the records are maintained does not impact upon rights of access. 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.

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).

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15330

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June 9, 2005

E-Mail

TO: Brian Magoolaghan, The Wave

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. Magoolaghan:

I have received your letter concerning a delay in response to your request for records of the New York City Transit Authority.

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

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

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

RJF:jm

cc: Gail Rogers, Records Access Officer

FOIL-AO-15331

From: Robert Freeman
To: MULLEN, VICTORIA
Date: 6/10/2005 8:27:24 AM
Subject: Re: me again

The reason is that disclosure, in the words of the law, would result in "an unwarranted invasion of personal privacy." When an agency receives a complaint, i.e., regarding a building code violation or a dirty restaurant, the government agency doesn't care who made the complaint; what it cares about is whether the complaint has merit. In short, the identity of the complainant is largely irrelevant to the agency. Further, if an agency has a practice of disclosing the identities of complainants, people may not complain, and the result may be that the government does not learn of situations it should know of in order to protect the public.

I hope that this will help.

Enjoy the weekend!

Robert J. Freeman
Executive Director
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(518) 474-2518 - Phone
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>>> "MULLEN, VICTORIA" <VMULLEN@oswego.org> 6/10/2005 7:56:36 AM >>>
Robert.....if someone foils a complaint made against them, I know we do not give out the information on who filed it...

I have this person screaming at me for not saying who made the complaint. What are the reasons we do not have to give out the name of the complainant I want to make sure I told him the right things.

FOIL-AO-15332

From: Robert Freeman
To: Richard J. Brickwedde
Date: 6/10/2005 9:21:58 AM
Subject: Re: Hi Dick - -

Good morning - -

There is case law, both state and federal, indicating that if a governing body or decision maker has clearly stated or announced that it has adopted an opinion or recommendation as its decision or policy, that record is accessible under FOI provisions. That was the holding of the US Court of Appeals for the Second Circuit in *National Council of La Raza v. Department of Justice*, which was published within the past week in the New York Law Journal. If you need a copy, I can fax it to you. Although that decision was rendered under the federal Freedom of Information Act, I believe that the same conclusion would be reached under the New York Freedom of Information Law.

I have written a couple of opinions on the subject, and I will forward the most recent to you.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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>>> "Richard J. Brickwedde" [redacted] > 6/10/2005 8:47:51 AM >>>
Thanks for the prompt reply.

If a town board/planning board explicitly relies on a legal opinion from the town attorney, does that public reliance mean the legal opinion should be made available to the public?

Thanks for any advice.

Dick Brickwedde

Brickwedde Law Firm
One Park Place, Suite 400
Syracuse, NY 13202-2004
315-423-3302
rbrickwedde@brickwedde.com

-----Original Message-----
From: Robert Freeman [mailto:RFreeman@dos.state.ny.us]
Sent: Friday, June 10, 2005 8:39 AM
To: [redacted]
Subject: Hi Dick - -

Hi Dick - -

Now you've got my email address. Hope to hear from you soon.

Bob

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-15333

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June 10, 2005

Mr. James T. Langlois
District Superintendent
Putnam/Northern Westchester BOCES
200 BOCES Drive
Yorktown Heights, NY 10598-4399

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

Dear Mr. Langlois:

I have received your letter and the materials attached to it. You wrote that a person seeking the home addresses of members of the Putnam/Northern Westchester BOCES Board asked you to obtain my opinion concerning rights of access to those items.

In short, the Freedom of Information Law, Article 6 of the Public Officers Law, §§84 to 90, specifies that home addresses of present or former public officers or employees need not be disclosed. Section 89(7) states in relevant part that "[n]othing in this article shall require the disclosure of the home address of an officer or employee."

Even if that provision did not exist, it would be advised that a home address of a public officer or employee may be withheld pursuant to §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." In a variety of contexts, it has been found that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have determined that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the

performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union, Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Seelig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

In my view, the home addresses of public officers or employees are largely irrelevant to the performance of their official duties. That being so, based on the thrust of case law, an agency could withhold the home addresses at issue, even in the absence of the enactment of §89(7).

Lastly, in Buffalo Teachers Federation, Inc. v. Buffalo Board of Education [156 AD2d 1027 (1989], petitioners attempted to prohibit a board of education from disclosing the home addresses, as well as other items, of all employees of the Board. The Court held, and I believe correctly so, that "[a]lthough the Board of Education is not required to release the home addresses of its employeesit may, should it choose, grant access to information which is exempt from disclosure under FOIL" (id., 1028). In general, the Freedom of Information Law is permissive, and an agency may disclose records even though it is not obliged to do so [see Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Glen W. Johnson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15334

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June 10, 2005

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:

I have received your correspondence and apologize for the delay in response. You have raised several issues, and I will attempt to address them.

Perhaps the primary issue involves public access to "assessment data and tax information on someone else's property to be used in a comparable arguement" [sic]. A member of the Broadalbin Planning Board appears to believe that records of that nature are personal and may be withheld. I disagree with his contention and point out, since he referred to the federal Freedom of Information Act, that that statute applies only to records of federal agencies; it does not apply to entities of state or local government.

More pertinent is the New York Freedom of Information Law. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Further, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. As, 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 fund-raising, is in my opinion irrelevant; when records are accessible, once they are disclosed, the recipient may do with the records as he or she sees fit.

The only aspect of the Freedom of Information Law that involves the ability to deny access based on the intended use of the records, 89(2)(b)(iii), represents what might be viewed as an internal conflict in the law. As indicated above, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. The cited provision states that an agency may withhold records when disclosure would constitute an "unwarranted invasion of personal privacy", and that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." Due to the language of §89(2)(b)(iii), rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)]. However, for reasons to be considered in detail, §89(2)(b)(iii) is, according to judicial decisions, inapplicable with respect to a request for an assessment roll.

Long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969), including assessment rolls. Moreover, even though the Freedom of Information Law authorizes an agency to withhold a list of names and addresses if the list is requested for commercial or fund-raising purposes, in a decision rendered more than twenty years ago, it was held that assessment rolls are accessible even though the request was made for a commercial purpose.

Section 89(6) of the Freedom of Information Law provides that records available under a different provision of law remain available, notwithstanding the grounds for denial of access appearing in the Freedom of Information Law. In Szikszay v. Buelow [436 NYS 2d 558 (1981)],the court found that assessment rolls or equivalent records are public records and were public before the enactment of the Freedom of Information Law. Specifically, it was found that:

> "An assessment roll is a public record (Real Property Tax Law [section] 516 subd. 2; General Municipal Law [section] 51; County Law [section] 208 subd. 4). It must contain the name and mailing or

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

In consideration of the issue of privacy and citing the provision dealing with lists of names and addresses, it was held that:

> "The Freedom of Information Law limits access to records where disclosure would constitute 'an unwarranted invasion of personal privacy' (Public Officers Law [section] 87 subd. 2(b), [section] 89 subd. 2(b)iii). In view of the history of public access to assessment records, and the continued availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.R.L.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted' (cf. Advisory Opns. of Committee on Public Access to Records, June 12, 1979, FOIL-AO-1164). In addition, considering the legislative purpose behind the Freedom of Information Law, it would be anomalous to permit the statute to be used as a shield by government to prevent disclosure. In this regard, Public Officers Law [section] 89 subd. 5 specifically provides: 'Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.'" [id. at 563; now section 89(6)].

The court stated further that:

> "...the records in question can be viewed by any person and presumably copies of portions obtained, simply by walking into the appropriate county, city, or town office. It appears that petitioner could obtain the information he seeks if he wanted to spend the time to go through the records manually and copy the necessary information. Therefore, the balancing of interests, otherwise required, between the right of individual privacy on the one hand and the public interest in dissemination of information on the other...need not be undertaken...

> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner' s purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy" (id.).

Based upon the foregoing, I believe that an assessment roll or its equivalent must be disclosed, irrespective of the intended use of that record. I point out that the same conclusion was reached by Supreme Court in Nassau County in an unreported decision [Real Estate Data, Inc. v. County of Nassau, Supreme Court, Nassau County, September 18, 1981].

Second, you asked whether a tape recording or notes of an executive are "FOILABLE". While I believe that those materials fall within the coverage of the Freedom of Information Law, their content and the effects of their disclosure are the primary factors in considering the extent to which they must be disclosed.

As you may be aware, §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."

Based on the foregoing, I believe that a tape recording or notes of an executive session constitute "records" that fall within the coverage of the Freedom of Information Law. However, depending on their content, several of the grounds for denial might be applicable. Disclosure of portions of the records might, if disclosed, result in an unwarranted invasion of personal privacy; if a matter involves collective bargaining or the purchase of goods or services, disclosure might "impair present or imminent contract awards or collective bargaining negotiations [see §87(2)(c)]; opinions, advice, suggestions, recommendations and the like , as well as notes to oneself, would constitute intra-agency materials that may be withheld [see §87(2)(g)]. In short, while those materials constitute "records", there are likely grounds for withholding substantial elements of them.

Next, you asked whether records maintained by a contractor retained by the Town fall within the scope of the Freedom of Information Law. In this regard, based on the definition of the term "record", documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises..

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency.

The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In sum, insofar records are maintained for the Town, I believe that the Town would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

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 13, 2005

Ms. Jeanine Fitch
[redacted]

The staff of the Committee on 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. Fitch:

I have received your letter and apologize for the delay in response. You have sought my views concerning the propriety of a denial of your request made to the Town of Arcadia for "a copy of the Adult Use Land Study prepared by Dr. Robert Penna, a consultant the Town of Arcadia employed to study the impact of an Adult Pleasures Complex that is interested in opening for business" in the Town. Dr. Penna has issued a "FOIL Notice" in which informed the Town that the study prepared for the Town "is not subject to distribution under the New York State Freedom of Information Act." He referred to two of the exceptions to rights of access, as well as a claim of copyright, as grounds for contending that the study can not be distributed.

From my perspective, the report is the property of the Town, not Dr. Penna, and those portions that are accessible under the Freedom of Information Law are available for inspection and copying. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all government agency records, and §86(4) of that statute defines the term "record" expansively to mean:

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

Based on the foregoing, when a record is prepared *for* an agency, it is an agency record. In this instance, the study prepared for the Town by Dr. Penna, its consultant, constitutes a Town record that clearly falls within the scope of the Freedom of Information Law.

Second, when records are available under that statute, §87(2) states that they are available for inspection and copying.

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.

Although§87(2)(g) potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals, the State's highest court, stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such

> reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

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

I note that in another decision by the Court of Appeals, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

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

[Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a report is never adopted or may not have been relied upon or cited would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access.

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

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation" (id., 276-277)."

I would conjecture that substantial elements of the study, in accordance with the direction offered by the Court of Appeals, would consist of statistical or factual information that must be disclosed.

Next, even if a record is copyrighted, the Copyright Act in my view doe not forbid the public from viewing or obtaining copies of the study. The only exception to rights of access pertinent to the matter would be §87(2)(d), which permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under the Copyright Act, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the U.S. Department of Justice, the most common basis for the assertion of the federal Freedom of Information Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, to the extent that reproduction of a copyrighted work 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 those aspects of work. On the other hand, if

reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it would be available for copying under the Freedom of Information Law.

In consideration of the nature of the study, it is questionable whether §87(2)(d) could properly be cited as a means of denying access. As indicated earlier, 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 opinion, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would

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

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

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

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise...
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not

> contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

From my perspective, it is possible that the study may have *some* value to competitors, but whether every aspect of the report would, if disclosed, cause *substantial injury* to the competitive position of the consulting firm is doubtful, and that is the standard that must be met to justify a denial of access.

I note, too, that when an agency denies access and the denial is challenged in court, §89(4)(b) of the Freedom of Information Law specifies that the agency has the burden of proof. In this instance, the Town would have to prove to a court that disclosure would indeed cause substantial injury to the consultant's competitive position to justify a denial of access pursuant to §87(2)(d).

Lastly, insofar as the content of the report has been effectively disclosed at one or more meetings open to the public, I believe that the Town would have waived its ability to deny access to those portions of the report. Further, the Freedom of Information Law is permissive; stated differently, although an agency *may* withhold records in accordance with the exceptions appearing in the Freedom of Information Law, it not required to do so and may choose to disclose [see 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: Town Board
Robert Penna

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 17, 2005

Mr. Darrin B. Derosia
Corporation Counsel
Department of Law
City Hall, 97 Mohawk Street
Cohoes, NY 12047-2897

Mr. Daniel J. Stewart
Dreyer Boyajian LLP
75 Columbia Street
Albany, NY 12210

Dear Mr. Derosia and Mr. Stewart:

I have received letters from both of you acting in your capacities as attorneys for municipalities concerning the disclosure of a personnel file pertaining to a police officer who resigned from the Cohoes Police Department. Mr. Derosia wrote that the file includes "citizen complaints (both founded and unfounded), letters of reprimand, notices of discipline arbitrator decisions (being found guilty of some charges and not guilty of others), and notices of suspension." The officer was later hired by the City of Rensselaer, Mr. Stewart's client. Disciplinary charges have been initiated by that municipality against the officer, which has led the City of Rensselaer to seek the personnel file from the City of Cohoes pertaining to the officer.

From my perspective, the primary issue involves the interpretation of §50-a(4) of the Civil Rights Law. Insofar as that is so, the matter appears to be beyond the advisory jurisdiction of this office. As you are likely aware, §89(1) of the Freedom of Information Law provides the Committee on Open Government with the responsibility to prepare advisory opinions involving that statute. Situations frequently arise in which the Freedom of Information Law must be considered in relation to other statutes in order to offer correct and appropriate advice. However, in this instance, to the extent that §50-a(4) applies, I do not believe that the Freedom of Information Law is implicated in any way.

As a general matter, the Freedom of Information Law pertains to the obligation of government agencies to disclose records to the public, or conversely, their ability to deny public access. The first basis for denying access, §87(2)(a), involves situations in which records "are specifically exempted from disclosure by state or federal statute." One such statute, as you are aware, is §50-a of the Civil Rights Law. Subdivision (1) states in relevant part that:

> "All personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency or department....shall be considered confidential and not subject to review without the express written consent of such police officer....except as may be mandated by lawful court order."

Based on the foregoing, when a request for personnel records pertaining to a police officer is made under the Freedom of Information Law, consideration must be given to §50-a of the Civil Rights Law, for some personnel records pertaining to police officers are "used to evaluate performance toward continued employment or promotion", while others are not. Insofar as such records are used to evaluate performance toward continued employment or promotion, they are, in my view, exempted from disclosure by statute. Insofar as §50-a does not apply, I believe that the Freedom of Information Law governs in determining the ability or perhaps the obligation to disclose.

Allegations or charges against police officers, whether substantiated or otherwise, as well as reprimands or other determinations in which there have been findings or admissions of misconduct, have been found to be exempted from disclosure pursuant to §50-a [see e.g., Prisoners' Legal Services of New York v. NYS Department of Correctional Services, 73 NY2d 26 (1988); Daily Gazette v. City of Schenectady, 93 NY2d 145 (1999)]. On the other hand, attendance and leave records and a settlement agreement pertaining to a retired police officer were found to be accessible under the Freedom of Information Law, for those records were not used to evaluate performance toward continued employment or promotion, and, therefore, §50-a did not apply [see respectively, Capital Newspapers v. Burns, 67 NY2d 562 (1986) and Village of Brockport v. Calandra, 305 AD2d 1030 (2003)].

In short, to the extent that the contents of the records at issue are or would not be used to evaluate performance toward continued employment or promotion, in my opinion, there is no bar to disclosure. However, to the extent that the records are used for that purpose, I believe that §50-a of the Civil Rights Law, not the Freedom of Information Law, is the governing statute and subdivision (4) is most relevant in that context. That provision states that:

> "The provisions of this section shall not apply to any district attorney or his assistants, the attorney general or his deputies or assistants, a county attorney or his deputies or assistants, a corporation counsel or his deputies or assistants, a town attorney or his deputies or assistants, a village attorney or his deputies or assistants, a grand jury, *or any agency of government which requires the records described in subdivision one, in the furtherance of their official functions*" (emphasis added).

As I view the language quoted above, it is based on a recognition that records that are ordinarily exempt from disclosure may be disclosed to certain government officials or agencies acting in the performance of their official duties. While it appears that subdivision (4) authorizes the City of Cohoes to disclose the records at issue that are exempt from disclosure to the public to

the City of Rensselaer, for the latter is seeking the records "in the furtherance of [its] official functions", I cannot properly offer a formal opinion on the matter, for it does not involve the interpretation of the Freedom of Information Law. It is suggested that you might seek guidance from either the Attorney General or the Conference of Mayors.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

From: Robert Freeman
To: Keith Eddings
Date: 6/17/2005 4:02:58 PM
Subject: Re: Heads up!

Hi - -

The law continues to require that an appeal be determined within ten business days of its receipt. Within that time, the agency must "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought." One of the amendments also states that a failure to determine an appeal within ten business days of its receipt constitutes a denial of the appeal.

Hope this helps.
>>> Keith Eddings <keddings@thejournalnews.gannett.com> 6/17/2005 3:28:39 PM >>>
Attached is the appeals letter I sent to DA Pirro today on an issue that
we've discussed. I characterized the response you gave me in our earlier
concersation.

Question: I know the deadlines for responding to initial foi requests have
changed. Have the deadlines for responding to appeals changed also?

Thanks.

Keith

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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June 20, 2005

Mr. James P. Drohan, Esq.
2517 Route 52
Hopewell Junction, NY 12533

Mr. David Hagstrom
[redacted]

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

Dear Messrs. Drohan and Hagstrom:

I have received your letters and apologize for the delay in response. Mr. Drohan, in his capacity as attorney for the Spackenkill Central School District, has sought an opinion on behalf of the District concerning rights of access to a real property appraisal report pertaining to properties at issue in certiorari proceedings involving the Town of Poughkeepsie as a defendant. Mr. Hagstrom represents the Town in those proceedings. Although a settlement has been reached, it is my understanding that some elements of the certiorari actions have not been concluded. Based on that assumption, 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, two of the grounds for denial of access are pertinent to consideration of the matter.

Section 87(2)(g) authorizes an agency, such as a town, to withhold "inter-agency or intra-agency materials." When an appraisal or survey is prepared by agency officials, it may be characterized as "intra-agency material." Additionally, the Court of Appeals has held that appraisals and other reports prepared by consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of §87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

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

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

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

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i).

Those portions of appraisals reflective of an appraiser's opinion may, in my view, clearly be withheld pursuant to §87(2)(g). Other portions of an appraisal consisting of statistical or factual information should be accessible, again, unless a different exception to rights of access may be asserted.

One such exception relates to §87(2)(a) concerning records that "are specifically exempted from disclosure by state or federal statute." If the appraisals at issue have not been exchanged or filed, and if they were prepared for litigation, it appears that they would be exempt from disclosure. As stated in Orange & Rockland Utilities, Inc. v. Assessor of Town of Haverstraw (Supreme Court, Rockland County, October 21, 2004):

> "CPLR §3140 and 22 N.Y.C.R.R 202.59(g)(1) direct the parties in a tax assessment review proceeding to exchange all appraisal reports intended to be used at trial. It is well settled, however, that any unexchanged and unfiled appraisal reports prepared by a consulting expert qualify as material prepared in anticipation of litigation pursuant to CPLR 3102(d)(2) and are, generally, not discoverable...."

Based on the foregoing, if indeed the appraisal reports remain "unexchanged and unfiled", it appears that they would be exempt from disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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June 20, 2005

E-MAIL

TO: David Dranschak

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. Dranschak:

I have received your letter and apologize for the delay in response. You have asked "whether the Freedom of Information Law covered obtaining information related to a deposition."

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."

Based on the foregoing, as a general matter, entities of state and local government in New York fall within the requirements of the Freedom of Information Law.

Second, that statute pertains to all agency records, and §86(4) defines "record" expansively to include:

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

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

In consideration of the definitions quoted above, any documentary material, irrespective of the medium in which it is stored, that is maintained by or for an agency would be subject to rights conferred by the Freedom of Information Law.

Third, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the content of depositions and the effects of their disclosure are the factors that would determine the extent to which depositions may be withheld, or conversely, must be disclosed. If you could provide additional information concerning the nature of the records of your interest, perhaps additional guidance could be offered.

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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FOIL-AO-15340

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June 21, 2005

Mr. Rich Stewart
[redacted]

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

Dear Mr. Stewart:

I have received your letter and apologize for the delay in response. You referred to executive sessions held by the Board of Trustees of the Village Penn Yan. It is your view that the motions for entry into executive session are "vague" and that the Board often discusses issues in private that should be discussed in public. In addition, you questioned whether the Clerk must "list how each member voted."

In this regard, I offer the following comments.

First, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as village boards of trustees, must be conducted open to the public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session.

Second, the Open Meetings Law contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

Since you referred to motions to enter into executive session as "vague", I note that although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered

in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

> "...the medical, financial, credit or employment history of a <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 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)]

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 Council discusses its litigation strategy may an executive session be properly held under §105(1)(d).

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

Based on the foregoing, a proper motion might be: "I move to enter into executive session to discuss litigation strategy in relation to the case of the XYZ Company v. the Village of Penn Yan", or something similar to that.

Lastly, with regard to information detailing how each member voted, 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", which is defined to include a state or municipal board [see §86(3)], such as a school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

> "it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)].

In an effort to enhance understanding of and compliance with open government laws, a copy of this opinion will be sent to the Board of Trustees. You may duplicate and distribute copies as you see fit.

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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June 21, 2005

Mr. Anthony R. Gray
[redacted]

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

Dear Mr. Gray:

I have received your letter and apologize for the delay in response. Following a review of vouchers by the Dresden Town Board, you asked to review the monthly report submitted to the Board by the Town Justice. It was contended, however, that the report is not a public record.

From my perspective, the record in question should be made available by the Town or by the court. In this regard, I offer the following comments.

First, to put the matter in perspective, I note that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to mean:

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

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

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

Based on the foregoing, the Town of Dresden constitutes an "agency", but its justice court falls outside the coverage of the Freedom of Information Law.

Second, when applicable, the Freedom of Information Law includes all agency records within its coverage, for §86(4) defines the term "record" expansively to include:

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

I point out that the Court of Appeals, the state's highest court, has held that records transmitted by a court to an agency are agency records that fall within the coverage of the Freedom of Information Law [see Newsday v. Empire State Development Corporation, 98 NY2d 746 (2002)]. Therefore, when the Town Justice submits a report or any other documentation to Town officials, those materials constitute agency records that are subject to rights of access conferred by the Freedom of Information Law. That statute, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a monthly report involving the collection of fines or similar information must be disclosed, for none of the grounds for denial of access could properly be asserted.

Lastly, while courts are not included within the coverage of the Freedom of Information Law, court records are generally accessible pursuant to other provisions of law. In this instance, pertinent is §2019-a of the Uniform Justice Court Act, which 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 there is a provision of law that authorizes or requires a justice court to withhold records, the records in possession of a justice court are accessible to the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Town Justice

From: Robert Freeman
To: A Isselhard
Date: 6/21/2005 10:58:20 AM
Subject: Re: FOIL request copy fees

Dear Mr. Isselhard:

The FOIL includes all agency records within its coverage, and I know of no line of demarcation between "FOIL copies" and "non-FOIL copies." When any record is requested, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches, unless a different fee is prescribed by statute.

In the case of records maintained by a county clerk, statutes other than the FOIL often authorize a clerk to charge more than twenty-five cents per photocopy (see Civil Practice Law and Rules, §8019 *et seq.*). In those instances, the provisions in the FOIL pertaining to fees are superseded and do not apply.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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>>> "A Isselhard" [redacted]> 6/21/2005 10:51:39 AM >>>
Dear Mr. Freeman,

My wife and I have FOIL requested numerous copies of documents from the town hall in our town. Recently the town board passed a motion to increase the cost of a FOIL copy from $.10/copy to $.25/copy. The increase in charges apply ONLY to FOIL copies as that was how the resolution was made that adopted policy. Is it within the law for the town board to pass a resolution charging more for FOIL request copies than it charges for non-FOIL copies? Is this inconsistency legal?

Our Orleans County clerk's office charges $1/copy for FOIL requests. This is exhorbatant and much higher than ajoining counties charge. I believe this charge is unreasonably high to discourage and prevent people from requesting FOIL copies. This high charge defeats the FOIL process and I believe it is illegal for the Orleans County clerk to charge this outrageous fee for a FOIL copy. If you read the NYS Public Officer's Law, Article 6, section 87 it says:

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

In view of the above - how can the Orleans County clerk's office charge $1/copy?

Thanks for your help in this matter.

STATE OF NEW YORK
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June 21, 2005

E-MAIL

TO: Steven M. Schneider

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. Schneider:

I have received your letter and apologize for the delay in response.

You indicated that you are a member of the Cherry Valley-Springfield Central School District Board of Education, and that you wrote to this office "as an individual member, and not as a representative of the Board of the District." You wrote that:

> "Our current contract with the Cherry Valley-Springfield Teacher's Association contains a procedure for handling grievances. Part of that procedure calls for a Board of Education hearing, should the Association wish to appeal a decision by the Superintendent. The contract explicitly states that these hearings shall be conducted by the Board of Education in an executive session."

It is your view, however, that:

> "...the contract binds the Board in an illegal way. As Members of the Board, we should be free to decide, on a case by case basis, if a matter ought to be considered in executive session. If, in the opinion of a majority of the Board, a matter ought not be heard in executive session, we should be free to make that choice. In other words, it seems to me that the particular contract provision obligating the Board to enter into executive session is contrary to law."

In this regard, I offer the following comments.

First, a contract cannot validly diminish rights conferred by law, and the Open Meetings Law, which is Article 7 of the Public Officers Law, states in §110(1) that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Therefore, in the context of the situation that you described, insofar as the contract may require that an executive session must be held, even if the Open Meetings Law or some other provision requires that the proceeding be open, I believe that any such provision is invalid and of no effect.

Second, 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. Further, as you inferred, a public body has the option of entering into an executive session when there is an appropriate basis to do so; even when such a proper basis exists, there is no obligation to conduct an executive session.

From my perspective, the subject matter of a grievance is the key factor in considering whether an executive session may properly be held. If, for example, the grievance involves the bells going off too late or early or that there are not enough parking spaces, I do not believe that there would be any basis for entry into executive session. On the other hand, if a grievance relates to a teacher's health or medical condition, it is likely that an executive session could be justified [see §105(1)(f)].

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a

public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

Of possible relevance to the matter is §108(1) of the Open Meetings Law, which exempts from the coverage of that statute "judicial or quasi-judicial proceedings..." 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 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. For instance, in a decision rendered under the Open Meetings Law, it was found that:

> "The test may be stated to be that action is judicial or quasi-judicial, when and only when, the body or officer is authorized and required to take evidence and all the parties interested are entitled to notice and a hearing, and, thus, the act of an administrative or ministerial officer becomes judicial and subject to review by certiorari only when there is an opportunity to be heard, evidence presented, and a decision had thereon" [Johnson Newspaper Corporation v. Howland, Sup. Ct., Jefferson Cty., July 27, 1982; see also City of Albany v. McMorran, 34 Misc. 2d 316 (1962)].

Another 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)].

It is my opinion that the final determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon this notion is based in part upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as:

> "A term applied to the action, discretion, etc., of public administrative officials, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

In the situation that you described, it is unclear whether the Board, following a hearing, renders a determination that is final and binding. If it does so, I believe that its deliberations would be quasi-judicial and, therefore, exempt from the requirements of the Open Meetings Law. It is noted, however, that even when the deliberations of a board of education may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, even if the Board may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

Moreover, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies, such as boards of education. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

The minutes are not required to indicate how the Board reached its conclusion; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes. I note, too, that since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

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

In short, because a board of education is a "public body" and an "agency", I believe that it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of the votes of each member in conjunction with §87(3)(a) of the Freedom of Information Law.

Lastly, even if a hearing is exempt from the coverage of the Open Meetings Law, based on a decision rendered by the Court of Appeals, the state's highest court, it is questionable whether a hearing may be closed. In Herald Company, Inc. v. Weisenberg [59 NY2d 378 (1983)], it was held

that administrative and quasi-judicial proceedings are presumptively open to the press and the public, and that those proceedings may be closed only upon a showing of "compelling circumstances." Whether the holding in Herald Company would be applicable to the hearings that you described has not, to my knowledge, been determined.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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June 22, 2005

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 information presented in your correspondence.

Dear Mr. Fitzgerald:

As you are aware, I have received your letter concerning responses to your requests for records of the Valhalla Union Free School District.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I note that the Freedom of Information Law was recently amended, and as of May 3, when

an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Kelly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15345

41 State Street, Albany, New York 12231
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June 22, 2005

Ms. Jean A. Black
[redacted]

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

Dear Ms. Black:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You have asked that I prepare an opinion to be sent to the Akron Central School District advising that it is required "to transmit available information by electronic means." In your request to the District, you asked that a "list encompassing all full-time teachers by name, title and most recent salary" be emailed or sent to you "by computer disc".

In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

As indicated earlier, the Freedom of Information Law pertains to existing records. It is emphasized, however, that §86(4) defines the term "record" expansively to include:

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

Based upon the language quoted above, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in

computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. "Form" or "format" in my view involves the medium by which information is stored; whether information is stored on paper or on a computer tape or in a computer disk, it constitutes a "record."

In what may be the leading decision relating to an agency's obligations regarding disclosure in an electronic medium, Brownstone Publishers Inc. v. New York City Department of Buildings [166 AD2d 294 (1990)], the question involved an agency's duty to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division:

> "The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1][b][iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" (id. at 295).

In another decision, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" [Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992); aff'd 190 AD2d 1067 (4th Dept., 1993)].

In short, assuming that the conversion of format can be accomplished, that the data sought is available under FOIL, and that the data can be transferred from the format in which it is maintained to a format in which it is requested, an agency would be obliged to do so.

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

As you requested, copies of this opinion will be sent to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alan R. Derry
Cindy Tretter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 23, 2005

Mr. Dominick J. Siani
[redacted]

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

Dear Mr. Siani:

I have received your letter and apologize for the delay in response. You have asked that this office "consider the following circumstances" and render and advisory opinion concerning these questions:

> "Would it be permissible disclosure for SUNY to make available official college transcripts for the sole purpose of enabling the public to verify that a faculty member has taken the coursework that they were hired to teach as specifically outlined in their job duties? This disclosure would be limited to only their documented duties and would not include the disclosure of electives or other coursework outside their job responsibilities. This disclosure would also exclude routine personal information along with grades, grade point averages and any references to academic standing.
>
> "Plain and simple, if a faculty member was hired to teach specific courses in the discipline of accounting, would it be permissible to disclose the related accounting coursework contained on their official college transcripts maintained on file at the SUNY campus?"

From my perspective, based on the thrust of judicial decisions, the items off your interest should be disclosed. In this regard, I offer the following comments.

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, 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, I believe that the details within a transcript that are irrelevant to the performance of one's duties, as well as one's grades, may generally be withheld. However, in my opinion, based on judicial decisions, those portions of such a record or its equivalent that are relevant to one's duties or which represent requirements that must be met to be appointed to a position must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: M. Fischer
Stacey B. Hengsterman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15347

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

June 28, 2005

Mr. D. Sinkler
99-B-2255
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. Sinkler:

I have received your letter concerning a failure by the Ontario County Court Clerk to respond to your requests for certain records pertaining to yourself.

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 law defines the term "agency" to mean:

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

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

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

Based on the foregoing, the Freedom of Information Law does not apply to the courts.

Nevertheless, there are other statutes which often require the disclosure of court records (see e.g., Judiciary Law, §255). It is suggested that you renew your request, 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-15348

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

June 28, 2005

Mr. Leopold Siao-Pao
82-B-1697
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508-8245

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

Dear Mr. Siao-Pao:

I have received your letter in which you asked whether you may consider a failure to respond to an appeal within ten business days of its receipt by an agency a "constructive denial" of the appeal.

In this regard, in Floyd, Matter of v. McGuire [87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)], it was determined that an agency's failure to determine an appeal within ten business days of its receipt constitutes a constructive denial of the appeal. In that circumstance, the person denied access has the ability to seek judicial review of the denial of access by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-15349

From: Robert Freeman
To: Richard J. Brickwedde; 'Roy Mallette'
Date: 6/29/2005 8:03:11 AM
Subject: Re: digging

Good morning - -

There are many instances in which certain portions of records are accessible, while other portions may properly be withheld. In those circumstances, the agency is required to review the records in their entirety and delete or "redact" those portions that may properly be withheld, and disclose the remainder. The act of deleting or redacting cannot be equated with tampering with public records.

In the context of the request that appears to have been made, attorneys' bills or invoices might include descriptions of litigation strategy or other material that would fall within the scope of the attorney client privilege; they might include names of witnesses or perhaps students in the case of a school district. In those kinds of situationss, those portions of the records might be redacted, but the remainder consisting of a brief description of services rendered, the amount of time spent, and the amount billed would be accessible.

To obtain a more expansive consideration of the topic, you might review advisory opinions accessible on our website. Go the FOIL advisory opinion index, click on to "A", and scroll down to "attorney client privilege."

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

>>> "Richard J. Brickwedde" [redacted] > 6/28/2005 3:44:57 PM >>>
No, it's called redacting, but I am cc'ing Bob Freeman on this email to see what he thinks of redacting vouchers for payment which have already been acted upon.

Dick Brickwedde

Brickwedde Law Firm
One Park Place, Suite 400
Syracuse, NY 13202-2004
315-423-3302
[redacted]

-----Original Message-----
From: Roy Mallette [redacted]
Sent: Tuesday, June 28, 2005 2:45 PM
To: Richard J. Brickwedde
Subject: digging

Went to Town Hall to look at vouchers which I have been after for more than a month. All attorney vouchers have been pulled. Town Clerk told me it would take three weeks because they wanted to be able to edit them before shown to the public.

I aksed her for a letter that explains their position. Isn't this tampering with government records?

Roy Mallette
www.ciceronetnews.com

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15350

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

June 29, 2005

E-MAIL

TO: Marsha S. Freer

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. Freer:

I have received your letter in which you asked whether "there is a legal stipulation regarding Board of Education members and the necessity to submit a FOIL Request for Information."

In this regard, by way of background, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A board of education, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board, member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15351

41 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 1, 2005

E-MAIL

TO: Beverly Bredemeyer

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. Bredemeyer:

I have received your letter in which you asked whether you have a right of access to an examination paper completed by your son. You wrote that the exam "consisted of a composition", but that you were informed that "parts of these exams are often used for future examinations and are not released."

In this regard, I believe that two statutes are pertinent to the matter.

First, the New York Freedom of Information Law includes records of state and local government within its coverage. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. One of the exceptions to rights of access provides that examination questions or answers may be withheld to the extent that the questions will be used in the future. Therefore, when the Freedom of Information Law governs, examination questions and answers may be withheld insofar as the questions will be used again.

I note, however, that §89(6) states that nothing in the Freedom of Information Law can be asserted to deny access to records that are accessible under a different provision of law. In this instance, I believe that a second statute requires disclosure of the composition to you. Specifically, the federal Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. §1232g) is applicable to all educational agencies or institutions that participate in federal educational funding programs. As such, it applies to virtually all public educational institutions. In general, FERPA confers rights of access to "education records" pertaining to a student under the age of eighteen to the parents of the student or to an "eligible student." The federal regulations define the phrase "eligible student"

to mean "a student who has reached 18 years of age or is attending an institution of postsecondary education" (see 34 C.F.R. §99.3). Concurrently, it generally requires that education records be kept confidential, unless the parents or eligible students, as the case may be, waive the right to confidentiality. I note that the regulations promulgated by the U.S. Department of Education define the term "education record" broadly to include "those records that are - [1] Directly related to a student; and [2] Maintained by an educational agency or institution or by a party acting for the agency or institution..."

Based on the foregoing, insofar as a school district maintains a record identifiable to your minor child, such as the composition that he wrote, I believe that it would constitute an "education record" available to you as a parent pursuant to rights conferred by FERPA.

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

July 11, 2005

Mr. Carl T. Morgan
03-R-5493
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. Morgan:

I have received your letter of in which you sought assistance in obtaining court records 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 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-15353

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July 11, 2005

Mr. J. Miceli
84-A-6855
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5498

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

Dear Mr. Miceli:

I have received your letter in which you complained that you have sent "several FOIL appeals to Counsel's Office" at the NYS Department of Correctional Services and you believe that no response will be forthcoming because you are preparing to take them to court on a separate issue.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

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 or the status of the applicant, is in my opinion irrelevant.

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-15354

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July 11, 2005

Mr. Michael Thomas
03-B-2134
Groveland Correctional Facility
7000 Sonyea Road
Sonyea, NY 14556

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

Dear Mr. Thomas:

I have received your letter in which you requested an advisory opinion concerning an agency's failure to respond to an appeal and when you would be able to proceed with an Article 78 proceeding. You also asked if you would be able to prevail in a request for an award of attorney's fees.

In this regard, I offer the following comments.

First, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the

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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

Second, it is my understanding that initiation of an Article 78 proceeding must be done within four months of the denial of your appeal.

Lastly, 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

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July 11, 2005

Mr. Emilio Ramos
Reg. #35179-054
U.S. Penitentiary
P.O. Box 1000
Lewisburg, PA 17837

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

Dear Mr. Ramos:

I have received your letter and the materials attached to it. You have requested assistance in gaining access to records from the New York City Police Department and asked for information concerning the appeal process.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

Based on a review the materials that you sent, it appears that the some of the records are not in possession of the New York City Police Department. In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Lastly, as suggested by Lieutenant Daniel Gonzalez, it is recommended that you submit a request for records to the Queens County District Attorney's Office. It appears that that office may have the records 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

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July 11, 2005

Mr. Carl A. Macedonio
72-A-0476
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. Macedonio:

I have received your letter in which you asked that this office conduct an investigation on your behalf concerning your unanswered requests for records directed to the Suffolk County District Attorney's Office.

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

With respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15356

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July 11, 2005

Mr. Eric Birdsall
93-A-1028
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990

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

Dear Mr. Birdsall:

I have received your letter in which you requested an advisory opinion concerning access to records of a 911 call made by your aunt and related materials prepared following that call.

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

Section 87(2)(b) states that an agency may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." It is possible that disclosure of a tape recording or transcript of a 911 call made by a person other than yourself, or perhaps related records, might result in an unwarranted invasion of that person's privacy. To that extent, records may properly be withheld.

Another exception of significance pertains to communications between an employee of the agency in receipt of an emergency call and another public employee, i.e., a town police officer or a state trooper, both of whom would be "agency" employees. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

I. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. In my experience, the communications at issue typically consist of factual information (i.e., medical emergency at 210 Main St.), or perhaps an instruction to staff that affects the public, both of which would be available unless a different exception applies, such as §87(2)(b) concerning unwarranted invasions of personal privacy. On occasion, the communications may also include opinions or recommendations ("I think that a person may be hurt"), which an agency may withhold.

Finally, §87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308(4), which states that:

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

Based on the foregoing, "records...of calls" means either a recording or a transcript of the communication between a person making a 911 emergency call to a county run E911 service, and the employee who receives the call. Records of that nature are, in my view, exempted from disclosure by 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

FOIL-AO-15357

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July 11, 2005

Mr. Oscar Rhodes
00-A-7092
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. Rhodes:

I have received your letter in which you complained that as of the date of your letter to this office, you had not received any response to your appeal. You also asked if this office received a copy of the appeal and determination.

In this regard, having researched our files, no appeal or determination has been forwarded to the Committee.

With respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15358

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July 11, 2005

Mr. Richard Champion
97-B-1527
Oneida Correctional Facility
6100 School Road
Rome, NY 13440

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

Dear Mr. Champion:

I have received your letter in which you asked if you are entitled to a variety of training bulletins, videotapes, policies, seminar materials, etc. from the Oneida County Sheriff's Department.

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 record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, insofar as records that are the subject of your inquiry exist, three of the grounds for denial may be relevant to your inquiry.

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

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

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

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

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

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

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

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

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

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The

> information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

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

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

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

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15359

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July 11, 2005

Peter R. Litchka, Ed.D.
Superintendent of Schools
North Salem Central School District
230 June Road
North Salem, NY 10560

Dear Dr. Litchka:

I appreciate having received a copy of your determination of an appeal by Ms. Marie Martell made pursuant to the Freedom of Information Law. She has taken issue with an element of that determination. Specifically, in your consideration of §87(2)(g) and "the four categories of non-exempt documents" referenced in that provision, you wrote that "they all share one common characteristic: they reflect conditions or facts which *already exist*" (emphasis yours). From my perspective, based on the judicial interpretation of the Freedom of Information Law, your contention is inaccurate.

In this regard, I offer the following comments.

First, the characterization of a record as "draft" or "preliminary" is not determinative of rights of access. I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) of the Law defines the term "record" to mean:

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

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

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

the Law. As you are aware, §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 developed prior to the adoption of a budget, are accessible, even though they may have been advisory, preliminary 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, 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, even though they do not pertain to events or actions that have already occurred or to conditions that already exist.

I hope that the foregoing will be enlightening and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Marie L. Martell

FOIL-AO-15360

From: Robert Freeman
To: [redacted]
Date: 7/12/2005 9:01:40 AM
Subject: Dear Mr. Braun:

Dear Mr. Braun:

As I understand your remarks, a warrant for arrest was served at a local housing project, and the manager requested information concerning the identities of any persons who were arrested. However, you wrote that the "the Police Department said that information could not be disclosed." You have asked whether that is so.

From my perspective, unless the records relating to an arrest have been sealed because charges were dismissed in favor of an accused (see Criminal Procedure Law, §160.50), records or portions thereof that identify those who were arrested are accessible under the Freedom of Information Law. That was the conclusion reached by the state's highest court, the Court of Appeals, in *Johnson Newspapers Corp. v. Stainkamp* [61 NY2d 958 (1984)]. Perhaps the Police Department should be reminded that we do not have secret arrests in this country.

I hope that I have been of assistance.

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

From: Robert Freeman
To: [redacted]t
Date: 7/12/2005 9:33:04 AM
Subject: Dear Mr. Falkowitz:

Dear Mr. Falkowitz:

I have received your inquiry concerning requests made to a village pursuant to the Village Law, §4-402(e), and the Freedom of Information Law, and whether such requests must be made by individuals, or whether they may be made by organizations as well.

While I cannot offer guidance concerning the Village Law, I note that all government records fall within the scope of the Freedom of Information Law. Further, from my perspective, requests may be made pursuant to that statute by natural persons as well as entities. Numerous judicial decisions refer to entities, such as news organizations, corporations and public interest groups as petitioners. That being so, again, I believe that requests for records may be made by both individuals and entities under the Freedom of Information Law.

I hope that I have been of assistance.

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

FOIL-AO-15362

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July 12, 2005

Ms. Lisa Mevorach, Esq.
[redacted]

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

Dear Ms. Mevorach:

As you are aware, I have received your correspondence concerning a complaint alleging sexual harassment that you filed when you were a student at the City University of New York School of Law. The complaint was dismissed, and you raised questions concerning your ability to gain access to records relating to the complaint and the ensuing investigation.

From my perspective, based on judicial decisions, in situations in which there is a complaint followed by an inquiry or investigation, the outcome is the critical factor in determining whether or the extent to which records must be disclosed. In this instance, because the complaint was dismissed, it appears that the records of your primary interest may be withheld.

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

Section 87(2)(b) states that an agency may withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy. Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons,

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

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

In short, if there was no determination to the effect that an employee engaged in misconduct, I believe that a denial of access to the records based upon considerations of privacy would be consistent with law.

The other provision of significance is §87(2)(g), which permits an agency to withhold records that:

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

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

In sum, if there was a final determination indicating misconduct on the part of a public employee, based on judicial determinations, such a determination would be accessible. In that event, other aspects of the records consisting of factual information would be available, except to the extent that disclosure would constitute an unwarranted invasion of personal privacy. Again, however, if

there was no finding of misconduct, it appears that the request could have been denied to protect personal privacy.

Another aspect of your letter pertains to a requirement that the School of Law's Sexual Harassment Committee "submit a report annually to the Chancellor, including a summary of the educational activities undertaken at the college during the year and a summary of the number of complaints filed and the general outcomes thereof." You asked whether you may have the right to gain access to that report. Assuming that the report does not identify victims, alleged victims, or persons who were not found to have engaged in misconduct, it appears that the report would be accessible to the public. As I understand its contents based on the description that you provided, it would consist statistical and factual information in summary form. If that is so, I believe that it would be accessible under §87(2)(g)(i).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: William Fox, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15363

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July 12, 2005

Mr. Frederick Dixon
03-A-6265
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

Dear Mr. Dixon:

I have received your letter and the correspondence relating to it. In this regard, it is emphasized at the outset that the primary function of the Committee on Open Government involves offering advice and guidance concerning the Freedom of Information Law. Consequently, the issue that you raised concerning your "merit" and the ASAT program is beyond the jurisdiction or expertise of this office.

You also included an appeal addressed to this office relating to an apparent denial of a request made under the Freedom of Information Law. However, you did not include any information concerning the nature of the records that you requested. Further, I point out that the Committee is not empowered to determine appeals or to compel an agency, such as the Department of Correctional Services, 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 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 by the Department to determine appeals is Anthony J. Annucci, Counsel to the Department.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 15364

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July 12, 2005

Mr. Danny Holliman
01-A-4537
Eastern Correctional Facility
P.O. Box 338
Napanoch, NY 12458

Dear Mr. Holliman:

I have received your letter in which you appealed to this office based on a constructive denial of your request for records of the Schenectady County District Attorney.

In this regard, I point out that you referred to the federal Freedom of Information Act, which applies only to federal agencies. The applicable statute in the context of your request is the New York Freedom of Information Law.

It is also emphasized that the Committee on Open Government is not empowered to determine appeals or compel an agency to grant or deny access to records. Nevertheless, 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state,

> in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alfred D. Chapleau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3998
FOIL-AO-15365

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

July 12, 2005

E-Mail

TO: Cora Edwards

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. Edwards:

I have received your correspondence concerning your efforts in obtaining information relating to a proposed development in Swan Lake.

One of your questions involves your request that a second public hearing be held. In this regard, the advisory jurisdiction of the Committee on Open Government pertains to "meetings" and the Open Meetings Law. Provisions concerning "hearings" are separate and distinct, and I have neither the expertise nor the jurisdiction to offer guidance or advice concerning the possibility that a second public hearing may be required. Since the issues appear to involve environmental matters, it is suggested that you seek guidance from the regional office of the Department of Environmental Conservation.

Other questions relate to minutes of meetings of the Planning Board, and you referred audio tapes of meetings that had not yet been transcribed. Here I point out that there is no requirement that minutes consist of a verbatim account of all that is expressed during meetings, nor is there an obligation to prepare transcripts of tape recordings of meetings. If a transcript is prepared, it constitutes a "record" that would be accessible under the Freedom of Information Law. If, however, no transcript has been or will be prepared, a tape recording of an open meeting is also a record that would be accessible under that statute, and it was so held more than twenty-five years ago (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978).

The Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes, and in addition, it provides direction concerning the time within which minutes must be prepared and made available. 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 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."

Subdivision (3) deals specifically with the time within which minutes must be prepared and made available, a period of two weeks with respect to minutes of open meetings, and one week when action is taken during executive sessions.

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

RJF:jm

cc: Planning Board

FOIL-AO-15366

From: Robert Freeman
To: A Isselhard
Date: 7/13/2005 9:53:39 AM
Subject: Re: FOIL requests

The courts are not subject to the Freedom of Information Law. However, other statutes often grant substantial rights of access to court records. In the context of your inquiry, §2019-a of the Uniform Justice Court Act generally requires that records maintained by a justice court be made available, unless there is some other provision of law that exempts records from disclosure. Examples of records exempted from disclosure would involve arrest records pertaining to juveniles and records that have been sealed because criminal charges have been dismissed in favor of an accused. If I correctly understand the matter that you described, the records in question in possession of the court would be available, not pursuant to FOIL, but rather pursuant to the Uniform Justice Court Act.

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

>>> "A Isselhard" [redacted]> 7/12/2005 10:07:33 PM >>>
Mr. Freeman,

Can I FOIL information from town justice courts on procedural issues? FOIL information and correspondence between the town and the defendant (or defendant's lawyer's firm) in a small claims court case (before the case is actually heard)? Thanks.

Alan Isselhard
Holley, New York

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15307

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

July 13, 2005

Mr. Kenneth J. Bradley
04-06202
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. Bradley:

I have received your letter in which you complained that, as of the date of your letter to this office, you had not received any response to your request directed to the New York State Division of Parole.

In this regard, with respect to requests made before May 3, 2005, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed

to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

initiate a challenge to a constructive denial 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 New York State Division of Parole is Terrence X. Tracy, Counsel to the Division.

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15368

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

July 13, 2005

Mr. Lane Shelter
98-B-1655
Groveland Correctional Facility
7000 Sonyea Road
Sonyea, NY 14556

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

Dear Mr. Shelter:

I have received your letter in which you asked for assistance in gaining access to records possessed by your trial attorney.

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 attorney, for example.

It is unclear from your letter whether your trial attorney performs functions relative to an assigned counsel program under Article 18-B, which encompasses §§722 to 722-f of the County Law. Under §722, the governing body of a county and the City Council in New York City are required to adopt plans for providing counsel to persons "who are financially unable to obtain counsel." Those plans may involve providing representation by a public defender, by a legal aid organization, through a bar association, or by means of a combination of the foregoing.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information

Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

I hope that 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-15369

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

July 13, 2005

Mr. Anthony Dixon
86-A-4087
Eastern N.Y. Correctional Facility
P.O. Box 338
Napanoch, NY 12458-0338

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

Dear Mr. Dixon:

I have received your letter in which you indicated that you requested records from the Nassau County Police Department in April of 2004 and that every few months you have received requests for extensions. Having researched our files, this office received a copy of a determination of your appeal to the Police Department. Deputy Chief Robert W. McGuigan determined that your appeal was premature as you were not denied access to records.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

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

It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added]. In the context of your correspondence, it appears that approximate dates have been given, but that the agency has repeatedly gone beyond those dates.

In a case that described an experience similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89 (3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming.
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the agency "is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law, §89(4)(a)."

Based on the foregoing, I believe that your requests have been constructively denied and that you may appeal the denial to Deputy Chief Robert W. McGuigan pursuant to §89(4)(a). That provision states in relevant part that:

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

Alternatively, based on the holding in Bernstein, it appears that you could seek judicial review of the denials now.

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

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to Deputy Chief McGuigan.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Deputy Chief Robert W. McGuigan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15370

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

July 13, 2005

Mr. Tamar Loper
99-A-0853
Auburn Correctional Facility
135 State Street
Auburn, NY 13021.

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

Dear Mr. Loper:

I have received your letter in which you asked the meaning of a "certification" under §89(3) of the Freedom of Information Law.

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."

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-15371

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

July 13, 2005

Mr. Michael Graham
03-R-0367
Marcy Correctional Facility
Box 3600
Marcy, NY 13404-3600

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. Graham:

I have received your letter in which it appears that you are trying to obtain daily activity reports prepared by a particular police officer of the New York City Police Department. You indicated that at your trial, another officer testified that the police department no longer maintains the reports because the officer who prepared them was transferred to another command.

In this regard, I point out that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

Based upon the language quoted above, 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 Police Department, I believe that the Police Department would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to Lieutenant Daniel Gonzalez, Records Access Officer of the New York City Police 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: Lieutenant Daniel Gonzalez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 15372

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

July 13, 2005

Mr. Adrian Glover
Albion Correctional Facility
01-G-0334
3595 State School 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. Glover:

I have received your letter in which you indicated that you have requested photographs taken of you during an alleged assault that occurred at your facility. As of the date of your letter to this office, you had not received any response to your request.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

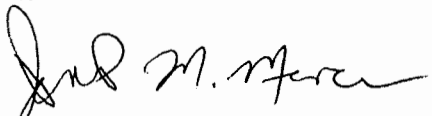
The person designated to determine appeals by the Department of Correctional Services is Anthony J. Annucci, Counsel to the Department.

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. Assuming that the photographs involve only you, I do not believe that any of the grounds for denial would be applicable.

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- 15373

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

July 13, 2005

Mr. David C. Young
93-A-4529
Groveland Correctional Facility
7000 Sonyea Road
Sonyea, NY 14556

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

Dear Mr. Young:

I have received your letter and the correspondence attached to it. It appears that you have encountered difficulty in obtaining a copy of your preliminary hearing transcript from a court because records indicating the name of the court reporter that recorded the minutes cannot be found.

In this regard, the Committee on Open Government is authorized to provide advice concerning the state's Freedom of Information Law. The Freedom of Information Law is applicable to agencies, and §86(3) of that statute defines the term "agency" to mean:

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

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. However, since the records cannot be found, I note that §255 of the Judiciary Law states that:

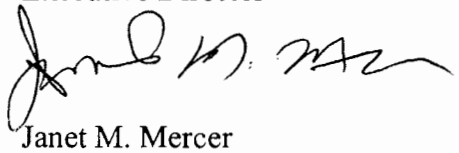
> "A clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make 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."

If you believe that it would be worthwhile to do so, it is suggested that you seek a certification that the records cannot be found.

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 13, 2005

Hon. Frederick J. Amato
Monroe County Legislator
268 Morrow Drive
Rochester, NY 14616

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

Dear Legislator Amato:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning the applicability of the Freedom of Information and Open Meetings Laws to the Monroe County Internal Audit Committee (hereafter "the Committee"), for you have been told that the Committee's meetings, its reports and its "Audit Committee Plan" are "not open to public scrutiny."

From my perspective, the meetings of the Committee fall within the requirements of the Open Meetings Law, and its records are subject to rights conferred by the Freedom of Information Law. This is not intended to suggest that meetings of the Committee must necessarily be open to the public in their entirety or that the records to which you referred must be accessible to the public *in toto,* but rather that the meetings of the Committee must be held in accordance with the Open Meetings Law and that its records may be accessible or deniable in whole or in part in accordance with the Freedom of Information Law. In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

It is noted that several decisions indicate generally that ad hoc entities consisting of persons other than members of public bodies having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In this instance, the entity in question is not ad hoc, for it has a continual existence and has certain legally imposed powers and duties. Moreover, it has been held that an advisory body created by law, which is so in this instance, is a public body subject to the Open Meetings Law [see MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977)].

The Monroe County Code indicates, however, that the functions of the Committee are not solely advisory. According to excerpts from the Code, copies of which you attached, the Committee is a creation of law [§C6-5(4)(a)], it consists of seven members, and "[a] majority vote of the total Audit Committee (i.e., four votes) is required for Committee approval of any matter" [§C6-5(4)(b)]. The ensuing provision entitled "Powers and duties" states in part that the Committee shall "receive from the Director of Finance on or before March 15, and approve within 30 days of receipt, the presentation of the County's annual internal audit plan...."

In consideration of the foregoing, I believe that the Committee possesses the attributes necessary to conclude that it is a "public body" required to comply with the Open Meetings Law. In short, it consists of seven members, it functions and can carry out its duties only by means of a quorum, i.e., a majority vote of its total membership (see also, General Construction Law, §41), it clearly conducts public business and performs a governmental function for a public corporation, Monroe County, by means of its legal obligation to receive and approve the finance director's internal audit plan.

Second, you asked whether "documents produced" by the Committee, particularly "Internal Audit Reports", are "public documents." In my view, all such documents fall within the coverage of the Freedom of Information Law; their content, however, is the primary factor in determining the extent to which they must be disclosed pursuant to that law.

By way of brief background, 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 definition quoted above, any documents maintained, acquired or produced by the Committee constitute "records" that fall within the scope of the Freedom of Information Law.

That statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 note that §C6-5(c)(2) of the County Code states in part that:

> "...the confidentiality of employee records cited in any audit shall be strictly maintained within the Committee. Such records shall be restricted solely to use within the Committee for informational purposes only and shall not be transmitted to the Legislature nor released to the public."

Insofar as the provision quoted above is inconsistent with the Freedom of Information Law, I believe that it is invalid and of no effect. The state's highest court, the Court of Appeals, has held that a request for, a promise or any assertion 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.

Moreover, it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as a county code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. In short, a local enactment cannot confer, require or promise confidentiality.

There may, however, be portions of the records referenced in §C6-5(c)(2) that may be withheld. I point out that there is nothing in the Freedom of Information Law that deals specifically with employee records or personnel files. The nature and content of those records 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 employee records are available, while others are not. By means of example, items within a record indicating a public employee's gross pay would be accessible, but items involving charitable contributions, alimony, deductions and the like would be exempt; those latter items are unrelated to the performance of one's official duties. Attendance records indicating time in and out, days and dates of leave claimed have been found to be accessible (see Capital Newspapers, supra), but portions of those records indicating an employee's medical condition could be withheld.

With respect to internal audits and other internal governmental communications, the provision of primary significance §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.

Because the provision cited above refers to "external audits", it has been contended that internal audits, such as those that are the subject of your inquiry, may be withheld in their entirety. Nevertheless, there is nothing in the language of the Freedom of Information Law that pertains specifically to internal audits or that exempts them from disclosure. The fact that external audits must be disclosed does not suggest other records, such as internal audits, are exempt, in their entirety, from disclosure. On the contrary, as stated earlier, all records are presumed to be available, and silence in the law concerning a certain kind of record does not confer confidentiality, but rather a presumption of access. In this instance, an internal audit constitutes "intra-agency" material that is accessible or deniable, in whole or in part, based on its contents.

The paragraph quoted above, other than the first sentence, was quoted in full in Gannett Co. v. Rochester City School District [684 NYS 2d 757, 759 (1998)], and the Supreme Court, Monroe County, agreed with my opinion that portions of internal audits consisting of "statistical or factual tabulations or data" must be disclosed pursuant to subparagraph (i) of §87(2)(g), unless some other basis for denial, i.e., §87(2)(b), may properly be asserted.

I note, too, that the Court of Appeals dealt with a similar contention relating to a different aspect of §87(2)(g). In Gould et al. v. New York City Police Department [89 NY2d 267 (1996)], the agency denied access on the basis of §87(2)(g)(iii), which grants access to "final agency policy or determinations", on the ground that the records sought were not final and did not relate to any event whose outcome had been finally determined. As in Gannett, in which the agency contended that because external audits are accessible, internal audits can be withheld in their entirety, the New York City Police Department argued that because final determinations are public, records other than final may be withheld in their entirety. The Court of Appeals rejected that argument 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); emphasis added by Court].

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).

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

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

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. 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.).

Based on the language of the law and especially its judicial interpretation, again, those portions of internal audits consisting of statistical or factual information, in my view, must be disclosed, except to the extent that a different exception may be properly asserted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 14, 2005

E-MAIL

TO: Marion Cassie

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. Cassie:

As you are aware, I have received your letter concerning the placement of minutes of meetings of the Town Board of the Town of Canandaigua on the Town's website. You wrote that the Town Clerk indicated that I "recommended against posting town board minutes on a town's website because individuals who speak at a Town Board meeting must give their name and address, and that posting the minutes which included that information would be a breach of their privacy." You have asked whether the Clerk correctly described my position on the matter.

I believe that she did so, and for purposes of clarification, I offer the following comments.

First, I note that the Town Clerk requested an opinion raising essentially the same issue. It was pointed out in that opinion that, in my view, there is nothing that requires that the names and addresses of those who speak at meetings be included in the minutes of those meetings. While those items may be included, there is no obligation to do so. In a related vein, it was suggested that there are circumstances in which it may be damaging in some way for a person who wishes to speak before a public body to identify himself or herself with his or name and address.

Second, I do not believe that it would be contrary to law for the Clerk to include speakers' names and addresses with minutes of meetings and to place those minutes on the Town's website. Nevertheless, as suggested to the Clerk, I question the wisdom of doing so. As stated in the opinion addressed to her:

> "When a person's name and home address are placed on a website, anyone, anywhere in the world, has the ability to obtain and combine them with other items available in cyberspace by means of various search engines and data mining. When a name and an address are

> placed on a website, anyone, anywhere has the ability to acquire a variety of additional data about a person and use that information for purposes that cannot be anticipated. Persons identified may be solicited online or by other means; profiles of individuals can be developed; information about a person may be used for illegal purposes or perhaps to transmit viruses that can disable computers or electronic information systems."

Lastly, you referred to other records, such as real property assessment rolls, that are posted on the internet. It is true that those and similar records have been made available via government websites. It is also true, however, that concern regarding the inclusion of personal information accessible via a government website has increased and in some cases has resulted in reconsideration and changes in practices. For instance, in Nassau County, where the assessment roll was posted and included names of owners of parcels of real property, there were strong objections. As a consequence, the names were excluded from the data made available online. Similarly, court records that have historically been available for inspection and copying remain available, but new policies will enable those who file those records to exclude social security and bank account numbers, as well as other personal information, from the records prior to filing. While court records have generally been available for inspection and copying at a court clerk's office, it was considered appropriate to remove certain items from those records prior to filing due to their potential use or misuse when made available via the internet.

I hope that the foregoing serves to clarify your understanding of the advice that I have given and that you can appreciate its basis.

RJF:tt

cc: Hon. Judith H. Carson

From: Robert Freeman
To: [redacted]
Date: 7/14/2005 2:57:16 PM
Subject: http://www.dos.state.ny.us/coog/Right_to_know.html

http://www.dos.state.ny.us/coog/Right_to_know.html

Dear Ms. Siracusa:

I have received your inquiry. In short, there is no general requirement that a request for records made pursuant to the Freedom of Information Law be notarized. The only instances in which proof of identity can be required would involve those situations in which a person seeks records pertaining to himself or herself and is the only member of the public who would have the right to gain access to them, and in which requests for the same records by others would be denied on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

Attached is "Your Right to Know", a general guide to the Freedom of Information Law that includes a sample letter of request that may be useful to you.

I hope that I have been of assistance.

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

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July 14, 2005

Mr. Ramzan Ali
97-A-1989
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. Ali:

I have received your letter in which you asked how you could obtain crime statistics concerning NYS Penal Law, §220.39 from 1995 through 2004.

In this regard, 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. The records access officer has the duty of coordinating an agency's response to requests.

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

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

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the

definition of "record" includes specific reference to computer tapes and discs, and it was held some fifteen years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

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

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

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

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-15378

41 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 14, 2005

Mr. Dave Carr
04-A-1103
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

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

Dear Mr. Carr:

I have received your letter in which you asked whether you are entitled to a copy of your Grand Jury minutes 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.

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

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

As such, grand jury minutes would be outside the scope 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.

Enclosed is a copy of "Your Right to Know", which is an explanatory guide to the Freedom of Information Law.

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

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

Enc.

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July 14, 2005

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 how your facility can be required to preserve videotapes. You indicated that these videotapes are recycled after fourteen days and facility staff always denies access to the tapes. You also stated that you are indigent and would like these videotapes free of charge.

In this regard, I point out that this office has previously issued an advisory opinion to you concerning the same issue. Enclosed is a copy of that opinion for your review.

With respect to your question concerning a waiver of fees, 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 its established 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
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15380

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

July 14, 2005

Mr. Alphonso Samuels
82-A-5791
Livingston Correctional Facility
Route 36, Sonyea Road
Sonyea, NY 14556-0049

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

Dear Mr. Samuels:

I have received your letter and the materials attached to it. It appears that you submitted a series of questions concerning an incident at your correctional facility to the inmate records coordinator, who informed you that the Freedom of Information Law does not require that answers be prepared in response to your request.

In this regard, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request.

Therefore, facility staff in my view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive. In short, in the future, rather than seeking information or raising questions, it is suggested that you request existing records. Enclosed is "Your Right to Know", which explains the Freedom of Information Law and includes a sample letter of request that may be useful to you.

I hope that 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-15381

41 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 14, 2005

Mr. Neron Dozier
01-A-3845
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. Dozier:

I have received your letter in which you asked that this office compel your facility to respond to your requests for records.

In this regard, I point out that your referred to the federal Freedom of Information Act, which applies only to federal agencies. The applicable statute in the context of your request is the New York Freedom of Information Law. Also, the Committee on Open Government is authorized to provide advice concerning that statute. 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.

In this regard, with respect to requests made before May 3, 2005, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15382

41 State Street, Albany, New York 12231
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July 14, 2005

Mr. Carlos Moreno
82-A-2217
Mid-State Correctional Facility
P.O. Box 216
Marcy, NY 13403-0216

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

Dear Mr. Moreno:

I have received your letter in which you indicated that you requested records from the New York City Police Department. The request was acknowledged, indicating that it would take up to 120 days before a determination would be made. The 120 days have elapsed and, as of the date of your letter to this office, you had not received a response.

In this regard, with respect to requests made before May 3, 2005, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15383

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July 14, 2005

Mr. Ubaldo Romero
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 information presented in your correspondence.

Dear Mr. Romero:

I have received your letter in which you requested assistance in obtaining information pertaining to victims involved in your case from two hospitals under the Freedom of Information Law.

In this regard, I offer the following comments.

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

Since you are not a "qualified person", I believe that the medical records of your interest would be exempt from disclosure. To obtain additional information regarding access to patient information, it is suggested that you contact Mr. Peter Farr, NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

I hope that I have been of assistance.

Sincerely,

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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FOIL-AO-15384

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July 14, 2005

Mr. Domenic Larocco
97-A-6278
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. Larocco:

I have received your letter in which you indicated that you requested records from the Queens County District Attorney's Office in September of 2003, which has sought extenstion to is time to respond. As of the date of your letter to this office, you still have not received the records.

In this regard, with respect to requests made before May 3, 2005, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

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

It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added]. In the context of your correspondence, it appears that approximate dates have been given, but that the agency has repeatedly gone beyond those dates.

In a case that described an experience similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89 (3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming.
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the agency "is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law, §89(4)(a)."

Based on the foregoing, I believe that your requests have been constructively denied and that you may appeal the denial pursuant to §89(4)(a). That provision states in relevant part that:

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

Alternatively, based on the holding in Bernstein, it appears that you could seek judicial review of the denials now.

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

may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to Tina Loschiavo of the Queens County District Attorney's Office.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Tina Loschiavo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15385

41 State Street, Albany, New York 12231
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July 14, 2005

Mr. Thomas Odgen
03-A-3991
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. Ogden:

I have received your letter in which you complained that, as the date of your letter to this office, you had not received a response to your request for records from the Greene County Public Defenders Office.

It is noted that you referred to the federal Freedom of Information and Privacy Acts, both of which apply only to federal agencies. The applicable statute in the context of your request is the New York Freedom of Information Law.

In this regard, I offer the following comments.

With respect to requests made before May 3, 2005, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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

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July 14, 2005

Mr. Alberto Rodriguez
95-A-8295
Five Points Correctional Facility
P.O. Box 119, State Rt. 96
Romulus, NY 14541

Dear Mr. Rodriguez:

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

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 concerning the right to appeal, §89(4)(a), states in relevant part that:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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July 18, 2005

Ms. BettyLou Kranz
President, CSEA 7912
85 Shinhollow Road
Port Jervis, NY 12771

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

Dear Ms. Kranz:

I have received your correspondence concerning a request for a report prepared by a consultant for a school district that was denied on the ground that the report was "not held by this agency."

Based on the language of the Freedom of Information Law and its judicial construction, a report prepared for an agency, such as a school district, falls within the coverage of that statute, irrespective of the physical location where that record is kept. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, such as those of a school district, for §86(4) defines the term "record" expansively to mean:

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

In consideration of the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was

his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Perhaps most significant is a decision rendered by the Court of Appeals, the state's highest court, in which it was found that materials maintained by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Insofar as records are "kept, held, filed, produced or reproduced...*for* an agency", i.e., a school district, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law.

In circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation described in the correspondence, insofar as a consultant maintains records for the district, to comply with the Freedom of Information Law and the implementing regulations, the records access officer must either direct the consultant to disclose the records in a manner consistent with law, or acquire the records in order to review them for the purpose of determining rights of access.

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

Pertinent to this instance is §87(2)(g). Although that provision potentially serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

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

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

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

The same kind of analysis would apply with respect to records prepared by consultants for agencies, for the Court of Appeals has held that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][I], or other

> material subject to production, they should be redacted and made available to the appellant" (id. at 133)

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

With respect to a contention that the records are "predecisional" or "non-final", I note that in Gould v. New York City Police Department, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

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

In short, that the records are "predecisional" or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access.

In sum, based on the direction offered by the state's highest court, I believe that records prepared by a consultant for the school district constitute district records that fall within the coverage of the Freedom of Information Law, even though the records may not in the physical possession of the district. Moreover, insofar as the records consist of "statistical or factual tabulations or data", they must be disclosed, even though they may be predecisional or "non-final."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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July 18, 2005

Mr. Gus Potkovick
[redacted]

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

Dear Mr. Potkovick:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You expressed the opinion that Chautauqua County has acted in a manner "in violation of [your] rights." In a letter addressed to "responsible parties", you referred to and contended that the County "has denied [you] and has knowledge of....the state of unpaid taxes...Any and all environmental issues to date...[and] all or any tax liens or private liens filed" in relation to a certain parcel of real property. In a letter addressed to you by the First Assistant County Attorney, Daniel R. Polowy, it was stated that he enclosed a list of delinquent taxes assessed against the parcel of your interest. However, he also wrote that records prepared in relation to a tax foreclosure proceeding are confidential.

From my perspective, it appears that Mr. Polowy's response was consistent with law. In this regard, in an effort to enhance your understanding, I offer the following comments.

First, as Mr. Polowy suggested, the Freedom of Information Law pertains to existing records; it does not require the staff of an agency to provide information in response to questions. Similarly, §89(3) of that statute provides in part that an agency is not required to create a record in response to a request for information.

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, three of the grounds for denial are pertinent to the matter.

Communications between and among county officers and employees would fall within the coverage of §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.

Perhaps more significant is the initial ground for denial of access, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute. Three of the provisions to which Mr. Polowy referred are statutes or portions of statutes that exempt records from disclosure. Those statutes are subdivisions (c) and (d) of §3101 of the Civil Practice Law and Rules (CPLR), which respectively make confidential the work product of an attorney and material prepared for litigation, and §4503 of the CPLR, which makes attorney-client communications privileged and confidential.

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 limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable", and §3101(d)(2) 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 records from a potential or actual adversary that would, if disclosed, result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed to a third party. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

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

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

The thrust of case law concerning material prepared for litigation is consistent with the preceding analysis, in that §3101(d) may properly be asserted as a means of shielding such material from an adversary.

The remaining exception of significance was cited by the County Executive and states that an agency may withhold records insofar as disclosure would "impair present or imminent contract awards..." The provision has been cited by the state's highest court in a situation in which an appraisal of property owned by a government agency was sought prior to the sale of the property. The court determined that disclosure prior to the sale would place the agency at a disadvantage [Murray v. Troy Urban Renewal Agency, 56 NY2d 888 (1982)]. In short, if the assessed value is known in advance, prospective purchasers would tailor their offers accordingly, and disclosure would impair the government's ability to obtain an optimal price on behalf of taxpayers.

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. Mark W. Thomas
Daniel R. Polowy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 20, 2005

Mrs. Parry Brown
[redacted]

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

Dear Mrs. Brown:

I have received your letter and hope that you will accept my apologies for the delay in responding.

You referred to correspondence with the Division of Parole in which you requested information but apparently received no response. In your letter, you raised the following questions:

> "How many persons, men and women, are still in New York prisons who were convicted of first or second degree murder in the 1960s, only persons with sixties numbers, murderers serving life sentences who presumedly could still be paroled? How many of these individuals are serving time for a single homocide?"(emphasis yours).

In addition, "[w]hen a crime in New York gets a 'heinous label' tacked on to it", you asked "how such a determination is made and who makes it."

From my perspective, there is little doubt that the information that would be responsive to your questions is public. However, the issue for purposes of the Freedom of Information Law involves the ability of a government agency, such as the Division of Parole or perhaps the Department of Correctional Services, to produce that information.

In this regard, first, the title of the Freedom of Information Law may be misleading, for it pertains to the public's right to gain access to existing records, rather than information *per se*. Section 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 provide information in response to questions, they are not required to do so to comply with the Freedom of Information Law. In the future, rather than seeking information by raising questions, it is suggested that you request existing records. For

instance, you might request "records or portions of records that indicate or that would enable me to ascertain the number of persons currently incarcerated who were convicted of first or second degree murder in the 1960's." The same provision also requires that an applicant must "reasonably describe" records sought, and it has been found that whether or the extent to which a request meets that standard may be based on the nature of an agency's filing, recordkeeping or retrieval system [see Konigsberg v. Coughlin, 68 NY2d 245 (1968)].

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

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

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

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

Often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort by entering queries, case law indicates that an agency must do so[see e.g., NYPIRG v. Cohen, 729 NYS 2d 379 (2001)].

In the context of your request, again, if no records or statistics exist that provide totals or answers to your questions, an agency would not be required to prepare new records containing the information sought on your behalf. If a request for records is made (as opposed to seeking information by raising questions),to the extent that the Division of Parole or another agency has the ability to locate or generate them with reasonable effort, I believe that it would be required to do so. For instance, if there is a paper file pertaining only to those convicted of murder in the 1960's, I believe that a request for that file or portions of it would reasonably describe the records as required by §89(3) of the Freedom of Information Law. On the other hand, if there is no way of retrieving the information of your interest from data stored electronically, or if locating and/or retrieving the information sought would involve what, in essence, would be the search for the needle in the haystack, the request would not reasonably describe the records, and your request could be rejected on that basis.

Also for future reference, the Freedom of Information provides directions concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of

the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Lucretia Bailey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 20, 2005

E-MAIL

TO: Carl Falk

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 Mr. Falk:

I have received your letter and apologize for the delay in response. You referred to executive sessions held by the Richland Town Board that are scheduled in advance of meetings, as well as executive sessions held to discuss "contracts." Additionally, I note that a copy of a determination following a request for records was sent to this office by the Town Supervisor in which he denied your appeal. That, too, will be addressed in the following comments.

First, by way of background, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

In consideration of the foregoing, it has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a deoision 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. I understand that the intent was to be considerate to the public, and by indicating that an executive session is likely to be held (rather than *scheduled*), the public would implicitly be informed that there may be no overriding reason for arriving at the beginning of a meeting.

Second, paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. The only reference in §105(1) to "contracts", "negotiations" or "contract negotiations" appears in paragraph (e). The provision pertains only to collective bargaining negotiations involving a public employee union and would clearly be inapplicable in the context of the situation that you described.

The provision that might have justified an executive session in the circumstance described does not refer directly to contracts. Paragraph (f) of §105(1) states that a public body may 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..."

Frequently contract negotiations include consideration of the "financial, credit or employment history" of a "particular person or corporation" or "a matter leading to the employment of a particular person or corporation." To the extent that is so, I believe that an executive session may properly be held. Nevertheless, unless the basis for entry into executive session is expressed in that manner (i.e., "I move to enter into executive session to discuss the financial or credit history of a particular corporation"), the public cannot know whether there is indeed a proper basis for conducting an executive session. A description of the matter as "contracts" would not describe the matter in a way that offers justification for holding an executive session.

In short, a more precise or artful motion for entry into executive session might resolve some of the difficulties encountered.

Lastly, in determining your appeal under the Freedom of Information Law, the Supervisor wrote that "all interagency and intra-agency materials that are not final agency policy or determinations exempt from access..." Based on the language of the law and its interpretation by the state's highest court, the Court of Appeals, the Supervisor's contention is inaccurate. While the provision to which he referred, §87(2)(g), governs rights of access, due to its structure, it may require disclosure, depending on the contents of the records.

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

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

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

One of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals was that certain reports could be withheld because they are not

final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

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

In short, that a record is predecisional or does not represent a final policy or 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 or other items accessible under subparagraphs (ii), (iii) or (iv) of §87(2)(g), they must be disclosed, unless a different basis for denial of access may properly be asserted.

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Hon. James Atkinson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 20, 2005

E-MAIL

TO: Barry Harris

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. Harris:

As you are aware, I have received your letter in which you asked whether the public may "foil a copy of the tape recording made at a village meeting" and whether such a request should be made to the village clerk.

In this regard, first, the Freedom of Information Law pertains to agency records, such as those of a village, and §86(4) of the Law defines the term "record" expansively to include:

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

Based on the foregoing, when a municipal board maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law, irrespective of the reason for which the recording was prepared.

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

Supreme Court, Nassau County, NYLJ, December 27, 1978]. When an agency has the ability to prepare a copy of a tape recording, it must do so, and §87(1)(b)(iii) of the Freedom of Information Law states that the agency may charge based on the actual cost of reproduction, i.e., the cost of a cassette.

Lastly, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person. In my experience, the clerk is the records access officer in most villages.

I hope that I have been of assistance.

RJF:tt

From: Robert Freeman
To: Ann Leber
Date: 7/21/2005 10:16:37 AM
Subject: Re: FOIL Request

Good morning - -

As records access officer, it is your duty to coordinate the Town's response to requests. Therefore, if records are not in your physical possession but rather are kept in other Town offices, I believe that persons in those offices should be contacted, told of the the request, and asked to retrieve the records to the extent that they have the ability to do so with reasonable effort. When the records are located, those persons can be asked to disclose the records directly to the applicant or to forward the records to you so that you can review them to determine the extent to which they must be disclosed.

As you may recall, if more than five business days will be needed to determine to grant a request in whole or in part, the receipt of the request must be acknowledged in writing within five business days of its receipt. The acknowledgment must include an approximate date indicating when the records will be made available in whole or in part. If more than twenty business days from the date of acknowledgment will be needed to do so, the reason for the delay must be expressed, and a date certain on which the records will be granted in whole or in part, in essence, a self-imposed reasonable deadline, must be given.

Because you are dealing with a frequent requester, it is suggested that a record be kept indicating what has been disclosed to him/her in order to avoid duplication.

I hope that I have been of assistance. If you have additional questions, please feel free to contact me.
>>> "Ann Leber" <ALEBER@northcastleny.com> 7/20/2005 4:42:03 PM >>>
Bob,
I am still knee-deep in FOIL requests from the disgruntled developer whom I spoke to you about two weeks ago. He has now submitted 9 requests between June 13 and July 15.

If I suspect that some documentation exists in the files of one of the other town departments, but I do not have it in my files, am I required to produce it? For example, he has asked for documentation relating to the status of all NYS grants received by the Town within the last five years. I have a record of some but I don't think all. Am I required to track down documentation that exists in other departments?

Thanks for your help,
Ann

Ann Leber, Town Clerk
Town of North Castle
15 Bedford Road
Armonk, NY 10504
(914) 273-3321 phone
)914) 273-4176 fax

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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July 21, 2005

Ms. Angela Celeste
[redacted]

The staff of the Committee on 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. Celeste:

I have received your letter and apologize for the delay in response. You have asked whether "fire and safety inspection records" pertaining to an elementary school in the East Meadow School District are accessible 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.

Assuming that the inspections are carried out by District staff, the provision of relevance is §87(2)(g) concerning internal governmental communications. Although that provision potentially serves as a basis for denying access, due to its structure, it often requires substantial 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.

I point out, too, that one of the contentions offered by an agency in a decision rendered by the Court of Appeals, the State's highest court, was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

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

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

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

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

deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) id., 276-277).]

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 21, 2005

Mr./Ms. Dale Pager
John R. Probst Investigations, Inc.
352 Loudon Road
Loudonville, NY 12211

Dear Mr./Ms. Pager:

I have received your letter concerning your inability to obtain records from the Olympic Regional Development Authority (ORDA).

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 stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I note that the Freedom of Information Law was recently amended, and as of May 3, when

an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgment must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: John Cansdale
Stephanie Ryan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15395

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July 26, 2005

Mr. Joseph W. Plater
95-B-2336
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

Dear Mr. Plater:

I have received your correspondence, which you characterized as an appeal under the "the Freedom of Information Act (FOIA), 5 U.S.C. §552." The appeal is also addressed to Ms. Nancy Fuller, Director of Health Information Management at Cortland Memorial Hospital.

In this regard, first, the Freedom of Information Act is a federal statute applicable only to federal agencies. Second, I would conjecture that Cortland Memorial Hospital falls outside the coverage of 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, the Freedom of Information Law generally applies to entities of state and local government in New York. If Cortland Memorial Hospital is not a governmental entity, the Freedom of Information Law would not apply. Even if it did apply, I believe that access to the information sought could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [§§87(2)(b) and 89(2)b)].

Lastly, 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. For future reference, the provision concerning the right to appeal an agency's 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 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 clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Nancy Fuller

FOIL-AO-15396

FROM: Robert Freeman
TO: rgarcia@roosevletufsd.com
DATE: July 26, 2005

Dear Ms. Garcia:

I have received your inquiry concerning acess to "student files located in the guidance office." I believe that the governing statute is the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). In brief, that statute pertains to records identifiable to students that are maintained by educational agencies or institutions and generally grants rights of access to the parents of students. Concurrently, it requires that those records be kept confidential, unless there is specific direction to the contrary, or unless a parent consents to disclosure.

Attached are the regulations that implement FERPA, and it is suggested that you review them, particularly 99.31, which deals with instances in which records identifiable to students may be disclosed without consent by a parent. If you are alluding to disclosures to District staff, under 99.31, it must be determined that there is a "legitimate educational interest" in order to disclose.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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July 26, 2005

Ms. Cheryl Holmes
Citizens for True and Honest Government
P.O. Box 477
Fulton, NY 13069

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

Dear Ms. Holmes:

I have received your letter concerning the First Fire District in Granby and the Granby Center Fire Department. Because the jurisdiction of this office is limited matters involving the Freedom of Information and Open Meetings Laws, the following comments will relate to your questions in which those laws are implicated.

It is noted at the outset that the First Fire District and the Granby Center Fire Department are separate entities. I believe, however, that both are required to comply with the Freedom of Information Law, as well as the Open Meetings Law.

By way of background, the Freedom of Information Law pertains to agency records, and 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.

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, §66(1)], a fire district is an "agency" that falls within the coverage of the Freedom of Information Law.

I point out that the status of volunteer fire companies had been unclear for several years. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions if the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law. I note that the records at issue in that case involved a lottery conducted by a volunteer fire company, and the Court found that those records were subject to rights of access conferred by the Freedom of Information Law.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

Until recently, there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgment must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part.

That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

It is noted that it has been held that an agency may require payment of fees for copies of records prior to making copies available to an applicant [see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982].

Next, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) of that law defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

The governing body of a fire district, which, again, is a public corporation, is a board of fire commissioners, which is clearly a "public body" required to comply with the Open Meetings Law. Additionally, 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.

Lastly, both the Freedom of Information Law and the Open Meetings Law are based on a presumption of openness. In the case of the former, 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. In the case of the latter, meetings of public bodies are required to be held open to the public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. That being so, a public body cannot conduct an executive session to discuss the subject of its choice.

Enclosed for your review are copies of the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: First Fire District
Granby Center Fire Department

Encs.

OML-AO-4010
FOIL-AO-15398

From: Robert Freeman
To: Freer
Date: 7/27/2005 9:19:40 AM
Subject: Re: District Clerk Workshop

Good morning:

During the sessions at NYSASBO during which I spoke, no mention was made of any requirement that minutes of a meeting of a board of education must indicate the time when board members arrive late or leave prior to the conclusion of the meeting. The Open Meetings Law does not address that issue, and while I am not an expert regarding the Education Law, I know of no provision within that body of law that offers specific direction.

I recall indicating that the Open Meetings Law includes what might be characterized as minimum requirements concerning the contents of minutes (see §106). At a minimum, they must consist of a record or summary of all motions, proposals, resolutions, and the vote of the members. It is emphasized, too, that the Freedom of Information Law, §87(3)(a), has long required that a record be maintained that indicates the final vote of each member in every instance in which the member votes. The record of votes appears in the minutes and clearly precludes secret ballot voting or its equivalent. If the vote is 4 to 3, the minutes must identify which 4 members voted in the affirmative and the 3 in the negative.

The foregoing is not intended to suggest that the times that board members arrive late or leave early should not be included in the minutes; on the contrary, it may be wise and appropriate to include entries of that nature. I am merely suggesting that I know of no law that requires that the information at issue must be included in the minutes.

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
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

>>> "Freer" <Freerm@northsalem.k12.ny.us> 7/26/2005 5:41:28 PM >>>
Good afternoon:

I am the District Clerk in the North Salem Central School District. I was in attendance at the NYSASBO conference and first wanted to comment that the information shared at the workshop was very informative. There seems to be so much to learn in order to perform the duties of the District Clerk and many different sources to look to and through in order to find the answers to the various questions.

I was hoping that I could ask for clarification on an item regarding the Minutes of the Board of Education. I seem to recall that there is a "legal" requirement with regard to noting times of late arrival or early departure of Board members on the minutes of the meeting.

Can you please advise me as to which law (Education Law, School Law, etc.) and section of said law this "legal" requirement is contained in?

Thank you,
Marsha

Marsha S. Freer
Secretary to the Superintendent of Schools
District Clerk to the Board of Education
North Salem Central School District
230 June Road
North Salem, NY 10560

(914) 669-5414 x. 1011
Fax: (914) 669-8753

Email: freerm@northsalem.k12.ny.us

From: Robert Freeman
To: Bob and Jenny Petrucci
Date: 7/27/2005 9:39:14 AM
Subject: Re: state elected official

Good morning:

First, a request made under FOIL should ordinarily be addressed to the agency's records access officer. As you are aware, the records access officer has the duty of coordinating an agency's response to requests. Second, when a request is denied in writing or due to a failure to respond, an appeal may be made, according to §89(4)(a), to the head or governing body of the agency, or the person designated to determine appeals by the head or governing body of the agency. The appeals person or body has ten business days from the receipt of the appeal to grant access to the record or fully explain in writing the reasons for further denial.

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>>> "Bob and Jenny Petrucci" [redacted]> 7/27/2005 12:02:58 AM >>>
Hi, Bob.
If in FOILing a state elected official that person does not respond, to whom do we appeal?
Thanks,
Bob and Jenny Petrucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-4011
FOIL-AO-15400

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July 28, 2005

Ms. Diane Schena
[redacted]

The staff of the Committee on 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. Schena:

I have received your letter and apologize for the delay in response. You wrote that you serve as a member of the Board of Commissioners of the Providence Fire District, and that in that capacity, you have sought to attend meetings of the Providence Volunteer Fire Department. You have raised a series of issues concerning the Department's obligation to comply with the Open Meetings Law.

Before offering a perspective regarding information that you provided, I point out that the statutory functions of this office in relation to the Open Meetings Law are advisory in nature. The Committee does not have the authority or the resources to conduct investigations, nor is it empowered to determine that an entity or person has complied with or "violated" the law. The following remarks should, therefore, be viewed as an opinion that is advisory.

In considering whether volunteer fire departments or companies are subject to the Open Meetings Law, it is necessary to reference a decision rendered by the Court of Appeals, the state's highest court, concerning its statutory companion, the Freedom of Information Law. By way of background, I note that the status of volunteer fire companies had been unclear for several years. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions if the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

The Open Meetings Law is applicable to meetings of public bodies, and §102(2) of that law defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By reviewing the components in the definition of "public body", I believe that each is present with respect to the governing body of a volunteer fire company. The governing body 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. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, I believe that the governing body of such a company is a "public body" subject to the Open Meetings Law.

As indicated in the definition quoted above, a committee or subcommittee of a public body is itself a public body. Therefore, if, for example, the governing body of a volunteer fire company designates two or more of its members as a committee or subcommittee, that entity in my opinion would fall within the coverage of the Open Meetings Law.

The Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a village board of trustees. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less

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

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..."

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

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

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

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

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

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

> "...the medical, financial, credit or employment history of a 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.

In the context of the situation at issue, I do not believe that a discussion of the "leadership style" of the Board's president would have fallen within the coverage of §105(1)(f).

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304;

see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

"Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

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, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

Lastly, you asked whether town justices "are trained in the Open Meetings Laws..." I would conjecture that knowledge of the Open Meetings Law is not required of town justices. The Open Meetings Law in §108(1) exempts judicial proceedings from its coverage. In short, while public bodies are subject to the requirements of the Open Meetings Law, the courts are not.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Providence Volunteer Fire Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15401

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July 28, 2005

Mr. John Hynes
[redacted]

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

Dear Mr. Hynes:

I have received your letter and apologize for the delay in response. You referred to a request to the Department of Health's Fatality Assessment Control Unit (FACE) for the names of "the deceased workers whose deaths on the job FACE is investigating." Although you contend that the identities of those persons should be disclosed, the request was denied. You added that you want to obtain the names in order to "advise their surviving family members of their rights to file claims for workers compensation and other benefits such as Crime Victims Compensation." You have asked whether "the privacy laws apply to the deceased."

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 constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy.

The Court of Appeals, the state's highest court, recently dealt with issues involving the privacy of the deceased and their surviving family members for the first time in New York Times Company v. City of New York Fire Department (March 24, 2005; ___NY3d___). The records in question involved 911 tape recordings of persons who died during the attack on the World Trade Center on September 11, 2001, and the decision states that:

> "We first reject the argument, advanced by the parties seeking disclosure here, that no privacy interest exists in the feelings and experiences of people no longer living. The privacy exception, it is argued, does not protect the dead, and their survivors cannot claim 'privacy' for experiences and feelings that are not their own. We

> think this argument contradicts the common understanding of the word 'privacy'."
>
> "Almost everyone, surely, wants to keep from public view some aspects not only of his or her own life, but of the lives of loved ones who have died. It is normal to be appalled if intimate moments in the life of one's deceased child, wife, husband or other close relative become publicly known, and an object of idle curiosity or a source of titillation. The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy. We thus hold that surviving relatives have an interest protected by FOIL in keeping private affairs of the dead (cf. Nat'l Archives and Records Admin. V. Favish, 541 US 157 [2004])."

Based on the foregoing, it is clear that there may be an interest in protecting privacy in consideration of the deceased, as well as their family members. Nevertheless, the ensuing question involves the content of records, and whether the information is so intimate or personal that disclosure would result in an "unwarranted" invasion of privacy. As stated by the Court:

> "The recognition that surviving relatives have a legally protected privacy interest, however, is only the beginning of the inquiry. We must decide whether disclosure of the tapes and transcripts of the 911 calls would injure that interest, or the comparable interest of people who called 911 and survived, and whether the injury to privacy would be 'unwarranted' within the meaning of FOIL's exception."

In its focus on the nature of the calls, it was found that:

> "The privacy interests in this case are compelling. The 911 calls at issue undoubtedly contain, in many cases, the words of people confronted, without warning, with the prospect of imminent death. Those words are likely to include expressions of the terror and agony the callers felt and of their deepest feelings about what their lives and their families meant to them. The grieving family of such a caller – or the caller, if he or she survived – might reasonably be deeply offended at the idea that these words could be heard on television or read in the New York Times.
>
> "We do not imply that there is a privacy interest of comparable strength in all tapes and transcripts of calls made to 911. Two factors make the September 11 911 calls different.
>
> "First, while some other 911 callers may be in as desperate straits as those who called on September 11, many are not. Secondly, the

> September 11 callers were part of an event that has received and will continue to receive enormous - - perhaps literally unequalled - - public attention. Many millions of people have reacted, and will react, to the callers' fate with horrified fascination. Thus it is highly likely in this case - - more than in almost any other imaginable - - that, if the tapes and transcripts are made public, the will be replayed and republished endlessly, and that in some cases they will be exploited by media seeking to deliver sensational fare to their audience. This is the sort of invasion that the privacy exception exists to prevent."

As I view the direction offered by the Court of Appeals, the extent to which the contents of records are indeed intimate and personal is the key factor in ascertaining whether disclosure would result in an unwarranted invasion of personal privacy. From my perspective, the fact of a death is itself not intimate and, therefore, I believe that the Department is required to disclose the names of its former employees whose deaths are being investigated by FACE. This is not intended to suggest that details relating to their deaths must be disclosed, but rather that their identities must be disclosed.

Notwithstanding the foregoing, I point out that §89(7) of the Freedom of Information Law specifies that nothing in that statute

> "shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or address of a beneficiary of a public employees' retirement system..."

Based on the provision quoted above, the home addresses of deceased employees and the names and addresses of their surviving beneficiaries need not be disclosed. I note, too, that §89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Robert LoCicero, Records Access Officer
Fatality Assessment and Control Unit

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4012
FOIL-AO-15402

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July 29, 2005

Mr. Rob Howard
Editor in Chief
The Daily Orange
744 Ostrom Avenue
Syracuse, NY 13210

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

Dear Mr. Howard:

I have received your letter and apologize for the delay in response.

You wrote that you serve as editor in chief of the *Daily Orange*, the student run newspaper at Syracuse University and the SUNY College of Environmental Science and Forestry (ESF). The University's student association (the SA) has contended that it is not a "public agency" and therefore is not subject to either the Freedom of Information or Open Meetings Laws. You wrote that:

> "The question of the SA's status stems from the fact that it represents the students of Syracuse University, a private institution, and SUNY-ESF, a public institution. The two schools are inextricably linked; their campuses are adjacent, and their students can live in the same residence halls and take the same classes. As part of this relationship, SU and SUNY-ESF students pay a mandatory activity fee--for ESF students, $36 per year goes directly to SU. The sum of the activity fees in then divided among student groups by the Student Association.
>
> "There is no question that the Student Association received money from the mandatory fee paid by SUNY-ESF students, and the SA constitution makes clear that the organization represents all the matriculated undergraduates enrolled in both schools. Even the organizations official name, the 'SU and SUNY-ESF Student Association,' shows the SA's attachment to the public institution."

function"(id., 233). When that is so, it was found that records "relating to this activity are subject to FOIL" (id.). In like manner, §6005 concerning SUNY-ESF states that:

> "The state university trustees shall maintain general supervision over the requests for appropriations, budget, estimates and expenditures of such college. All moneys received from state appropriations for such college shall be expended upon vouchers approved by the chancellor of the state university, as the chief administrative officer of the state university, or by such authority or authorities in the state university as shall be designated by the chancellor by a rule or written direction filed with the comptroller, when and in the manner authorized by the state university trustees."

The records of the Student Association do not appear to distinguish between student of Syracuse University and SUNY-ESF. If that is so, I do not believe that the Freedom of Information Law would apply. However, those prepared to comply with §6005 of the Education Law would appear to fall within the scope of that law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF;tt

FOIL-AO-15403

From: Robert Freeman
To: info
Date: 8/1/2005 8:07:30 AM
Subject: Re: Department of Social Services

Dear Mr. Mack:

I have received your inquiry concerning the ability to obtain records indicating that a person was or is now in receipt of public assistance. In this regard, §136 of the Social Services Law has long stated that records maintained by departments of social services that identify either an applicant for or a recipient of public assistance are confidential. Because that is so, they are exempt from disclosure pursuant to §87(2)(a) of the Freedom of Information Law.

I am working my way through my stack of requests for advisory opinions and hope to reach yours soon.

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

>>> "info" <info@mackandassociates.net> 7/31/2005 12:26:01 PM >>>
Gov. Freemen,
Are these records public? I need to know if someone is currently or formerly on DSS. Any news on my appeal to the Town of Greece, NY.

Dave

David Mack and Associates Inc.
Private Investigative and Research Services
Statewide Service of Legal Process
Po Box 24633 Rochester NY 14624
P 585-225-6970 F 585-225-3119
www.MACKANDASSOCIATES.NET
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August 1, 2005

E-MAIL

TO: Peter Leahey

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. Leahey:

I have received your letter and apologize for the delay in response. You referred to a request made under the Freedom of Information Law to the New York City Human Rights Commission that was denied. The record in question, according to your letter, is "a typewritten memo with a handwritten notation evidencing the fact of discrimination concerning a complaint [you] made with the commission." You asked how you may obtain a copy of that document.

In this regard, first, when an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

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

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

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

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

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

If you did appealed the denial and the rejection of your request was sustained, you would have four months from the date of the determination of your appeal to seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice law and Rules. If you were not informed of the right to appeal and/or did not appeal, it is suggested that you resubmit your request. If it is again denied, you then would have the ability to appeal. Any such request should be made to the Commission's "records access officer." 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.

While I am unaware of the content of the documentation to which you referred, it appears that two of the grounds for denial are pertinent. Section 87(2)(b) authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." Insofar as a complaint has not been proven or substantiated, or if there is no admission of misconduct, it is likely that §87(2)(b) would justify a denial of access. Also significant is §87(2)(g), which authorizes an agency, such as the Human Rights Commission, to withhold records that:

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

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August 2, 2005

E-Mail

TO: Lisa Michalek

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. Michalek:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You asked whether you may request "an itemized copy of [y]our school budget." You wrote that you were told that you could "sit with...school representatives to review but cannot get a copy of the itemized budget."

From my perspective, it is clear that the district is required to prepare copies of the material at issue upon payment of the requisite fee. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Insofar as a "line by line" breakdown exists, it would fall within the coverage of that law. However, §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, if no record exists that includes the kind detail in which you are interested, school district officials would not be required to create new records on your behalf in an effort to satisfy a request.

Second, the Freedom of Information Law is expansive in its coverage, for it pertains to all agency records and defines the term "record" to include:

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

Based on the foregoing, insofar as materials maintained by or for a school district itemize allocations, proposed allocations or a budget, they constitute "records" that fall within the scope of the Freedom of Information Law.

Third, when records are accessible, §87(2) of the Freedom of Information Law states that they are available for inspection and copying, and §89(3) requires that an agency make copies available upon payment of the proper fee. Under §87(1)(b)(iii), an agency may charge a maximum of twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing other records (i.e., computer tapes, disks, tape recordings, etc.).

Lastly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the kinds of records in which you are interested must be made available for inspection and/or copying, for none of the grounds for denial would apply.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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FOIL-AO-15406

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August 2, 2005

Mr. Michael Kirshtein
96-A-7220
Upstate Correctional Facility
P.O. Box 2001
Malone, NY 12593

Dear Mr. Kirshtein:

I have received your letter in which you requested a copy of the Committee's master index of all records that are available to the public.

In this regard, I point out that §87(3)(c) of the Freedom of Information Law requires that each agency, including the Committee, shall maintain "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article." The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. 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 note that the phrase "master index" is used in the regulations of the Department of Correctional Services to refer to its subject matter list. The Committee's equivalent, its subject matter list, is enclosed for your review.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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August 2, 2005

E-MAIL

TO: Bill Hecht

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. Hecht:

As you are aware, I have received your letter and a variety of materials relating to it. Please accept my apologies for the delay in response.

You wrote that taxpayers "are at a disadvantage when it comes to looking at the data their home assessments are based on", because obtaining a copy of the Office of Real Property Services' RPS4 "tax database" would cost more than $2600. "If it is a State database program, and it will fit on a disk", you asked why you should have to "pay any more than the price of the disk and the copy time costs."

In this regard, when RPS4 was being developed, representatives of the Office of Real Property Services (ORPS) questioned its status in relation to the Freedom of Information Law. By way of background, ORPS receives assessment data in electronic form from municipalities pursuant to §1590 of the Real Property Tax Law. The data has long been accessible to the public and is made available by municipalities and by ORPS on request. To make the data usable, a representative of ORPS wrote that:

> "....staff proposes to copy this data into the data warehouse where it can be accessed by a new online web application. The application will allow the assessment community to access this information over the internet. Access will be restricted to assessors who will only be able to sign on if the agency has provided a valid usercode and password. The application will provide powerful features to run reports and select specific sets of data anywhere in the state. The

> original source of the data is still local governments, but we will be the primary owner of the application."

He asked whether I concur with his view that the application is "a delivery system" and not a "record" subject to the Freedom of Information Law.

I agreed, for I understand its function, the application is essentially a tool that enables assessors and others to use data; it is not data itself and, therefore, in my opinion, it could not be characterized as a "record" as that term is defined in §86(4) of the Freedom of Information Law. The application, like calculators or computers that provide individuals with the means to create or use data, but which are not themselves "records", would not in my opinion constitute a record for purposes of that statute.

I note that ORPS has indicated that it has never withheld requested data that it has the ability to generate by means of RPS4. In the future, rather than seeking the entirety of the data warehouse through the RPS4 delivery system, it is suggested that you request data relating to a particular parcel or parcels.

I hope that I have been of assistance.

RJF:tt

cc: Gregory Kidd

STATE OF NEW YORK
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FOIL-AO-1540 8

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August 3, 2005

E-Mail

TO: Amanda

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 Amanda:

As you are aware, I have received your inquiry. Please accept my apologies for the delay in response.

You have asked whether a request made under the Freedom of Information Law may be made for "an auditor's file during an on-going audit or do you have to wait until a formal assessment has been issued." In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, for §86(4) defines the term "record" to include:

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

Based on the foregoing, as soon as documentary materials exist, they constitute "records" that fall within the coverage of the Freedom of Information Law.

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

Third, although §87(2)(g), the provision pertaining to internal government records, potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

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

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

I note that in a case that reached the Court of Appeals, the state's highest court, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][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, assuming that the audit is typical or routine, those portions of the auditor's file, including audit work papers [see Polansky v. Regan, 81 AD2d 102 (1981)], that consist of statistical

or factual information should be accessible, unless a separate basis for a denial of access can properly be asserted. If, for example, the audit focuses on or refers to specific individuals, it is possible that portions of the records in question may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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FOIL-AO-15409

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

August 3, 2005

Mr. Curtis Robinson
00-B-0830
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. Robinson:

I have received your letter in which you indicated that you requested records, such as grand jury minutes, from a particular agency which has sought extensions to its time to respond. As of the date of your letter to this office, you still have not received the records.

In this regard, with respect to requests made before May 3, 2005, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

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

It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added]. In the context of your correspondence, it appears that approximate dates have been given, but that the agency has repeatedly gone beyond those dates.

In a case that described an experience similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote that:

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

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

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

As such, grand jury minutes 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

STATE OF NEW YORK
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August 3, 2005

E-MAIL

TO: Michael Koehler

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:

I have received your letter in which you indicated that you appealed a denial of access to records by the Village of Brookville pursuant to the Freedom of Information Law, but that the appeal has not been determined.

In this regard, §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 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 it was held more than twenty years ago that an agency's failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal, and that in such a circumstance, the person denied access has the ability to 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)]. Moreover, an amendment to §89(4)(b) that became effective on May 3 of this year specifies that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal.

I hope that I have been of assistance.

RJF:tt

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August 3, 2005

Mr. Jessie Engles
03-A-4237
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

Dear Mr. Engles:

I have received your letter in which you requested materials that might assist you in enforcing your rights.

In this regard, the advisory authority of the Committee on Open Government is limited to matters relating to public access to government information. Although a copy of "Your Right to Know", a guide to the Freedom of Information Law, has been enclosed, we have no materials concerning the other areas of your interest.

Since you referred to requests that had not been answered, I point out that with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the

Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO- 15412

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August 4, 2005

Mr. Daniel Karlin
93-B-2986
Barehill Correctional Facility
181 Brand Road
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. Karlin:

I have received your letter and the materials attached to it. It appears that you requested various statistical information concerning the Sex Offender Counseling Program and were informed that the information does not exist. You asked for assistance in gaining access to this information.

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-15413

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, 2005

Mr. Guy Zappullo
99-A-2233
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. Zappullo:

I have received your letter in which you indicated that you requested records from the New York City Department of Health & Mental Hygiene and that, as of the date of your letter to this office, you had received no responses to your requests.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

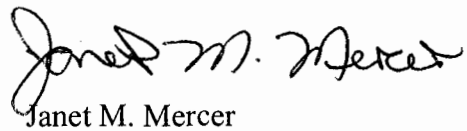
The person designated to determine appeals by the New York City Health & Mental Hygiene is Wilfredo Lopez, General Counsel.

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15414

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

August 4, 2005

Mr. Desmond Quick
03-B-1945
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. Quick:

I have received your letter in which you indicated that you have encountered difficulty in obtaining various records from the Oneida County Sheriff's Department. It appears from your correspondence that you previously possessed the records, but that you misplaced them. You also asked whether you could obtain a list that would describe the photographs that you are interested in obtaining from the City of Utica.

In this regard, I offer the following comments.

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 Oneida County Sheriff's Department.

With respect to your request for a list that describes the content of photographs, I point out that §89(3) of the Freedom of Information Law states that an agency is not required to prepare a record in response to a request. Therefore, if no list or description of the photographs exists, the City of Utica would not be required to prepare a list or description of the photographs on your behalf.

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-15415

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

August 4, 2005

Ms. Christa Perrin
00-G-1337
Albion Correctional Facility
3595 State School 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 Ms. Perrin:

I have received your letter in which you indicated that you filed a "Notice of Intent" with respect to an accident in which you were involved. You then requested records concerning the accident and were denied access, because, in your words, "a recent State Supreme Court ruling was handed down that inmates are not entitled to any supporting documentation or investigation reports."

In this regard, I point out that I am unaware of any Supreme Court decision indicating that inmates are not entitled to records because they are involved in a lawsuit. In fact, there are judicial decisions to the contrary.

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 or the status of the applicant, is in my opinion irrelevant.

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-1541G

41 State Street, Albany, New York 12231
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August 4, 2005

Mr. Norman Shachter
02-A-3134
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5498

The staff of the Committee on Open 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 wrote that you requested records from the New York City Department of Corrections but that as of the date of your letter to this office, you had not received a response.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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

OMC-AO- 4016
FOIL-AO- 15417

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August 5, 2005

Mr. Robert D. Lonski
Administrator
Erie County Bar Association
107 Delaware Avenue
670 Statler Towers
Buffalo, NY 14202-2906

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

Dear Mr. Lonski:

I have received your letter and hope that you will accept my apologies for the delay in response.

You have requested an advisory opinion concerning whether or the extent to which the Open Meetings Law applies to "the Erie County Bar Association Aid to Indigent Prisoners Society, Inc. [hereafter 'the Program'], commonly known as the Assigned Counsel Program." You wrote that:

> "This organization is a private not-for-profit member corporation, whose sole member is the Bar Association of Erie County. It is governed by a Board of Directors which, pursuant to its bylaws, must have a quorum at its meetings in order to conduct business. Funding for the program is provided primarily by the County of Erie and the State of New York Its sole purpose is to provide legal counsel pursuant to the plan of the county and the Bar Association of Erie County in accordance with Article 18-B of the County Law.
>
> "The County of Erie contracts with two not for profit organizations to provide legal representation pursuant to Article 18-B. One is The Legal Aid Bureau of Buffalo, which provides such representation only in Buffalo City Court, and which is also a not-for-profit corporation. The other is the Assigned Counsel Program, which provides representation in all local, County, and Supreme Courts in Erie County. Neither employees of the Assigned Counsel Program itself nor the attorneys who provide legal services through the

> Program are employees of the County of Erie. Consequently, none of these employees or attorneys receive government benefits, including participation in the state retirement system. The same is true of employees and attorneys of The Legal Aid Bureau."

Although questions have arisen in the past concerning rights of access to records conferred by the Freedom of Information Law in relation to assigned counsel or "Article 18-B" programs, your question involves a matter of first impression. In considering the status of the Board of Directors of the Program under the Open Meetings Law, it is useful in my view to refer to essentially the same issue as it has arisen under the Freedom of Information Law.

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."

As such, the Freedom of Information Law generally applies to records maintained by state and local government; it would not ordinarily apply to a private organization.

As you are aware, Article 18-B, 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). 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 Erie County Bar Association and the Program are not, in my opinion, "agencies" subject to the Freedom of Information Law. However, if a bar association, for example, or other organization maintains records for a county, I believe that those records 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.

In a decision rendered by the Court of Appeals, it was found that materials received by a corporation providing services for a branch of the State University pursuant to a contract that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In sum, insofar as records 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 the extent required by law.

The Open Meetings Law is applicable to public bodies, and §102(2) of that law defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, the Open Meetings Law generally applies to governmental bodies. However, in Smith v. City University of New York [92 NY2d 707 (1999)], the Court of Appeals held that a student government association carried out various governmental functions on behalf of CUNY and, therefore, that its governing body is subject to the Open Meetings Law. In its consideration of the matter, the Court found that:

> "in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under

> which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" (id., 713).

You wrote that two not-for-profit entities provide legal representation under the County's Article 18-B program, one of which is the Legal Aid Bureau of Buffalo. If that entity is similar to other legal aid organizations, it performs numerous law related functions that are carried out in a variety of contexts. One element of those functions involves the 18-B program. In contrast, you wrote that the "sole purpose" of the Program "is to provide legal counsel pursuant to the plan of the county and the Bar Association of Erie County in accordance with Article 18-B..." If my understanding is accurate, the Program would not exist, but for its relationship with the County. Its umbrella organization, the Bar Association, performs a variety of functions, and it is my opinion that the Bar Association does not fall within the coverage of the Open Meetings Law. The only function of the Program, however, involves carrying out duties in accordance with Article 18-B pursuant to a contract with the County. That being so, because its only functions are carried out for the County, it appears that its Board of Directors constitutes a "public body" subject to the Open Meetings Law.

Further, by breaking the definition of "public body"into its components, it appears that each condition necessary to a finding that the Board of the Program is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. In view of the degree of its nexus with the County, it appears to conduct public business and perform a governmental function for a governmental entity.

Notwithstanding the foregoing, as you inferred, even if the Board of Directors of the Program may be characterized as a public body, it is likely that significant aspects of its meetings may be conducted during executive sessions.

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-15418

41 State Street, Albany, New York 12231
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August 5, 2005

Ms. Joanne Grubman
[redacted]

The staff of the Committee on 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. Grubman:

As you are aware, I have received your letter and the materials relating to it. Please accept my apologies for the delay in response.

You described a chronology of events concerning "an estimated two-plus year investigation of the Jewish Home & Hospital by the State Department of Health." Even though several units within the Department were involved in the investigation, the Department disclosed only ten pages of material, portions of which were deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. Most of the deletions involve the name or address of your deceased father, whose treatment is the subject of your complaint and the ensuing investigation, or references to you. Although your request made reference to a complaint number and to specific employees and units within the Department, you were told in a conversation with the Department's records access officer, Mr. Robert LoCicero, that any request, in your words, should be as absolutely detailed as possible concerning all names dates, venues and all wording in general" and that "without absolute detail, no records would be found." It is your view "numerous records [you] sought were being deliberately withheld..."

In this regard, I offer the following comments.

First, the Freedom of Information Law includes within its scope all agency records, irrespective of their physical form or function, for §86(4) defines the term record to include:

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

Second, Mr. LoCicero's direction that a request must be as detailed as possible, and that "without absolute detail, no records would be found", is, in my view, inconsistent with 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 merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the Department's recordkeeping systems, it seems unlikely that staff could locate only ten pages of material pertaining to the events and issues that you raised and which were investigated by several units and personnel within the Department.

I note, too, that the regulations promulgated by the Committee on Open Government state that an agency's records access officer "...is responsible for assuring that agency personnel....Assist the requester in identifying requested records, if necessary" [21 NYCRR §1401.2(b)(2)]. In my opinion, Mr. LoCicero, in carrying out that responsibility, should have ensured that either he or other Department personnel provided guidance to you in your efforts to reasonably describe the records of your interest as a means of gaining access.

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. As indicated earlier, several deletions from records made available involved your name or that of your deceased father. In short, you cannot invade your own privacy, and as next of kin of the deceased, I do not believe that the deletion of items identifiable to your father were justifiable.

Although the response to your request refers to the deletions referenced above, it is your belief that other records falling within the scope of your request exist and were withheld. If that is so, the response by the records access officer should have so indicated. Absent an indication that additional records have been withheld, the right to appeal a denial of access is effectively negated.

In a related vein, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I regret that I cannot be of greater assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Robert LoCicero

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1541 9

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 5, 2005

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:

As you are aware, I have received your letter and the materials relating to it. Please accept my apologies for the delay in response.

You have requested an advisory opinion concerning several issues relating to §87(2)(g) of the Freedom of Information Law. That provision states that an agency may deny access to records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

Section 87(2)(g) was enacted as part of a new Freedom of Information Law that became effective on January 1, 1978. Initially it included subparagraphs (i), (ii) and (iii). Subparagraph (iv) concerning external audits was added by the enactment of Chapter 814 of the Laws of 1987, and is part of the "Governmental Accountability, Audit and Internal Control Act."

An "agency", according to §86(3) of the Freedom of Information Law is:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Therefore, inter-agency materials consist of communications between or among officers or employees of two or more agencies. Intra-agency materials consist of communications between or among officers of a single agency or, for example, notes to oneself prepared by an officer or employee of an agency.

You characterized a response to a request by Anthony W. Crowell, the records access officer for the Office of Mayor Bloomberg, as "fraudulent", because he claimed "an exemption by inserting two words 'in nature' to replace the actual wording under 87(2)(g)(i)." From my perspective, there is nothing "fraudulent" about Mr. Crowell's response, for there is nothing in the law that requires that a person responding to a request include a word for word, verbatim rendition of the language of the law. Moreover, I do not believe that the addition of the words "in nature" alters the meaning or sense of §87(2)(g)(i).

What is critical is the accuracy of the response as it pertains to §87(2)(g). Again, under that provision you have the right to gain access portions inter-agency or intra-agency materials that consist of:

> "i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

To the extent that the records sought do not consist contain any of those four kinds of items, I believe that the City could properly have denied access.

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: Anthony W. Crowell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15420

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 8, 2005

Ms. Hillary Hunter & Mr. Kay Hilsberg
[redacted]

The staff of the Committee 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. Hunter and Mr. Hilsberg:

As you are aware, I have received you letter and the correspondence attached to it. Please accept my apologies for the delay in response.

Based on a review of the materials and our conversation, the issue that you raised involves an alleged refusal by the City of Syracuse to certify that records that you requested either do not exist or could not be found. 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."

Additionally, the regulations promulgated by the Committee on Open Government state in part that an agency's records access officer has the duty of coordinating an agency's response to requests and 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" [21 NYCRR §1401.2(b)(6)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Joseph Francis Bergh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15421

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 8, 2005

Ms. Carrie L. Penna
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Penna:

I have received your letter in which you requested an advisory opinion concerning a request made to the King's County Office of the District Attorney. You stated that you received an acknowledgement indicating that a decision to grant or deny access to the records would be made by January 5, 2006 and asked if a period of six months would constitute "an unreasonable delay" under the Freedom of Information Law.

In this regard, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state,

> in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible.*" Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15422

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 8, 2005

Mr. Brad Somerville
[redacted]

The staff of the Committee 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. Somerville:

As you are aware, I have received your correspondence concerning a request made under the Freedom of Information Law to the Office of Children and Family Services (OCFS). I note, too, that Senator Bonacic has sent copies of your letter to him and other correspondence to this office and asked that I offer guidance. Based on a review of the materials and discussions with OCFS staff, I offer the following comments.

First and perhaps most importantly in consideration of your request and the response to it, I emphasize that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, an agency is not required to "compile" a list on behalf of an applicant in a situation in which no list exists. Similarly, if no "accounting" pertaining to a particular training program has been prepared, OCFS would not be obliged to create a new record or series of records on your behalf.

In a related vein, the same provision requires that an applicant "reasonably describe" the records sought. In considering that standard, the Court of Appeals, the state's highest court, has held that when requested records can be located and identified with reasonable effort, a request meets that standard, irrespective of the volume of a request. However, the Court also determined that whether or the extent to which a request reasonably describes the records sought may be dependent on the nature of an agency's filing, recordkeeping or retrieval systems [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. For instance , in response to your request for an accounting of costs related to HPO training, you were informed that HPO is "one of several hundred training programs" provided by OCFS, and that there is no "separate cost center associated solely with the HPO trainings." In discussing the matter with OCFS staff, because there is no code or cost center pertaining to HPO training, to obtain the information of your interest, thousands of documents would have to be reviewed individually, one by one, in order to locate those of your interest. That being so, a request of that nature would not reasonably describe the records.

Second, you referred to a specific record, a "Pay Serv Report NPAY 747", and contend that it is maintained by OCFS and was improperly withheld. I was told, as you were in a letter of June 16, that the record that you identified is created and maintained by the Office of the State Comptroller, and that a request to that agency would enable you to obtain the contents of the record in a manner consistent with the Freedom of Information Law.

Third, you refer to the portion of your request in which you state that OCFS was not responsive to your request for youth recidivism rates. I confirmed with OCFS that, apart from the youth facility admissions and revocator data collected in that agency's annual *Youth in Care* report, it is the New York State Division of Criminal Justice Services (DCJS) that is responsible for collecting and maintaining data regarding youth recidivism. As OCFS' letter of June 16 suggests, a request to DCJS may enable you to obtain the recidivism data you seek.

Lastly, you referred to a portion of your request concerning the "Connections" database that was granted, and the response indicates that the data was enclosed. You wrote, however, that there was no enclosure. Having discussed the matter with staff at OCFS, a second copy of the data at issue will be sent to you.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. John A. Bonacic
Joseph Conway

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15423

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 9, 2005

Mr. Joseph T. LaBalbo
[redacted]

Dear Mr. LaBalbo:

I have received copies of letters that you addressed to Mr. Leo Matzke, Mayor of the City of Oneida, and to Mr. David Cimpi, President of the Oneida Area Little League (hereafter "the Little League"). In both, you indicated that I informed you that the Little League is obliged to respond to your requests made under the Freedom of Information Law. Further, in your letter to the Mayor, you suggested that compliance with the Freedom of Information Law by the Little League "should be a condition of the use of the field" that is owned by the City.

Although I recall discussing the matter with you, I do not believe that I indicated in any way that the Little League is required to comply with the Freedom of Information Law. To ensure that you understand why that is so, I point out that the Freedom of Information Law applies to agency records, and that §86(3) of that law defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, in general, the Freedom of Information Law includes entities of state and local government within its coverage. It does not include private or social organizations, such as the Little League.

As you are aware, there are many private groups that use government facilities. Their use of those facilities, however, does not transform them into government agencies, nor does it bring them within the scope of the Freedom of Information Law. However, often the use of government facilities involves the creation of records that are maintained by government agencies. Insofar as a government agency maintains records concerning the use of its facilities by a private organization, those records fall within the coverage of the Freedom of Information Law. If, for example, the City has a contract with the Little League or other organization concerning the use of City property, the

contract would be accessible from the City under the Freedom of Information Law, because it is an "agency." On the other hand, the contract, as well as other records maintained by the Little League, are beyond the coverage of that law, because the Little League is not an "agency."

I hope that the preceding commentary serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Leo Matzke
David Cimpi

FOIL-AO-15424

From: Robert Freeman
To: townclerk@townofhamburgny.com
Date: 8/11/2005 9:04:13 AM
Subject: Good morning - -

Good morning - -

With respect to your first question, the FOIL officer, called the "records access officer" in regulations promulgated by the Committee on Open Government (which are available on our website), is designated by the governing body of a municipality. In the great majority of towns, although the town clerk is designated as records access officer, a town board may choose to designate anyone to carry out that function. In contrast, the records management officer, by law, §57.19 of the Arts and Cultural Affairs Law, must be the town clerk in towns.

As for the second concerning salaries and benefits of public employees, in my view, it is clear that "benefit information" is accessible under the Freedom of Information Law. In short, benefits involve an expenditure in some manner of public moneys or resources, and records indicating those expenditures are clearly 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15425

41 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 11, 2005

Mr. Teddy Hill
99-B-1948
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

Dear Mr. Hill:

I have received your letter which is characterized as a request made under the Freedom of Information Law. In brief, you asked whether law firms must be registered and whether certain individuals in 1999 were indeed registered as "a law firm/legal entity."

In this regard, first, this office, the Committee on Open Government, is authorized to provide advice and opinions concerning the Freedom of Information Law. We do not maintain records generally and have no records concerning the subjects of your interest. As a general matter, a request made under that law should be directed to the "records access officer" at the agency that you believe would maintain the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

Second, and more importantly, the Freedom of Information Law pertains to requests for existing records. That Law does not require that agencies answer questions or supply information in response to questions. It is suggested that any future requests involve existing records. It is also noted that any such requests must reasonably describe the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

Lastly, although I cannot answer your questions, I point out that attorneys must be licensed and that the names and work locations of practicing attorneys in New York can be found by contacting the Office of Court Administration.

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15426

41 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 11, 2005

Mr. Alan Isselhard
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Isselhard:

I have received your letter and apologize for the delay in response.

You wrote that it is your understanding that the Town Law requires that members of planning boards be residents of the towns that they serve. However, in response to a request for the residence address of a certain member of the planning board in your community, you were informed that "this is a matter of privacy and that the town is not obligated to provide [you] with that information." You asked whether the response is consistent with law.

In this regard, §89(7) of the Freedom of Information Law specifies that the home address of a present or former public employee need not be disclosed. That being so, I believe that the response by the clerk was appropriate. However, in similar situations, such as those in which there is a local residency law, it has been suggested that the zip code of residence of a public officer or employee is accessible. Disclosure of the zip code would not indicate the residence of a public officer or employee, but in most instances, it would indicate whether that person resides within a particular municipality.

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-15427

41 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 11, 2005

E-MAIL

TO: Scott Smith

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Smith:

Your letter transmitted to the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to provide advice and opinions concerning the Freedom of Information Law.

You asked whether you "are permitted access to the same information that local newspapers seem to have access to for their police blotter sections."

In this regard, first, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, as a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, 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 sum, the news media have no special rights under the Freedom of Information Law, for that law does not distinguish among applicants for records.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15428

41 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 12, 2005

Mr. John Quenell
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Quenell:

I have received your letter and apologize for the delay in response. You have sought guidance in your efforts in obtaining records concerning "the number of rescue calls made during 2004" by the Village of Saranac Lake Fire Department to two named locations. The correspondence attached to your letter indicates that the Village has supplied "summary records", but that it does not maintain "the actual dispatch records."

In this regard, it appears that the Village does not maintain the records of your interest. If that is so, I do not believe that Village officials would be required to attempt to acquire those records on your behalf.

It is noted that the volunteer fire department and the Village are separate corporate entities. The Village is a public corporation, and volunteer fire companies are typically not-for-profit corporations. Although not-for-private or private entities generally fall beyond the coverage of the Freedom of Information Law, it was found twenty-five years ago by the Court of Appeals, the state's highest court, that volunteer fire companies perform what has traditionally be considered an essential governmental function and would not exist but for their relationship with one or more municipalities. Based on those findings, the Court determined that a volunteer fire company is an "agency" subject to the Freedom of Information Law [see Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980; also, definition of "agency", Freedom of Information Law, §86(3)].

In consideration of the foregoing, it is suggested that you request the records of your interest from the volunteer fire company. As you are likely aware based on receipt of my response to you of March 25, records prepared by a provider of medical services are subject to HIPAA and provisions of the New York Public Health Law. Consequently, when requesting the records, I recommend that you indicate that you recognize that personally identifiable details pertaining to the recipients of medical care must be deleted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kareen Tyler
Chief Gerard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15429

41 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 12, 2005

Mr. Raheme Byrd
00-A-3474
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

Dear Mr. Byrd:

I have received your letter in which you appealed an apparent denial of access to certain records by the office of the Chief Medical Examiner in New York City.

Please be advised that 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, to compel an agency to grant or deny access to records, or to obtain records on behalf of an individual.

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."

It is suggested that you review the response to your request to attempt to ascertain the name of the person to whom an appeal may be made.

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-15430

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 12, 2005

Ms. Barbara Berardelli
Sheepshead Bay/Plumb Beach
Civic Association
2814 Ford Street
Brooklyn, NY 11235

The staff of the Committee on 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. Berardelli:

As you are aware, I have received your letter and the correspondence attached to it. Please accept my apologies for the delay in response. You have sought an advisory opinion concerning a request made under the Freedom of Information Law to Community Board 15 in Brooklyn.

In this regard, first, the title of the law may be somewhat misleading, for it does not pertain to information *per se*, but rather to records. Stated differently, the Freedom of Information Law pertains to existing records, and §89(3) specifies that a government agency is not required to create a record in response to a request. One aspect of your request involves records "as they become available." In my view, an agency may but is not required to honor a request that is prospective in nature. A request of that nature involves records that do not yet exist, and technically, an agency can neither grant nor deny access to records that do not exist. In a related vein, at the beginning of your request, you sought information by raising questions. Again, because the law deals with records, agency officials may choose to supply information by answering questions, but they are not required to do so. In the future, rather than attempting to elicit information in response to questions, it is suggested that you request existing records.

Second, the Freedom of Information provides direction concerning the time and manner in which agencies must respond to requests. Specifically, prior to May 3, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949,

950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgment must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Ben Akselrod

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15431

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August 15, 2005

Mr. Ernest Amato
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Amato:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. As I understand the correspondence, you requested a variety of materials from the Deer Park School District, and some of the documentation was disclosed. However, the portions of cell phone bills indicating the numbers called were deleted.

Based on your remarks and the content of the correspondence, I offer the following comments.

First, I note that the title of the Freedom of Information Law may be somewhat misleading, for it does not deal with information *per se*, but rather with records. Further, §89(3) of the law states in part that an agency, such as a school district, is not required to create a record in response to a request for information. Similarly, while agency staff may choose to supply information in response to questions, it is not required to do so to comply with the Freedom of Information Law. In the future, rather than attempting to receive answers to questions, it is suggested that you request existing records.

Second, with respect to the cell phone bills and other records indicating expenditures of public money, 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, two of the grounds for denial of access are pertinent with respect to the kinds of bills to which you referred.

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 a variety of 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. Moreover, 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 of the District who uses a District phone.

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. However, 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. 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.

This is not to suggest 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, informants in the context of law enforcement, 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. 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 context of a school district's phone bills, a second ground for denial, §87(2)(a) of the Freedom of Information Law, would be relevant, at least with respect to some of the bills. Section 87(2)(a) pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is the Family Educational Rights and Privacy Act ("FERPA"20 U.S.C. §1232g). In brief, FERPA applies to all educational agencies or institutions that participate in funding or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of FERPA is the protection of privacy of students. It provides, in general, that any "education record", a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years of over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The students name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR §99.3).

Having contacted the Family Policy Compliance Office, the entity within the federal Department of Education that oversees FERPA, and describing the situation, it was advised that FERPA may be implicated in ascertaining public rights of access to the records in question, depending on the functions of the District employees.

If a person employed by the District routinely and as a part of his or her official duties contacts parents of students by telephone, those portions of a phone bill that could identify parents and, therefore, students, would in my opinion be exempted from disclosure. Stated differently, under the federal regulations cited above, if a phone number could identify a parent of a student, a disclosure of that number would likely "make the student's identity easily traceable." To that extent, I believe that FERPA would forbid disclosure. On the other hand, there are District employees who may have little or no direct contact with students or their parents. For example, the sample bill that you attached relates to an MIS technician who likely has little contact with students or parents. In that and similar instances, I believe that the portions of bills indicating numbers called would be available in their entirety.

Lastly, when an agency denies access to records in whole or in part, the person denied access must be informed of the right to appeal the denial [see 21 NYCRR §1401.7(b)] in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

If an appeal is denied, the person denied access has the right to seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. In addition, §89(4)(c) authorizes a court to award attorney's fees to that person, payable by the agency, in certain circumstances.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Bancroft Burke
Hon. Owen Johnson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15432

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August 16, 2005

Mr. Michael J. Marnell
[redacted]

The staff of the Committee 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. Marnell:

I have received your letter and the materials relating to it concerning your requests made pursuant to the Freedom of Information Law to the Kingston Public Access Cable Commission (hereafter "the Commission").

In this regard, first, I do not believe that the Commission is an independent governmental agency. Rather, based on regulations promulgated by the State Department of Public Service, it appears that it is under the control of one or more municipalities. Specifically, the regulations, 16 NYCRR §895.4 entitled "Minimum standards for public, educational and governmental (PEG) access", state in subdivision (c) as follows:

> "*Administration and use.* The use of the channel capacity for PEG access shall be administered as follows:
>
> (1) The public access channel shall be operated and administered by the entity designated by the municipality or, until such designation is made, by the cable television franchisee; provided, however, that the municipality may designate such entity at any time throughout the term of a franchise.
>
> (2) The educational and governmental access channel shall be operated and administered by a committee or a commission appointed by local government and shall include appropriate representation of local school districts within the service area of the cable television system and may include for purposes of coordination any employee or representative of the cable television franchisee.**

> (3) The entity responsible for administering and operating the public access channel shall provide notice to the general public of the opportunity to use such channel which notice shall include: (i)periodic messages transmitted on such channel; and (ii) written notice to subscribers at least annually. Notices shall include the name, address and telephone number of the entity to be contacted for use of the channel. All PEG access programming shall be identified as such.
>
> (4) Channel time shall be scheduled on the public access channel by the entity responsible for the administration thereof on a first-come, first-served, nondiscriminatory basis..."

Of possible significance is the first asterisk (*) appearing at the end of paragraph (1), which states in relevant part that: "If a single public access channel is shared by more than one municipality, a single entity shall be jointly designated by the local legislative bodies of each franchising municipality in the system."

Based on the foregoing, the members of the Commission are "appointed by local government", and it owes its existence to the action taken by one or more municipalities. If I recall our conversation correctly, despite its name, the Commission is appointed not only by the City of Kingston, but by several other municipalities in the vicinity of Kingston. If that is so, rather than requesting records directly from the Commission, it is suggested that you submit requests to the municipalities that make appointments to the Commission.

I point out that the regulations promulgated by the Committee on Open Government require each agency (i.e., a city or town) 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. That is pertinent, because the Freedom of Information Law is expansive in its scope. That statute pertains to all agency records, and §86(4) defines the term "record" to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of the authority of municipalities to appoint the members of the Commission, it appears that records maintained by or <u>for</u> one or more municipalities would constitute agency records subject to rights conferred by the Freedom of Information Law, even if they are not in the physical custody of a municipality. In other circumstances in which records are kept for an agency but are not in the physical possession of an agency, it has been suggested that a request be made to the agency's records access officer. When in receipt of the request, records access officer, in my view, would be required to direct the custodian of the records to disclose them

in a manner consistent with the Freedom of Information Law, or obtain the records so that they can be reviewed and disclosed in accordance with law.

Second, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) states in relevant part that an agency is not required to create a record in response to a request. Several of your requests involve "lists." If, however, no list exists containing the information sought, an agency would not be required to prepare a list on your behalf. For instance, if there is no "list of all past and present officers and advisors retained on a paid or voluntary basis since its inception", there would be no obligation to create a list containing the items sought. In the future, rather than requesting lists that may not exist, it is suggested that you seek records, i.e., records identifying present and former members of the Commission.

Third, §89(3) also requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records of interest. One of your requests involves "all correspondence (files) the KPACC has had since its inception..." While I am unfamiliar with the nature or volume of correspondence maintained by the Commission, or the length of time that it has existed, it is unlikely in my opinion that a request for "all correspondence" would reasonably describe the records.

Lastly, insofar as records exist and 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.

Some of the records that you requested might properly be withheld in whole or in part, depending on their content. For example, in one request, you sought "any legal files." There may be portions of those files that fall within the coverage of the attorney-client privilege. In that circumstance, those records would be exempted from disclosure by statute and deniable under §87(2)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Dorothy Carbo

From: Robert Freeman
To: [redacted]
Date: 8/16/2005 4:16:47 PM
Subject: http://www.dos.state.ny.us/coog/ftext/f9736.htm

http://www.dos.state.ny.us/coog/ftext/f9736.htm

Dear Mr. Visentin:

I tried to reach you by phone without success. However, attached is an advisory opinion which deals with the kinds of records to which you referred. The opinion is accessible under "payroll records" in our index to opinions.

I note that when an agency indicates that it does not maintain requested records, the person seeking the records may, pursuant to §89(3) of the Freedom of Information Law, request a "certification" in writing in which an agency official must assert that the agency does not possess the records or that the records could not be found after a diligent search.

If indeed the district does not maintain the records within its premises, it is possible that they are maintained by the BOCES under which the district functions. Often a BOCES maintains administrative and financial records pertaining to its member school districts.

If the attached opinion or suggestion concerning the appropriate key phrase in our index is inadequate, please so inform 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-15434

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 18, 2005

Mr. Cleveland Moore
92-B-1715
Wende Correctional Facility
P.O. Box 1187
Alden, NY 14004

Dear Mr. Moore:

I have received your letter in which you requested a variety of records from this office pursuant to the Freedom of Information Law.

In this regard, please be advised that the Committee on Open Government is authorized to offer opinions and guidance concerning the operation of the Freedom of Information Law. The Committee does not maintain possession or control of records generally, and we do not maintain any of the records of your interest.

As a general matter, a request for records should be made to the "records access officer" at the agency that you believe would maintain the records of interest. The records access officer has the duty of coordinating an agency's response to requests.

Since you asked that fees for copies be waived, I point out that the federal Freedom of Information Act includes provisions concerning fee waivers. However, the applicable statute in this instance, the New York Freedom of Information Law, includes no such provision. Further, it has been held that an agency may charge its established fee, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that the foregoing serves to enhance your understanding.

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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August 18, 2005

Mr. Derrick Stroud
89-T-2999
Wende Correctional Facility
P.O. Box 1187
Alden, NY 14004

Dear Mr. Stroud:

I have received your letter in which you requested a variety of records from this office pursuant to the Freedom of Information Law.

In this regard, please be advised that the Committee on Open Government is authorized to offer opinions and guidance concerning the operation of the Freedom of Information Law. The Committee does not maintain possession or control of records generally, and we do not maintain any of the records of your interest.

As a general matter, a request for records should be made to the "records access officer" at the agency that you believe would maintain the records of interest. The records access officer has the duty of coordinating an agency's response to requests.

Since you asked that fees for copies be waived, I point out that the federal Freedom of Information Act includes provisions concerning fee waivers. However, the applicable statute in this instance, the New York Freedom of Information Law, includes no such provision. Further, it has been held that an agency may charge its established fee, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that the foregoing serves to enhance your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 18, 2005

Mr. John Goetschius
Greenburgh Eleven Federation of Teachers
P.O. Box 298
Dobbs Ferry, NY 10522

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Goetschius:

I have received your letter and apologize for the delay in response. You have asked that I review the rules concerning the implementation of the Freedom of Information Law established by the Greenburgh Eleven Union Free School District.

In this regard, sections 4 and 6 of the rules respectively provide that requests will be acknowledged in writing within five "school days" of their receipt and that records will be made available within "a reasonable time." I point that the Freedom of Information Law refers to five business days, not school days, and that the provisions concerning the time within which an agency must respond to requests were recently amended. 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

New language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state,

> in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Section 8 of the rules states that records are available for inspection between the hours of 10 a.m. and 3 p.m. However, the regulations promulgated by the Committee, which have the force of law, require that agencies accept requests and produce records during regular business hours (21 NYCRR §1401.4).

You referred specifically to a portion of section 8 stating that:

> "For those persons who are not permitted on campus, arrangements will be made for inspection of the records at a specific date and time....at a reasonably convenient location selected by the District."

While it is unclear why some persons would not be permitted on campus, I point out that it was held soon after the enactment of the Freedom of Information Law that accessible records must be made equally available to any person, without regard to one's status or interest [Burke v. Yudelson, 51 AD2d 673 (1976); also see Farbman v. New York City, 62 NY2d 75 (1984)]. Additionally, the Committee's regulations require that "Each agency shall designate the locations where records shall be available for public inspection and copying" (§1401.3). If the District "designates" a satellite office for reviewing or copying records, for example, I believe that action of that nature would be

consistent with law. However, choosing different locations in an *ad hoc* manner would, in my view, be unreasonable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Marsha Maddox

From: Robert Freeman
To: [redacted]
Date: 8/18/2005 4:01:09 PM
Subject: Dear Ms. Kurtzner:

Dear Ms. [redacted]

I have received your inquiry in which you asked whether your employer, Albany County "had the right to release information regarding the birth of [your] child to unemployment."

In this regard, I know of no provision of law that would prohibit the County from disclosing the information in question. I point out that birth certificates maintained by town or city clerks, as well as the NYS Department of Health, are confidential and cannot be disclosed to the public(see Public Health Law, §4173). Only the subject of a birth certificate or the parent of minor has the right to obtain that record. However, if the County has acquired information concerning the birth of your child, it is not barred from disclosing that information to another 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

From: Robert Freeman
To: [redacted]
Date: 8/18/2005 4:49:08 PM
Subject: Dear Mr. O'Hanlon:

Dear Mr. O'Hanlon:

I have received your note concerning the ability of a town clerk to charge one dollar per page for copies of the town budget. In this regard, in short, there is no authority to do so.

Section 87(1)(b)(iii) of the Freedom of Information Law indicates that an agency, such as a town, may charge a maximum of twenty-five cents per photocopy up to nine by fourteen inches, unless a different fee is prescribed by statute. The term "statute" has been construed by the courts to mean an act of the State Legislature. There is no statute that permits the clerk to charge more than twenty-five cents per photocopy for the kind of record at issue, and no local enactment, rule or policy could validly enable the clerk to do so.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15439

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 18, 2005

Mr. Rey Olsen
WSGNY, Inc.
P.O. Box 7022
New York, NY 10150

The staff of the Committee 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. Olsen:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. You have requested an "independent opinion" concerning the obligation of the New York City Department of Environmental Protection to disclose "a complete, unredacted" cost-benefit analysis concerning a project in Staten Island. Having requested the record in question, portions were deleted pursuant to paragraphs (c) and (g) of §87(2) of the Freedom of Information Law.

While I have not viewed the record at issue, I believe that the analysis offered by Robin M. Levine, the Department's FOIL Appeals Officer, is consistent with law. Notwithstanding the detail offered in her response to your appeal, with which I concur, 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)(c) permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." As it relates to the impairment of contract awards, §87(2)(c) is, in my opinion, generally cited and applicable in two types of circumstances.

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his

bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

The other situation in which §87(2)(c) has successfully been asserted to withhold records pertains to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Again, when premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving an optimal price, an agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In both of the kinds of the situations described above, there is an inequality of knowledge. More specifically, in the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an appraisal concerning the value of a parcel or similar documentation would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

If, as Ms. Levine suggested, the facts in the situation at issue are analogous to those present in Murray, portions of the record sought could, in my view, justifiably be withheld under §87(2)(c).

The other basis for denial, §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.

Even after a decision has been made or a determination reached, opinions and advice may ordinarily be withheld under §87(2)(g). The instance in which that would not be so would involve the situation in which the decision maker clearly indicates that a certain opinion or recommendation was adopted as the decision. In that case, the opinion or recommendation would become the final determination accessible under subparagraph (iii) of §87(2)(g) (Miller v. Hewlett-Woodmere Union Free School District, Supreme Court, Nassau County, NYLJ, May 16, 1990). Absent that kind of endorsement, the opinions, advice or recommendations contained within inter-agency or intra-agency materials may be withheld. My understanding is that actions may have been taken based in part on opinions and recommendations of staff, but that there was no statement of endorsement relative to any particular opinion or recommendation.

I hope that the foregoing serves to enhance your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robin M. Levine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1544O

41 State Street, Albany, New York 12231
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August 19, 2005

E-MAIL

TO: Rachel Rissetto

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. Rissetto:

As you are aware, I have received your inquiry. Please accept my apologies for the delay in response.

You asked whether "a public entity [may] conduct a grievance hearing (pursuant to a collective bargaining agreement), require that it be audio taped, and then refuse to give the grievant (who was at the hearing of course) a copy of the tape."

In this regard, first, 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."

Based on the foregoing, an audio tape prepared by a "public entity", an agency, constitutes a "record" that falls within the coverage of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I am unaware of the nature of the grievance or its outcome, and it is possible that the tape or portions thereof may properly be withheld from the public, likely on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see §§87(2)(b) and 89(2)(b)]. However, if indeed the grievant was present during the entirety of the proceeding, he or she could not invade his or her own privacy, and it is noted that §89(2)(c)(iii) provides that disclosure shall not be construed to constitute an unwarranted invasion of personal privacy "when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him." Further, the presence of the grievant in that circumstance would, in my opinion, have constituted a waiver of the ability of the agency to deny access to a tape recording containing information that he or she had the ability to hear during the proceeding. On the other hand, insofar as the grievant was not present during portions of the proceeding, and disclosure of the tape would constitute an unwarranted invasion of privacy with respect to others, i.e., witnesses or perhaps a person who is the subject of a complaint, those portions of the tape, in my view could be withheld.

If I have misinterpreted or misconstrued the facts, please so inform me.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15441

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 19, 2005

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.

Dear Mr. North:

As you are aware, I have received your letter in which you raised two issues. The first involves a statement attributed to me suggesting that the Town Board may require that you, in your capacity as Town Clerk, must require persons seeking records from the Town to use a prescribed form. The other pertains to a resolution adopted by the Board that states in part that the fees for photocopies "shall be $.25 per page..." You wrote, however, that you "would not charge $.25 for any copy produced."

In my view, the Town Board, the governing body of the Town, has the obligation to promulgate rules and regulations concerning the procedural implementation of the Freedom of Information Law, as well as fees, pursuant to §87(1) of the Freedom of Information Law. Subparagraph (b)(iii) of that provision specifies that such rules and regulations must include reference to "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches..." Based upon that grant of authority conferred upon the Town Board, I believe that it is empowered to determine and direct that fees for photocopies of records "shall be $.25 per page." In that instance, the matter in my opinion is not within your area of discretionary authority, but rather that of the Town Board.

In contrast, I believe that a requirement that a form prescribed by the Town is needed to request records is inconsistent with law and, therefore, is invalid. As you may be aware,§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 above, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that it unnecessarily serves to delay a response to or deny a request for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15442

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 22, 2005

Ms. Suzanne J. Young
8683 North Shore Road
Harrisville, NY 13568

The staff of the Committee on 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. Young:

I have received your letter and the materials attached to it. In short, you requested a copy of a police report maintained by the Lewis County Sheriff's Office in which you are named. The report apparently indicates that a neighbor whom you identified in your request alleged that you cut his grass. Your brother was also mentioned in the report, and he was able to obtain a copy, following the deletion of the portion pertaining to you. Although you have made several requests for the report, you wrote that the County has not responded.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

When a member of the public seeks a copy of a complaint under the Freedom of Information Law, it has been advised that those portions of the documentation identifying the person who made the complaint may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Similarly, if a complaint involves the conduct of an individual, and the complaint has not been substantiated, often the disclosure of the identity of that individual would result in an unwarranted invasion of his or her privacy. That latter kind of consideration might have been the basis for the acquisition of the report, without details identifying you, by your brother. In this instance, however, you are aware of the identity of the person who made the complaint, and further, you cannot invade your own privacy. That being so, unless there are unusual details in the report, I believe that it should be accessible to you 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible.*" Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard J. Graham

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15443

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 22, 2005

Mr. Charles Bianculli
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bianculli:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

Having reviewed the materials, I believe that the matter involves a clarification of the District's responsibilities under the Freedom of Information Law. I note that the title of that law may be misleading, for it does not involve information *per se*, but rather with records. In short, the Freedom of Information Law is applicable 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.

For instance, if there is no particular record indicating "the total expenditures on pupils in each category", District staff would not be required to analyze its records or data for the purpose of creating totals on your behalf. Similarly, if there is no record reflective of "the cost of the 193 students on April 11", the District is not obliged to prepare a record containing that information in response to your request.

Insofar as records exist, the Freedom of Information Law provides broad rights of access. Further, the kinds of totals or statistics in which you are interested would clearly be accessible to the public under §87(2)(g), if they exist. However, again, the law states that an agency is not required to create a record that it does not maintain, and the District is not obliged to prepare new records containing the information sought to satisfy your requests.

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: Gene Levenstien

FOIL-AO-15444

From: Robert Freeman
To: [redacted]
Date: 8/23/2005 11:40:44 AM
Subject: Dear Mr. Visentin:

Dear Mr. Visentin:

I have received your latest communication. From my perspective, the situation described in the opinion to which you referred is not analogous that described in your letter. The association that maintains the "master schedule" in which you are interested in my opinion could not be characterized as an "agency" that is required to comply with the Freedom of Information Law.

As you are aware, the definition of the term "record" in §86(4) of that statute pertains to documentation kept or produced "for" an agency, such as a school district. I believe that each of the twelve schedules would be kept for an agency, but to request them, a request should be made not to the association, but rather to the records access officers at each of the twelve schools. The access officers would have the duty of directing the association to disclose directly to you, or to obtain the schedules for the purpose of making them available to you. It does not appear that a "master schedule" is prepared for any agency in particular. If that is so, I do not believe that it would be subject to the Freedom of Information Law, and I would agree with your conclusion that twelve separate requests might be necessary to obtain the equivalent of its content.

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

FOIL-AO-15445

From: Robert Freeman
To: [redacted]
Date: 8/23/2005 12:11:06 PM
Subject: Dear Ms. Baravalle:

Dear Ms. Baravalle:

I have received your inquiry concerning the certification that may be requested when an agency claims that records requested under the Freedom of Information Law cannot be found. In this regard, §89(3) of that statute provides in relevant part that when an agency indicates that it cannot locate a record, on request it, "shall certify that it does have possession of such record or that such record cannot be found after diligent search." Additionally, the regulations promulgated by the Committee on Open Government state in 21 NYCRR §1401.2(b) that an agency's 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."

There is nothing in the Freedom of Information Law or the regulations that requires that any particular form be used. It is suggested that in seeking a certification, you refer to the language of the Freedom of Information Law and the regulations quoted above.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
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August 22, 2005

Mr. Richard T. Fisher
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fisher:

I have received your letter and the correspondence attached to it. Please accept my apologies for the delay in response.

You wrote that Ms. Katherine Hannan Wears, Ogdensburg's City Attorney and Freedom of Information Appeals Officer, "failed to provide the requested information in a timely manner, without cited exemption or exemptions, and failed to provide a listing of the specific records withheld." Based on those allegations, you asked that this office "make an official inquiry...as to the discriminatory motivations involved." The correspondence indicates that you requested information concerning "the presence of the Ogdensburg Police Department" on a certain day at a particular location. You added that, pursuant to a court order, you have the right to obtain information relating to your children.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee has neither the staff nor the resources to conduct an investigation or official inquiry. Nevertheless, in an effort to provide clarification, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Further, 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 records might properly be denied, the remainder might nonetheless be available and would have to be disclosed.

Most police departments maintain a "police blotter" or equivalent record. In this regard, 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. A blotter entry might indicate, for example, that there was a disturbance at a particular address at a certain time. An entry of that nature, in my view, would be accessible.

If, however, records concerning events 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 it is emphasized that many of them are based upon potentially harmful effects of disclosure. 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). It is also noted that if a person is charged with a criminal offense and the charge is later dismissed in his or her favor, the records relating to the event ordinarily are sealed pursuant to §160.50 of the Criminal Procedure Law.

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, or where a record identifies a confidential source or a witness, for example.

I am unaware of the nature of the incident to which you alluded. If, for example, there is a domestic dispute, an officer enters the premises, speaks with those involved and departs without making an arrest, I believe that the details of the event may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. On the other hand, if there is an arrest or charge, that information would be accessible, unless records have been sealed under the Criminal Procedure Law.

Also pertinent may be §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 compiled 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 reports, 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.

Of potential relevance 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 records in question are prepared by employees of a police department, I believe that they could be characterized as "intra-agency material". However, to the extent that they consist of factual information, they would be accessible, unless a different ground for denial may properly be asserted.

In sum, the content of records and the effects of their disclosure are the primary factors in determining rights of access.

Next, with respect to the absence of a list of documents withheld, there is nothing in the Freedom of Information Law or judicial decision construing that statute that would require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each document. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index.

Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

Lastly, since you complained that the City did not respond in a timely manner, 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Katherine Hannan Wears

encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 23, 2005

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 facts presented in your correspondence.

Dear Mr. Mack:

As you are aware, I have received your letter and the correspondence relating to it. Please accept my apologies for the delay in response.

You submitted a request to the Town of Greece as follows: "Pursuant to ongoing child custody litigation, under the Freedom of Information Law I request any and all police reports, notes, documents or records that the Town of Greece or its police department has in its possession" pertaining to two individuals that were identified by name and date of birth. You added that one of them was arrested by Town police in 1990, 1991 and 1999 and that he resided at particular addresses. In response to the request, the Town Clerk determined that "this information should be subpoenaed." You have asked whether the response is consistent with law.

In this regard, I offer the following comments.

First, that you requested the records for use in litigation has no impact on your rights or the Town's obligations under the Freedom of Information Law. As stated by the state's highest court, the Court of Appeals, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. 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.

Second, as you may be aware, §89(3) of the Freedom of Information Law states 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 Town, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, to the extent that the records sought cannot be located with reasonable effort, the request, in my view, would not have reasonably described the records. I point out that during the time period of your interest, many agencies moved from paper based to electronic filing and storage systems. That being so, often agencies have the ability to locate and retrieve records from a certain date forward, but they may have no ability to do so with respect to older records, unless they engage in the equivalent of searching for the needle in the haystack. In that latter circumstance, I do not believe that an agency would be required to do so.

Next, there was no expressed reason for withholding records. In this regard, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural

aspects of the Freedom of Information Law. Section 1401.2 (b)(3) states that an agency's records access officer is responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor." Based on the foregoing, the reasons for a denial of access must be stated in writing. This is not to suggest that any such reasons must be explained in an exhaustive manner. Later in the process of seeking records, if an appeal is denied, §89(4)(a) provides that the reason must be "fully explain[ed] in writing." Additionally, the regulations promulgated by the Committee state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

Lastly, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 records might properly be denied, the remainder might nonetheless be available and would have to be disclosed.

Most police departments maintain a "police blotter" or equivalent record. In this regard, 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. A blotter entry might indicate, for example, that there was a disturbance at a particular address at a certain time. An entry of that nature, in my view, would be accessible.

If, however, records concerning events 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 it is emphasized that many of them are based upon potentially harmful effects of disclosure. 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, if a person is charged with a criminal offense and the charge is later dismissed in his or her favor, the records relating to the event ordinarily are sealed pursuant to §160.50 of the Criminal Procedure Law.

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, unsubstantiated complaints, or where a record identifies a confidential source or a witness, for example.

I am unaware of the nature of any incidents that might pertain to those identified. If, for example, there is a domestic dispute, an officer enters the premises, speaks with those involved and departs without making an arrest, I believe that the details of the event may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. On the other hand, if there is an arrest or charge, that information would be accessible, unless records have been sealed under the Criminal Procedure Law.

Also pertinent may be §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 compiled 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

reports, 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.

Of potential relevance 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.

When records are prepared by employees of a police department, I believe that they could be characterized as "intra-agency material". However, to the extent that they consist of factual information, they would be accessible, unless a different ground for denial may properly be asserted.

In sum, the content of records and the effects of their disclosure are the primary factors in determining rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Patricia W. Anthony

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 23, 2005

E-MAIL

TO: Richard Vogel

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. Vogel:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

According to your letter, "administrators are generally permitted to maintain a 'working file' on personnel employed in the District." You wrote that you were "recently not...renewed for a coaching position behind the smoke screen of 'numerous complaints' by 'many parents.'" You have asked whether there is "any law that might compel [a school district] to show [you] what evidence there is, per se, of these so-called 'complaints.'"

In this regard, I offer the following comments.

First, the Freedom of Information Law includes all records of an agency, such as a school district, within its coverage, for §86(4) defines the term "record" to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, the materials contained in the "working file" to which you referred constitute "records" that fall within the scope of the Freedom of Information Law.

Second, the term "personnel" appears nowhere in that statute, and the nature and content of so-called personnel records may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

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.

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 that is particularly significant under the circumstances is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "FERPA." In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

"(a) The student's name;
(b) The name of the student's parents or other family member;
(c) The address of the student or student's family;
(d) A personal identifier, such as the student's social security number or student number;
(e) A list of personal characteristics that would make the student's identity easily traceable; or
(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld from the public in order to comply with federal law.

In some instances, the deletion of a name may be sufficient to ensure that a student's identity is not easily traceable. However, if other material in a record, such as a description of an event or personal characteristics would enable you or others to ascertain a student's identity, it is likely that

FERPA would require that the record be withheld in its entirety. Similarly, if the number of students on a team is relatively small, the deletion of names or similar details might not be sufficient to guarantee that a student's identity would not become known.

Also of possible relevance is §87(2)(b), which 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. Again, the complaint might properly be withheld in its entirety if, due to its contents, disclosure would permit identification of the author or a student. In that situation, the deletion of a name or other identifying details would not serve to protect privacy.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 24, 2005

Mr. Mark Houraney
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Houraney:

I have received your letter and the materials attached to it. In brief, you complained that your requests made under the Freedom of Information Law to the Town of Riverhead have frequently been ignored. Based on a review of the materials, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) states in relevant part that an agency is not required to create a record in response to a request. One of your requests involves a "list with dates, times and tail numbers of all aircraft authorized by the Town....to land at Calverton Executive Airpark" during a certain period. In short, if no list exists containing the information sought, the Town would not be required to prepare a list containing the items of your interest on your behalf.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, none of the grounds for denial of access could be asserted with respect to your requests for correspondence between Town officials and the Long Island Pine Barrens Society, audio or video tapes of open meetings, or permits issued by the Town concerning residences or other properties.

With respect to invoices, vouchers and similar records involving payments to attorneys and law firms, in the first decision of which I am aware involving records of that nature sought under the Freedom of Information Law, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter 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.

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, which shall be reasonable under the

circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Town Board
Hon. Barbara Grattan, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1545O

41 State Street, Albany, New York 12231
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August 24, 2005

Mr. John F. Fitzgerald
[redacted]

Dear Mr. Fitzgerald:

As you are aware, I have received your correspondence. In order to learn more of the matter, I have contacted the Office of the State Comptroller and was informed that the audit in which you are interested involving the Valhalla Union Free School District has not yet been completed. I was told, too, that it should be complete and accessible to the public next month.

Please note that elements of a draft or communications between officials of the District and the Office of the State Comptroller that consist of opinions or recommendations, for example, fall within §87(2)(g) of the Freedom of Information Law, the exception pertaining to inter-agency and intra-agency materials. However, when the audit becomes final, the Comptroller's opinions and recommendations contained within the audit will be available.

Since you asked that the response be sent to you "in an adobe pdf form", I point out that §105(1) of the State Technology Law provides in relevant part that state agencies "are authorized and empowered, but not required, to produce, receive, accept, acquire, record, file, transmit, forward and store information by use of electronic means." That being so, the Office of the State Comptroller, may choose to transmit records sought pursuant to the Freedom of Information Law via email, but it is not required to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 24, 2005

Mr. Douglas Lee
75-A-1894
Clinton Correctional Facility
P.O. Box 2000
Dannemora, NY 12929-2000

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. Lee:

I have received your letter in which you requested an advisory opinion concerning a denial of access to records by the Department of Correctional Services. You were denied access to job descriptions, a curriculum for a particular program and resumes of two employees because of security reasons.

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. With respect to job descriptions and resumes, 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 my view, a job description, as well as a curriculum for a particular program, indicating an employee's functions or assignments, would clearly be relevant to the performance of his or her official duties. Therefore, I believe that the records must be disclosed.

Also relevant to an analysis of rights of access is §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. A job description or curriculum would constitute "intra-agency material"; however, it would consist of factual information accessible under §87(2)(g)(i) or an agency's policy that would be available under §87(2)(g)(iii).

With respect to resumes, 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 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 note that the request was denied, according to your letter, "for security reasons." In this regard, §87(2)(f) authorizes an agency to withhold records insofar as disclosure "could endanger the life or safety of any person." Unless the content of the records in question is highly unusual, it does not appear that a denial on the basis of §87(20(f) could be justified.

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-15452

41 State Street, Albany, New York 12231
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August 24, 2005

Mr. Patrick Murray
02-R-4130
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. Murray:

I have received your letter in which you complained that you have encountered difficulty in receiving a copy of a master index from a correctional facility. You also asked if the master index contains the same number of pages for each facility.

In this regard, I offer the following comments.

First, the subject matter list referenced in the Freedom of Information Law is characterized as a "master index" in the regulations promulgated by the Department of Correctional Services. Section 87(3)(c) of the Freedom of Information Law, requires that each agency maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, although a subject matter list is not prepared with respect to records pertaining to a single individual, such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested. I direct your attention to the regulations promulgated by the Department of Correctional Services, which in §5.13 state that:

> "(a) Every custodian of records under these regulations shall maintain an up-to-date subject matter list, reasonably detailed, of all records in their possession. The records access officer shall maintain a master index, reasonably detailed, of all records maintained by the department. The master index shall include the lists kept by all custodians as well as a list of records maintained at the department's central office.

> (b) Each subject matter list and the master index shall be sufficiently detailed to permit identification of the file category of the record sought.
>
> (c) The master index shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list. Each custodian of records and the records access officer shall make available the index kept by him for inspection and copying. Any person desiring a copy of such list may request in writing a copy and upon payment of the appropriate fee, unless waived, a copy of such list shall be mailed or delivered."

Based on the foregoing, it is clear in my view that a master index must be maintained and made available for inspection and copying at each facility.

Second, the subject matter list or master index is different from the records to which it refers. Again, it is a categorization of the kinds of records maintained by an agency. The records themselves may be accessible or deniable, in whole or in part, under other provisions of the Freedom of Information Law.

Lastly, I have no knowledge concerning whether each master index would vary in size by facility.

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-15453

41 State Street, Albany, New York 12231
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August 24, 2005

Mr. Harold Chestnut
04-R-2839
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. Chestnut:

I have received your letter in which you complained that, as of the date of your letter to this office, the Long Beach Police Department has not responded to your request.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed

to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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

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August 24, 2005

Ms. Alexis Adair
[redacted]

The staff of the Committee on 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. Adair:

I have received your letter and the materials attached to it. You referred to an incomplete response to a request made to the Division of Housing and Community Renewal and a failure to respond to an appeal within the statutory time.

In this regard, first, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Second, §89(4)(a) of the Freedom of Information Law has long required that agencies determine appeals following denials of access within ten business days of the receipt of an appeal. Further, it has been held that a failure to determine an appeal within the statutory time constitutes a denial of the appeal that enables the person denied access to 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)]. It is also noted, however, that the law was amended on May 3 concerning agencies obligations to respond to requests and appeals in a timely manner.

Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the

> circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Director, FOIL Unit

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15455

41 State Street, Albany, New York 12231
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August 24, 2005

Mr. Joseph Ismach
01-A-5744
Mohawk Correctional Facility
P.O. Box 8450
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. Ismach:

I have received your letter in which you asked that this office intervene on your behalf and order a correctional facility to make available a record that was denied. The record was denied based on §87(2)(g) "as it constitutes inter-agency materials which are not final agency policy or determinations." You contend that the record was read to you at your grievance hearing.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, I offer the following comments.

First, if the record sought was read to you in its entirety at your grievance hearing, I believe that it must be made available to you now. In a decision concerning a request for records maintained by the office of a district attorney that would 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 or a similar proceeding during which you viewed or heard the contents of the record that was read aloud should be available to you. While it has been held that an erroneous or inadvertent disclosure does not create a right of access on the part of the public [see McGraw-Edison v. Williams, 509 NYS 2d 285 (1986)], the disclosure in this case was apparently purposeful and intentional rather than inadvertent. If that is so, even though §87(2)(g) might ordinarily serve as a proper basis for withholding the records sought, the prior disclosure to you in my view precludes the facility from withholding document that was read to you.

Lastly, as an aside, I believe that the statement offered by the inmate records coordinator concerning §87(2)(g) is incomplete and, therefore, inaccurate. That provision does not exempt from disclosure inter-agency or intra-agency materials "which are not final agency policy or determinations." "Final agency policy or determinations" represents one category among four kinds of information within inter-agency or intra-agency materials that must be disclosed. Specifically, the provision at issue enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a case involving intra-agency materials, the Court of Appeals specified that the contents of those materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][I], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Based on the foregoing, the fact that inter-agency or intra-agency materials do not consist of final agency policy or determinations is not determinative of rights of access. Again, other categories of information found within those materials, i.e., "statistical or factual tabulations or data", must be disclosed, even if they are unrelated to a policy or a determination.

In an effort to enhance compliance with and understanding of applicable law, and to encourage their reconsideration of the matter, copies of this opinion will be forwarded to the inmate records coordinator.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Yvonne Tuzzo, IRC II

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15456

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 24, 2005

E-MAIL

TO: Barbara Morse

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. Morse:

As you are aware, this office has received your correspondence concerning requests for records of the New York City Police and Fire Departments. A primary issue appears to involve contentions by Department officials that records have been lost.

In this regard, 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 point out that early decisions concerning the certification associated with an unsuccessful search for records indicated that the certification was required to have been prepared by the person who actually performed the search [see e.g., Key v. Hynes, 205 AD2d 779 (1994). However, the Court of Appeals, the state's highest court held to the contrary in Rattley v. New York City Police Department [96 NY2d 873 (2001)]. In brief, the Court found that the Freedom of Information Law does not specify the manner in which in agency must certify that records cannot be located, and that no personal statement from the person who actually conducted the search is required. Nevertheless, that decision does not absolve an agency from preparing a certification pursuant to §89(3) in instances in which the certification is requested.

You also referred to appeals that had not been answered. Here I note that 89(4)(a) of the Freedom of Information Law has long required that agencies determine appeals following denials of access within ten business days of the receipt of an appeal. Further, it has been held that a failure to determine an appeal within the statutory time constitutes a denial of the appeal that enables the

person denied access to 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)]. It is also noted, however, that the law was amended on May 3 concerning agencies' obligations to respond to requests and appeals in a timely manner.

Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of

Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance,

the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

RJF:tt

cc: Jonathan David
Elena Ferrera

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15457

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 24, 2005

Mr. Keith Silvera
90-T-3701
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. Silvera:

I have received your letter in which you complained that you asked various agencies to write the name of your legal aid attorney on copies of records that you requested and they have not complied.

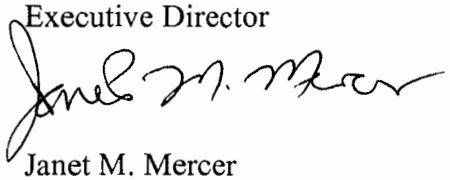
In this regard, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions, write the name of your attorney on a record, or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request.

Therefore, government officials in my view would not be obliged to accommodate you by preparing a new record or adding entries to existing records. Enclosed is "Your Right to Know", which explains the Freedom of Information Law and includes a sample letter of request that may be useful to you.

I hope that 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1545 8

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 24, 2005

Mr. Benjamin Patterson
92-A-7440
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. Patterson:

I have received your letter in which you complained that you were denied access to records that were read to you at your grievance hearing. The records were denied based upon §§87(2)(g) and (f) of the Freedom of Information Law.

In this regard, I offer the following comments.

If the records sought were read to you in their entirety at your grievance hearing, I believe that they must be made available to you now. In a decision concerning a request for records maintained by the office of a district attorney that would 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 or a similar proceeding during which you viewed or heard the contents of the record that was read aloud should be available to you. While it has been held that an erroneous or inadvertent disclosure does not create a right of access on the part of the public [see McGraw-Edison v. Williams, 509 NYS 2d 285 (1986)], the disclosure in this case was apparently purposeful and intentional rather than inadvertent. If that is so, even though §§87(2)(g) and (f) might ordinarily serve as a proper basis for withholding the records sought, the prior disclosure to you in my view precludes the facility from withholding documents that were read to you.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: R. Snow
Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15459

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 24, 2005

Mr. Jason Huntley
92-A-4446
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. Huntley:

I have received your letter in which you complained that you were denied access to records that were read to you at your grievance hearing. The records were denied based upon §§87(2)(g) and (f) of the Freedom of Information Law.

In this regard, I offer the following comments.

If the records sought were read to you in their entirety at your grievance hearing, I believe that they must be made available to you now. In a decision concerning a request for records maintained by the office of a district attorney that would 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 or a similar proceeding during which you viewed or heard the contents of the record that was read aloud should be available to you. While it has been held that an erroneous or inadvertent disclosure does not create a right of access on the part of the public [see McGraw-Edison v. Williams, 509 NYS 2d 285 (1986)], the disclosure in this case was apparently purposeful and intentional rather than inadvertent. If that is so, even though §§87(2)(g) and (f) might ordinarily serve as a proper basis for withholding the records sought, the prior disclosure to you in my view precludes the facility from withholding documents that were read to you.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: R. Snow
Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15460

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 24, 2005

Mr. Mitchell Kalwasinski
82-A-4795
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. Kalwasinski:

I have received your letter in which you complained that you are being charged a fee for copies of records that you want to inspect. Based on your correspondence, it appears that portions of the records must be redacted and a fee is being imposed. You also questioned your right to inspect records that are maintained at another facility.

In this regard, I offer the following comments.

When a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there are often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the grounds for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record.

With respect to your right to inspect records located at another facility, §87(2) requires that accessible records be made available for inspection and copying, and the regulations promulgated by the Committee on Open Government state in part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3). In my view, neither the Law nor the regulations require that records be transferred from their usual locations to accommodate an applicant at a site convenient to the applicant. In short, while inmates may be indigent or unable to travel, I do not believe that an agency is required to make records available at other than its designated or customary locations.

I hope that I have been of 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-15461

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 25, 2005

Mr. Reginald Persaud
95-A-1987
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Persaud:

I have received your letter in which you complained that Mr. Jonathan David, Appeals Officer for the New York City Police Department, granted part of your appeal and remanded it to the Department's records access officer for reconsideration, who shall issue a new determination within sixty days. As of the date of your letter to this office, you had not received any response.

Based upon its clear language, that determination, in my view, is inconsistent with the Freedom of Information Law. 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**" (emphasis added).

As I understand the foregoing, an agency in receipt of an appeal has two options: within ten business days of its receipt, the agency must either fully explain its reason for further denial or make the records available. Delaying disclosure for as much as sixty additional days in my view represents a failure to comply with law.

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to Mr. Jonathan David.

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-1546 2 PPPL-AO-314A

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August 25, 2005

Mr. James Hill
99-A-3411
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. Hill:

I have received your letter in which you indicated that you were denied access to documents relating to a confidential informant. You asked if you can appeal the denial.

In this regard, I offer the following comments.

First, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the

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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

With respect to your request, assuming that the records sought involve interviews of witnesses or informants that have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial could be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;

> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (I) through (iv) of §87(2)(e).

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure could "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

Lastly, since you requested "You Should Know", which pertains to the Personal Privacy Protection Law, I point out that that statute is likely inapplicable in relation to your request. Although §95(1) of the Personal Privacy Protection Law generally grants rights of access to records to a person to whom the records pertain, §95(7) provides that rights of access "shall not apply to public safety agency records". The phrase "public safety agency record" is defined by §92(8) to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty seven-a, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

Therefore, while the Personal Privacy Protection Law applies to records maintained by state agencies, rights of access conferred by that law do not include records of agencies or units within agencies whose primary functions involve investigation, law enforcement or the confinement or persons in correctional facilities. Further, that statute excludes local government, i.e., a municipal police department, from its coverage [see definition of "agency", §92(1)].

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-15463

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 25, 2005

E-MAIL

TO: Gene Lugo

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. Lugo:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. In brief, you referred to a situation in which you received a speeding ticket and requested a variety of materials without success from the officer who ticketed you. You have sought my "thoughts on this matter."

First, in my view, you might have had greater success had you not requested material directly from the arresting officer. I note by way of background that §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In short, in a town, I believe that the Town Board has the overall responsibility of ensuring compliance with the Freedom of Information Law and that the records access officer has the duty of coordinating responses to requests.

Section 1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

Based on the foregoing, again, the records access officer must "coordinate" an agency's response to requests. Therefore, I believe that when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law or forward the request to the records access officer. As a general matter, however, requests for records should be made the agency's designated records access officer. In most towns, that would be the town clerk.

Second, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the kinds of records that you requested would be accessible. In one case, Capruso v. New York State Police [Supreme Court, New York County, NYLJ, July 11, 2001; modified, 300 AD2d 27 (2003)], the request involved the "operator's manual for any radar speed detection device used" by the New York State Police and the New York City Police Department. The Division of State Police contended that disclosure would interfere with the ability to effectively enforce the law concerning speeding. Nevertheless, following an *in camera* inspection of the records, a private review by the judge, it was found that the Division could not meet it burden of proving that the harmful effects of disclosure appearing in the exceptions to rights of access would in fact arise.

In its attempt to deny access to the records, the Division relied upon §87(2)(e)(i) and (iv) of the Freedom of Information Law as a means of justifying its denial. Those provisions permit an agency to withhold records that are "compiled for law enforcement purposes" to the extent that disclosure would "i. interfere with law enforcement investigations or judicial proceedings" or "iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

From my perspective, records prepared by manufacturer of a radar device could not be characterized as having been "compiled for law enforcement purposes. If my contention is accurate, §87 (2)(e) would not be applicable as a means of withholding those records.

Even if that provision is applicable, the court in Capruso determined that a denial of access would not be sustained. The leading decision dealing with law enforcement manuals and similar records detailing investigative techniques and procedures is Fink v. Lefkowitz [47 NY2d 567 (1979)], which involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the state's highest court, the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate.

In consideration the direction given by the state's highest court in Fink, the court in Capruso rejected the contentions offered by the law enforcement agencies and determined that:

> "These arguments fail to establish a casual link as to how release of the information in the manufacturers' operational manual would enable a speeding driver to avoid detection. Similarly, absent from the affidavits is an explanation as to how the knowledge of the testing procedures used by the police to ensure the device is functioning properly would enable such driver to escape detection. Furthermore, the affidavits lack proof as to how the information in the manual would enable the use of a jamming device which could not otherwise be used. Thus, the claim that the release of these manuals would result in drivers engaging in dangerous behavior solely to avoid detection is speculative.
>
> The State also objects to the release of the State Police Radar and Aerial Speed Enforcement Training Manuals as they contain 'operational and legal considerations.' However, as the Court of Appeals stated in Fink v. Lefkowitz, supra at 571, 'To be distinguished from agency records compiled for law enforcement

> purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement.' The Court explained, the question is 'whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel,' (citations omitted) Id.
>
> Thus, after an in camera review, the City and State have failed to establish that the release of these manuals would allow motorists who are violating traffic laws to tailor their conduct to evade detection."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15464

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August 25, 2005

E-MAIL

TO: Douglas Greene and George Contoveros

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. Greene and Mr. Contoveros:

As you are aware, I have received your letter and related materials. Please accept my apologies for the delay in response. You have sought an opinion concerning the propriety of a denial of a request made to the Senate for time and attendance records pertaining to a particular employee of the Senate.

In this regard, I offer the following comments.

First, I point out that §88 of the Freedom of Information Law deals with rights of access to records of the State Legislature. While there have been numerous judicial decisions concerning rights of access to agency records in accordance with provisions applicable to agencies, there are few decisions that have been rendered with respect to access to records of the Legislature.

It is also noted that the structure of the Freedom of Information Law as it pertains to the State Legislature differs from its structure as it pertains to agencies of state and local government subject to §87 of the Law. In brief, as the Freedom of Information Law applies to agencies, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. As the Law applies to the State Legislature, §88(2) and (3) include reference to certain categories of records that must be disclosed. Therefore, unless records of the Legislature fall within one or more of those categories of accessible records, there is no obligation to disclose.

Second, of potential relevance to your inquiry is §88(3)(b), which requires that each house of the State Legislature maintain and make available "a record setting forth the name, public office

address, title and salary of every officer or employee." While that record is not the subject of your request, it may relate to the records sought. Among the categories of records available from the State Legislature is §88(2)(e), which requires the disclosure of "internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for inspection and copying pursuant to this section or any other applicable provision of law."

I have reviewed the blank time and attendance form used by Senate staff that you sent, and I believe that the items supplied by employees in which you are interested could be characterized as "statistical or factual tabulations." However, it is unclear whether those items are used to prepare or relate directly to other records that are available by law to the public. If they are, in my opinion, they would be accessible. If they are not, i.e., if the same salary is paid irrespective of the content of the time and attendance record, it is unlikely that they would be accessible under §88(2)(e).

Notwithstanding the foregoing, it is noted that in a decision affirmed by the State's highest court dealing with attendance records maintained by an agency (not the State Legislature), specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found that the records are accessible. In that case, 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,109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Insofar as an agency's 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.

Moreover, in affirming the Appellate Division decision in Capital Newspapers, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, it is clear that an agency's attendance records must be disclosed under the Freedom of Information Law. As suggested earlier, whether that is so with respect to similar records maintained by the State Legislature would be dependent on their relationship to records that are available pursuant to law.

I hope that I have been of assistance.

RJF:tt

cc: Kenneth E. Riddett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 25, 2005

Mr. Vincent Hurley
89-A-8199
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

Dear Mr. Hurley:

I have received your letter in which you asked that I indicate "the Crime Scene Unit's Procedure when they perform 'ballistic examination' on any weapon found at the scene of a crime, and whom do [you] contact to obtain the actual tests and the results thereof...."

In this regard, the functions of this office involves providing advice and opinions pertaining to public access to government records, primarily in relation to the state's Freedom of Information Law. Consequently, I have neither knowledge nor records concerning the procedure used to perform a ballistics examination of a weapon.

Based on a review of your correspondence, I would conjecture that the ballistics examination was performed by the New York City Police Department. If that is so, it is suggested that you request the records of your interest by writing to the Department's records access officer. The records access officer has the duty of coordinating an agency's response to requests. I point out, too, that §89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

Lastly, since the ballistics examination relates to an event that occurred nearly seventeen years ago, it is possible that it might legally have been destroyed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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August 25, 2005

Mr. Sheldon Dixon
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dixon:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

You referred to requests made to the New York City Police Department pursuant to the Freedom of Information Law and wrote that the Department has "failed to respond in a timely manner." The request that you attached involves a telephone message involving your transfer in 1999, and the disposition of certain complaints, some of which appear to involve police officers.

In this regard, first, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgment must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

Second, I point out that the Freedom of Information Law pertains to existing records. Since one aspect of your request involves a telephone message relating to a call made more than five years ago, I would conjecture that the record no longer exists. If that is so, the Freedom of Information Law would not apply.

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.

Assuming that the persons identified in your request are police officers, relevant is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police 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 complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or

embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered in 1999 reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)].

To acquire the records that fall within the coverage of §50-a, there must be a court order issued in accordance with other provisions in that statute that state that:

> "2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.
>
> 3. If, after such hearing, the judge concludes there is a sufficient basis he shall sign an order requiring that the personnel records in question be sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting."

Based on the language of §50-a of the Civil Rights Law, it appears that the records sought as they pertain to particular police officers are exempted from disclosure by statute.

The remaining record that you requested involves the "disposition of IAB complaint concerning alleged racial profiling of commercial businesses in the 47th pct." It is unclear whether the complaint was made with respect to a particular person or persons. If it did not, it is likely that

the disposition would be accessible on the ground that it constitutes a final agency determination [see §87(2)(g)(iii)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Lt. Daniel Gonzalez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15467

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August 25, 2005

Mr. Ruben A. Slacks
92-A-6182
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Slacks:

I have received your letter in which you indicated that you requested records from the Queens County District Attorney's Office, which sought extensions to its time of respond. As of the date of your letter to this office, you still have not received the records.

In this regard, with respect to requests made before May 3, 2005, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added]. In the context of your correspondence, it appears that approximate dates have been given, but that the agency has repeatedly gone beyond those dates.

In a case that described an experience similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89 (3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming.
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the agency "is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law, §89(4)(a)."

Based on the foregoing, I believe that your requests have been constructively denied and that you may appeal the denial pursuant to §89(4)(a). That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reason for further denial, or provide access to the record sought."

Alternatively, based on the holding in Bernstein, it appears that you could seek judicial review of the denials now.

I point out that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and

may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended (see attached), and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15468

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August 25, 2005

Mr. Miguel Rivera
96-A-4304
Wallkill Correctional Facility
Box G
Wallkill, NY 12289-0286

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rivera:

I have received your letter in which you asked if your are entitled to records concerning your children maintained by the New York City Department of Social Services under the Freedom of Information Law.

In this regard, I offer the following comments.

First, please note that the agency that deals with child welfare is now known as the Administration for Children's Services.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (I) of the Law.

Relevant in my opinion is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is§372 of the Social Services Law, which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4)(a) 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 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 Administration for Children's Services.

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-15469

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 25, 2005

Mr. Miguel Rivera
96-A-4304
Wallkill Correctional Facility
Box G
Wallkill, NY 12289-0286

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rivera:

I have received your letter in which you asked if your are entitled to records concerning your children maintained by the New York Foundling Hospital in Puerto Rico under the Freedom of Information Law.

In this regard, the New York State 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."

As such, the Freedom of Information Law would not apply to a hospital located in Puerto Rico.

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-15470

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 25, 2005

Mr. Corey Latimer
02-A-4186
Green Haven Correctional Facility
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Latimer:

I have received your letter in which you complained that your Freedom of Information Law requests directed to the Ulster County Court have not been answered.

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 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 citing an applicable provision of law as the basis for your request.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15491

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 25, 2005

Mr. Anthony Carty
92-A-9491
Shawangunk Correctional Facility
Box 200
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. Carty:

I have received your letter in which you complained that you have encountered difficulty in obtaining records from the Queens County Court. You indicated that you wrote numerous requests and have received no answers. You asked if there are other provisions of law besides the Freedom of Information Law or the Judiciary Law that would enable you to gain access to the records.

In this regard, as you may be aware, the Freedom of Information is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. As you are aware, court records are 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 emphasize that the request is being made pursuant to §255 of the Judiciary 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-15472

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 25, 2005

Mr. James Thomas
99-A-6643
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. Thomas:

I have received your letter in which you asked if an agency must explain its reasons for a denial of access to records under the Freedom of Information Law.

In this regard, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the Freedom of Information Law. Section 1401.2 (b)(3) states that an agency's records access officer is responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor." Based on the foregoing, the reasons for a denial of access must be stated in writing. This is not to suggest that any such reasons must be explained in an exhaustive manner. Later in the process of seeking records, if an appeal is denied, §89(4)(a) provides that the reason must be "fully explain[ed] in writing."

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-15473

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 25, 2005

Mr. Prince Shabazz
89-T-2267
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. Shabazz:

I have received your letter in which you inquired as to the time within which an agency must respond to a Freedom of Information request.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could

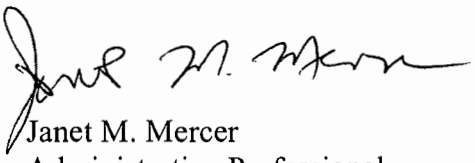
initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15474

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 25, 2005

Mr. Vincent Martin
03-R-4879
Cape Vincent Correctional Facility
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. Martin:

I have received your letter in which you indicated that you requested the names of the detectives involved in your arrest from the New York City Police Department. You were denied because the Department indicated that it is not required to answer interrogatories. You also indicated that it takes three to four months to receive a response to your Freedom of Information Law requests from the New York City Police Department.

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 Department officials could provide the information sought by providing the names of the detectives, they would not be required to do so by the Freedom of Information Law. In the future, it is suggested that you request existing records.

Second, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it

acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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

OML-AO- 4028
FOIL-AO-15475

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 25, 2005

Hon. Carole Clearwater
Town Clerk
Town of Hyde Park
P.O. Box 311
Hyde Park, NY 12538

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Clearwater:

I have received your letter and the memorandum relating to it. Please accept my apologies for the delay in response.

You indicated that the Hyde Park Town Board conducted an executive session that you did not attend, and when it reconvened in public, "the Supervisor announced that two (2) decisions were made." On the following day, you contacted the Town Attorney to request that he verify that a vote was taken during the executive session. He referred your inquiry to the attorney who was present and wrote that:

> "No votes were taken in Executive Session. In both instances the Board simply confirmed decisions it had previously made."

You wrote that you "fail to understand what that answer means." I must admit that I do not understand it either. Nevertheless, I offer the following comments.

First, as you are aware, the Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements pertaining to their contents. Specifically, §106 states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must generally be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

I point out that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, minutes reflective of its action would not have include reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy such as unsubstantiated charges or allegations [see Freedom of Information Law, §87(2)(b)].

On occasion, public bodies have taken action by what has been characterized as "consensus." 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).

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 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.

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-15476

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 25, 2005

Mr. Willie Smith
96-A-3430
Wallkill Correctional Facility
Box G
Wallkill, NY 12589-0286

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Smith:

I have received your letter in which you requested an opinion concerning a request made to the Department of Correctional Services for an inmate status report. A portion of the report that was withheld that contained evaluative information, and you asked whether that redaction was appropriate.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant under the circumstances 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, I believe that the denial of access to the portion of the report containing evaluative information 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-1547?

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 26, 2005

Mr. Norman Schachter
02-A-3134
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-3134

The staff of the Committee on Open 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 indicated that you requested records from the New York City Department of Correction and, as of the date of your letter to this office, you had not received the records.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the

Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended (see attached), and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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

cc: Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15478

41 State Street, Albany, New York 12231
(518) 474-2518
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August 26, 2005

Mr. Pedro Rodriguez
04-A-5136
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rodriguez:

I have received your letter in which you indicated that you requested records from the New York City Department of Correction, which sought extensions to its time of respond. As of the date of your letter to this office, you still have not received the records.

In this regard, with respect to requests made before May 3, 2005, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added]. In the context of your correspondence, it appears that approximate dates have been given, but that the agency has repeatedly gone beyond those dates.

In a case that described an experience similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89 (3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming.
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the agency "is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law, §89(4)(a)."

Based on the foregoing, I believe that your requests have been constructively denied and that you may appeal the denial pursuant to §89(4)(a). That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reason for further denial, or provide access to the record sought."

Alternatively, based on the holding in Bernstein, it appears that you could seek judicial review of the denials now.

I point out that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and

may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended (see attached), and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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

Enc.

cc: Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15479

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, 2005

Mr. Dwayne Chapman
92-A-5516
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Chapman:

I have received your letter in which you indicated that you requested records from the New York City Department of Correction and, as of the date of your letter to this office, you had not received the records.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the

Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended (see attached), and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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

cc: Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15480

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August 26, 2005

Mr. Louis Cyrus
04-A-1451
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cyrus:

I have received your letter in which you complained that, as of the date of your letter to this office, your Freedom of Information Law requests directed to the New York City Police Department had not been answered.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the

Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial 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 by the New York City Police Department to determine appeals is Mr. Jonathan David, Records Access Appeals Officer.

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-1548/

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August 26, 2005

Mr. John F. Murphy
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Murphy:

I have received your letter in which you questioned the authority of a county clerk to charge one dollar for a photocopy and asked whether the clerk is "only allowed to charge the .25 cents under FOIL."

In this regard, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. As you are aware, under the Freedom of Information Law, §87(1)(b)(iii), an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute".

In the case of fees that may be assessed by county clerks, §§8018 through 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, the fees may exceed those permitted under the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

Lastly, I note that §8019(f) of the Civil Practice Law and Rules, entitled "Copies of records", states in relevant part that:

> "The following fees, up to a maximum of forty 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."

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15482

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 26, 2005

Mr. Willie Smith
96-A-3430
Wallkill Correctional Facility
Box G
Wallkill, NY 12589-0286

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Smith:

I have received your letter in which you requested an opinion concerning a request made to the Division of Parole for an inmate status report and a "sentencing judge letter. A portion of the report, as well as the letter, were withheld, and you asked whether you are entitled to those records.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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, I believe that if the inmate status report contained evaluative information, the denial was consistent with law. I am unaware of the content of the sentencing judge letter. However, I would conjecture that it may fall within the coverage of §390.50 of the Criminal Procedure Law concerning pre-sentence reports. 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 is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. It is suggested that you review that statute.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15483

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 25, 2005

Mr. Steven L. Herrick
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Herrick:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You have sought an advisory opinion concerning the propriety of a denial of access to records by the Town of Hempstead.

By way of background, you wrote that you represent the owner of a shopping center in the Town of Hempstead, and that CVS Pharmacy has submitted permit applications concerning a nearby site. Having requested records pertaining to the proposed pharmacy, your client was informed that it is the "policy" of the Town Department of Buildings to withhold any information pertaining to such applications until the applications are approved. That agency indicated that:

> "The policy of this department is to maintain confidentiality regarding any proposed construction or other project during the application phase. This is done to provide all applicants the ability to work solely with this department in the planning and design of their proposed project in as sterile an environment as possible. This department does not consider a proposed project to be public information until such time as either a permit is issued or the application is denied and, at the applicant's request, sent to the Board of Zoning Appeals, or, in some cases, the Town Board for a public hearing."

From my perspective, the policy is inconsistent with law, and the records sought are clearly subject to rights of access conferred by the Freedom of Information Law. 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 the Town of Hempstead, and §86(4) defines the term "record" to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, as soon as information in some physical form is in the custody of an agency, irrespective of its use, status or relation to finality, it constitutes a "record" that falls within the coverage of the Freedom of Information Law. The materials sought in the request at issue, "plans, documents, correspondence, etc. for the proposed CVS Pharmacy", in my view clearly constitute "records" subject to rights conferred by that statute.

Second, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. That being so, the only question when a request is made involves the extent, if any, to which one or more of the exceptions to rights of access may properly be asserted. In this instance, it is unlikely that any of the grounds for denial would apply.

Lastly, a claim or promise of confidentiality is, according to the Court of Appeals, all but meaningless. Again, unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the records 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.

I note, too, that it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment or policy cannot confer, require or promise confidentiality.

Based on the foregoing, I believe that the "policy" relating to disclosure is invalid, for it is inconsistent with the Freedom of Information Law.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Attorney
Frederick Amorini
Fred Jawitz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15484

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August 26, 2005

Mr. Thomas Kaminski
00-B-0517
Mohawk Correctional Facility
61 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 indicated that you requested the "names, titles and assignments of every staff employee who works in the Medical Department" at your facility. You were denied access based upon considerations concerning the safety and security of the employees of the facility.

In this regard, I offer the following comments.

With respect to the disclosure of the names and titles of employees, I point out that the Freedom of Information Law as originally enacted in 1974 required only that titles and salaries of law enforcement agency employees be disclosed; their names did not have to be included in a payroll list. However, that version of the Freedom of Information Law was repealed and replaced with the current Freedom of Information Law, which became effective in 1978. Further, subject to one qualification, I believe that the titles and salaries, as well as the names of all public employees, must be disclosed.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law.

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 favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, subject to the following qualification, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

In my opinion, the only exception to rights of access that could appropriately be cited with respect to the payroll record is §87(2)(f). The cited provision states that an agency may withhold

records or portions of records when disclosure could "endanger the life or safety of any person." In my view, disclosure of the identities of employees working in the Medical Department, including law enforcement officers, would not in most instances endanger their lives or safety. In rare circumstances in which a law enforcement agency has engaged employees in undercover positions, for example, §87(2)(f) might be cited with justification as a basis for deleting those portions of a payroll record that identify such individuals. Other than in that rare kind of situation, I believe that the payroll record required to be maintained pursuant to §87(3)(b) must be made available.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Richard Harding

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15485

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August 29, 2005

E-Mail

TO: Vernon Horace

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. Horace:

I have received your letter in which you wrote that you requested a record from the Village of Monticello, but the Clerk indicated that she could not locate it. Thereafter, you requested a certification to that effect, but the clerk, according to your letter, refused to prepare the certification.

In this regard, §89(3) of the Freedom of Information Law provides in relevant part that when an agency indicates that it cannot locate a record, on request it, "shall certify that it does have possession of such record or that such record cannot be found after diligent search." Additionally, the regulations promulgated by the Committee on Open Government state in 21 NYCRR §1401.2(b) that an agency's 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."

It is suggested that in seeking a certification, you refer to the language of the Freedom of Information Law and the regulations quoted above.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be forwarded to the Village Clerk.

I hope that I have been of assistance.

RJF:jm

cc: Edith Schop

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15486

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 29, 2005

Ms. Victoria Libbey Simao
101 Flamingo Street
Atlantic Beach, NY 11509

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Simao:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

As I understand the matter, you requested records indicating the gross wages of employees of the Village of Atlantic Beach. The Village Clerk provided records reflective of salaries, but not overtime or other payments comprising gross wages. Further, she wrote that "W2's contain personal information to which you are not entitled and it is time consuming to redact them...." Following your appeal, the Village's appeals officer, appears to have affirmed the Clerk's determination and added that "[n]o appellate court has yet held that W2 forms of employees must be disclosed."

It is true that W-2 forms include personal items that you have no right to obtain, that it may be time consuming to redact them and that there is no appellate court decision of which I am aware that requires that they be disclosed. Nevertheless, there are numerous decisions that indicate that information in the nature of or analogous to gross wages must be disclosed, and that it is the responsibility of an agency to disclose portions of records, even though other elements of the records may justifiably be withheld. From my perspective, the blanket denial of access by the Village is inconsistent with law. In this regard, I offer the following comments.

Perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available

under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, 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), an exception distinct from that inferred in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the Village has engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought

must 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 Village for the purpose of identifying those portions that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

I note that there is nothing in the Freedom of Information Law that deals specifically with personnel records or 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.

Pertinent is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". 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)]. I note that several of the decisions cited above were rendered by appellate courts. 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 amount that a public employee is paid, his or her gross wages, clearly is relevant to the performance of his or her duties. Consequently, there is no doubt, in my view, such a figure is accessible, for disclosure would constitute a permissible, not an unwarranted invasion of personal privacy.

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, the same conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

Lastly, that the process of redacting items from W-2 forms may be time consuming is not a defense that justifies a denial of access. The Village does not employee hundreds or thousands of people; it employs dozens, and it has been held that a shortage of staff is not a defense to denial of access, for acceptance of such a claim would "thwart the very purpose of the Freedom of Information Law [United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 nYS2d 823 (1980)]. Moreover, the state's highest court has held that compliance with that law and "[m]eeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY2d 341, 347 (1979)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, 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:jm

cc: Board of Trustees
Emily Siniscalchi
Perry S. Reich

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 26, 2005

MEMORANDUM

TO: Ross Whaley, Chairman
Richard Lefebvre, Executive Director

FROM: Robert J. Freeman, Executive Director

SUBJECT: Disclosure of Employee Names

Based upon our conversation earlier today, the primary issue that you raised involves the disclosure of the names of four employees of the Adirondack Park Agency (APA) who are identified in a letter addressed to Chairman Whaley by Dineen Ann Riviezzo, the State Inspector General.

In brief, the Inspector General's letter deals in part with allegations that the employees, while using Agency computers, obtained and transmitted inappropriate images via email. The Inspector General referred to the APA's computer policy, which states in part that:

> "The use of Agency computers for illegal and unethical activities is strictly prohibited. The use of Agency computers to communicate or store obscene, racist, sexist, threatening, harassing or otherwise objectionable language or images is strictly prohibited."

Following the investigation by the Inspector General, she wrote that:

> "We showed each of the five employees copies of the inappropriate images located in their e-mails and/or on their computer hard drives. Each acknowledged responsibility for the existence of the materials."

From my perspective, because the five employees admitted to having obtained the inappropriate images on their computers, their names as they appear in the letter from the Inspector General are accessible pursuant to the Freedom of Information Law.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, there is nothing in the Freedom of Information Law that deals specifically with personnel records or 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.

Pertinent is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". 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 consideration of the acknowledgment of responsibility for the existence of the materials at issue by the five employees, I believe that the portions of the Inspector General's letter identifying those employees consist of factual information are accessible under subparagraph (i) of §87(2)(g). Further, it is clear that the matter relates to the performance of the duties of those employees and their failure to comply with APA policy. I note, too, that numerous judicial decisions specify that records indicating findings or admissions of misconduct on the part of public employees are accessible under the Freedom of Information Law.

If you would like to discuss the matter further, please do not hesitate to contact me.

RJF:jm

FOIL-AO-1548

From: Robert Freeman
To: Donna Combs
Date: 9/6/2005 8:50:10 AM
Subject: Re: Assessors Records

Hi Donna - -

I know of no law that deals directly with the issue, but certainly it is common for employees to temporarily take records with them when they are needed. However, as you are aware, based on §30(1) of the Town Law, as Town Clerk, you are the legal custodian of all town records. Additionally, §57.19 of the Arts and Cultural Affairs Law states that the town clerk is also the records management officer, and §57.25 specifies that it is "the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services 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 cooperate the the local government's records management officer...."

With respect to the Freedom of Information Law, it is assumed that you have been designated as "records access officer." If that is so, it is your duty to coordinate the Town's response to requests. You lose the ability to do so if you cannot gain access to records maintained by other Town officers or employees.

In my view, if records are removed, even temporarily, in consideration of your legal responsibilities as Town Clerk, as records management officer, and as records access officer, you should be informed so that you can be assured of the ability to carry out your duties.

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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>>> "Donna Combs" [redacted] > 9/1/2005 4:08:38 PM >>>
Dear Bob,
I am in the middle of a problem here and I need your help. The Town of Warrensburg's supposedly acting assessor removed all of the assessment files for a particular street on a Thursday night, a foil request had been made to review the records on Friday, when I went to the assessor's clerk with the person who was attempting to review the files we were informed of this. The resident who had filed to review the records needed them for an upcoming SCAR proceeding. The Town Supervisor maintains that the Assessor and his staff has the right to remove records from the building to work with in the field and at hearings and etc. Please advise me. Thank you so much. Donna Combs

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15489

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September 6, 2005

Ms. Katherine Allison
[redacted]

Ms. Margarita Walter
[redacted]

The staff of the Committee 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. Allison and Ms. Walter:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response.

You have sought assistance in gaining access to various records that you requested from the Office of Court Administration (OCA). Having discussed the matter with Shawn Kerby, Assistant Deputy Counsel at OCA, I was informed that a variety of records have been disclosed, but that "the underlying records involved in the JHO appointment process", those concerning the appointment of judicial hearing officers, which include materials concerning particular officers' medical and mental conditions, have been withheld. You referred to a number of advisory opinions rendered by this office suggesting that records or portions of records that are relevant to the performance of a public employee's official duties must be disclosed. While that is so in a number of circumstances, I do not believe it to be so in the context of your requests.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant in consideration of the nature of your requests is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

> "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article...."

In addition, §89(2)(b) lists a series of examples of unwarranted invasions of personal privacy, the first two of which pertain to:

> "i. disclosure of employment, medical or credit histories or personal references or applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

Perhaps the leading decision relative to the issues involving the protection of personal privacy is Hanig v. New York State Department of Motor Vehicles [79 NY2d 106 (1992)], a case in which the Court of Appeals, the state's highest court, determined that a motorist's responses to questions involving the possibility that he was being treated for certain disabilities could be withheld. The Court disagreed with a contention that the "medical history exemption" applies only to information contained within an employment application or disclosed to a health care provider in the course of treatment. In considering rights of access, the Court held that the nature of the information, not the kind of record in which it is contained, is the key factor in determining whether disclosure would constitute "an unwarranted invasion of personal privacy." The decision referred to medical information, whether or not it appears in what may be characterized as a medical record, as the type of information "that would ordinarily and reasonably be regarded as intimate, private information" and that "[t]he information at issue here – for example, that the license applicant is undergoing treatment for convulsive disorders, epilepsy, fainting or dizzy spells, heart ailments or mental disabilities – easily falls within that exemption" (id., 112).

Several of the opinions to which you referred pertain to the privacy of public employees and items involving the performance of their official duties. For instance, one of the opinions deals with rights of access to record indicating that a teacher is certified in a particular area. That kind of information could hardly be characterized as intimate; rather, it enables the public to know that he or she is qualified to teach in that area. In my view, that kind of situation may readily be distinguished from that in which a record includes information concerning a particular medical or mental condition or disease. The latter, according to the Court of Appeals, clearly may be withheld in consideration of the privacy of the subject of the record, for it was held that: "[o]nce it is determined that the requested material falls within a FOIL exemption, no further policy analysis is required. It is enough that the Legislature has determined to classify the release of such information as an unwarranted invasion of personal privacy" (id.).

With respect to the "underlying records involved in the JHO appointment process", OCA referred to §87(2)(g), which authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In considering the intent of §87(2)(g), the Court of Appeals has held that:

> "...the purpose underlying the intra-agency exemption... 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][Gould v. New York City Police Department, 289 NY 2d 267, 276 (1996)]."

The Court stated further that the "aim [is] to safeguard internal government consultations and deliberations" and to protect against the disclosure of "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" (id., 277).

In sum, it appears that OCA has denied portions of your requests in a manner consistent with the direction provided in judicial decisions rendered by the state's highest court.

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: Lawrence Marks
Shawn Kerby

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15490

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September 8, 2005

Mr. Robert Miles
[redacted]

Dear Mr. Miles:

I have received your letter in which you requested from this office "any and all of Governor Pataki's executive orders regarding work release."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have custody or control of records generally, and we do not maintain copies of executive orders.

As a general matter, 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.

It is suggested that a request be made to Mr. Ryan T. McAllister, Records Access Officer, Executive Chamber, The Capitol, Albany, NY 12224.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

COML-AO-4038
FOIL-AO-15491

From: Robert Freeman
To: peter@petergolden.com
Date: 9/12/2005 1:05:02 PM
Subject: Dear Mr. Golden:

Dear Mr. Golden:

I have received your inquiry relating to the role of this office and the ability of a member of the public to video record open meetings of a board of education.

In this regard, first, certainly a person seeking records may transmit a copy of his or her request made under the FOIL to this office. In some instances, the reference to a "cc" may encourage the agency in receipt of the request to respond more quickly than it might otherwise. I note that the primary function of the Committee on Open Government involves providing advice and opinions concerning public access to government records. Neither the Committee nor its staff has the authority to compel an agency to comply with law or to determine appeals. An appeal of a denial of access, according to §89(4)(a) of FOIL, is made to the head or governing body of an agency (e.g., a board of education) or to a person or designated by the agency head or governing body to determine appeals. Any person, however, may contact this office for advice, guidance, or to request a written advisory opinion. While opinions prepared by the Committee are not binding, it is our hope that they are educational and persuasive, and that they serve to encourage compliance with law.

With respect to the second issue, while there is nothing in the Open Meetings Law that addresses the ability to record an open meetings, judicial decisions indicate, in brief, that any person may audio or video record an open meeting, so long as the use of the recording equipment is neither obtrusive nor disruptive. To obtain more detailed information, advisory opinions accessible via the Open Meetings Law index to opinions on our website can be found under the headings "tape recorders, use of" and "video equipment, use of."

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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September 12, 2005

Ms. 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 facts presented in your correspondence.

Dear Ms. Warren:

I have received your note and your letter to the editor concerning failures by the Town of Lewiston to respond to your requests for records under the Freedom of Information Law.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

OML-AO-4033
FOIL-AO-1543

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September 14, 2005

Hon. Kenneth F. Dillon
Town Supervisor
Town of Montour
P.O. Box 261
Montour Falls, NY 14865

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Supervisor Dillon:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You have raised a variety of questions and issues, and I will attempt to respond to them, but not necessarily in the order in which they were presented. Additionally, the responses will be offered through commentary concerning the law and its judicial interpretation, and not necessarily in specific relation to unique facts that you presented.

It is noted at the outset that 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 point out that §105(2) of the Open Meetings Law states that any member of a public body, such as a town board, has the right to attend executive sessions held by that public body. While a public body may authorize persons other than its own members to attend an executive session, none other than the members have the right to attend an executive session.

One of the issues pertained to the exception involving litigation, and as you may be aware, §105(1)(d) permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. I point out that one of the decisions cited above, Concerned Citizens, involved a situation in which a town was involved in litigation and held an executive session with its adversary in the litigation in an attempt to reach a settlement. In brief, because the exception is intended to enable a public body to discussion litigation strategy in private, the court determined that an executive session could not be held with the presence of the town's adversary.

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 Montour."

Next, although the term "personnel" is frequently cited as a basis for entry into executive session, that word appears nowhere in the Open Meetings Law. The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of

legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co.

> v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

You raised questions in relation to special meetings held by the Town Board. In this regard, two statutes are pertinent to an analysis of the matter. Section 62 of the Town Law deals with notice of special meetings to members of a town board and states in relevant part that "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to the members of the board of the time when and the place where the meeting is to be held."

Section 104 of the Open Meetings Law deals with notice of meetings that must be given to the news media and to the public by means of posting. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations.

The judicial interpretation of the Open Meetings Law indicates that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School

> District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.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 clear necessity to do so.

Another issue involved the ability to tape record meetings of the Town Board. Here I point out that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. There are, however, several judicial decisions concerning the use of those devices at open meetings. In my view, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the tape recorders at meetings of public bodies, such as town boards. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, the Committee on Open Government advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk

County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell.

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In view of the judicial determination rendered by the Appellate Division, I believe that 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.

With respect to the requirement that the Board be informed in advance of a meeting of the intent to record, I note that the Court in Mitchell referred to "the unsupervised recording of public comment" (id.). In my view, the term "unsupervised" indicates that no permission or advance notice is required in order to record a meeting. Again, so long as a recording device is used in an unobtrusive manner, a public body cannot prohibit its use by means of policy or rule. Moreover, situations may arise in which prior notice or permission to record would represent an unreasonable impediment. For instance, since any member of the public has the right to attend an open meeting of a public body (see Open Meetings Law, §100), a reporter from a local radio or television station might simply "show up", unannounced, in the middle of a meeting for the purpose of observing the discussion of a particular issue and recording the discussion. In my opinion, as long as the use of the recording device is not disruptive, there would be no rational basis for prohibiting the recording of the meeting, even though prior notice would not have been given. Similarly, often issues arise at meetings that were not scheduled to have been considered or which do not appear on an agenda. If an item of importance or newsworthiness arises in that manner, what reasonable basis would there be for prohibiting a person in attendance, whether a member of the public or a member of the news media representing the public, from recording that portion of the meeting so long as the recording is carried out unobtrusively? In my view, there would be none.

Based on the foregoing, I believe that any person has the right to record open meetings of the Board, without permission to do so from the Board, so long as the recording device is used in a manner that is not disruptive.

Lastly, you referred to unanswered requests made under the Freedom of Information Law. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the

> circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-1549

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 15, 2005

Mr. Sherman Brown
02-A-5006
Woodbourne Correctional Facility
99 Prison Road, P.O. Box 1000
Woodbourne, NY 12788-1000

Dear Mr. Brown:

I have received your correspondence in which you have sought assistance in obtaining a "verification of professional credentials for health service personnel" from the Department of Correctional Services. You indicated that the "request continues to be denied" and you have asked this office to "...please forward requested information."

Please be advised that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. It is not empowered to compel an agency to grant or deny access to records, or to obtain records on behalf of an individual.

With respect to certifications of experts, I believe that records containing those kinds of information must be disclosed in conjunction with the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The only ground for denial significant to an analysis of rights of access is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such

instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

As I understand it, the issuance of a certification, which I believe is the equivalent of a license, is based upon findings by a certifying or licensing entity that a particular individual has met the qualifications to engage in a particular area or areas of endeavor. As such, I believe that it is clearly relevant to the performance of an individual's duties.

I note that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411,218 AD2d 494(1996)].

When an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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-1549S

41 State Street, Albany, New York 12231
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September 15, 2005

Ms. Nyeemah Azuza
05-G-0710
Bedford Hills Correctional Facility
P.O. Box 1000
Bedford Hills, NY 10507-2499

Dear Ms. Azuza:

I have received your correspondence, "an unusual occurrence addendum", dated September 6, 2005. It is not clear to whom you submitted your original Freedom of Information Law request.

In this regard, please be advised that the Committee on Open Government is authorized to offer opinions and guidance concerning the operation of the Freedom of Information Law. The Committee does not maintain possession or control of records generally, and we do not maintain any of the records of your interest.

As a general matter, a request for records should be made to the "records access officer" at the agency that you believe would maintain the records of interest. The records access officer has the duty of coordinating an agency's response to requests.

It is noted that an "Affidavit of Indigence" was attached to your material. I point out that the federal Freedom of Information Act includes provisions concerning fee waivers. However, the applicable statute in this instance, the New York Freedom of Information Law, includes no such provision. Further, it has been held that an agency may charge its established fee, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

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

OML-AO-4034
FOIL-AO-15496

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 15, 2005

E-MAIL

TO: Chris D. Brothers

FROM: Camille Jobin-Davis, Assistant Director CJD

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brothers:

I have received your communication dated August 18, 2005, which pertains to the obligation of the Town of Chazy to disclose meeting times and business conducted by a newly formed committee to which you have been appointed. According to your description of the entity, the purpose of the committee is to review the town's comprehensive plan and formulate any appropriate updates.

You inquire whether it is necessary to "advertise" your meetings to the public, whether the media may have access to your proceedings, and whether any minutes and/or tapes of the meetings would be available under the Freedom of Information Law ("FOIL"). As you note, the committee is most likely a special board, created pursuant to Town Law §272-a.

First, the Open Meetings Law is applicable to meetings of all public bodies. Section 102(2) of the Open Meetings Law defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Although it has been held that advisory bodies are not required to comply with the Open Meetings Law [see e.g., NYPIRG v. Governor's Advisory Commission, 507 NYS2d 798, aff'd with no opinion, 135 AD2d 1149, motion for leave to appeal denied, 71 NY2d 964 (1988); Poughkeepsie

Newspaper v. Mayor's Intergovernmental Task Force on New York City Water Supply Needs, 145 AD2d 65 (1989)], in this instance, the committee appears to be a creation of law. Section 272-a of the Town Law entitled "Town comprehensive plan" includes reference to a "special board." That phrase 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 amendment thereto."

If the Committee is a "special board", because it would have been created pursuant to a statute, I believe that it would constitute a "public body" subject to the Open Meetings Law.

As you are likely aware, the Open Meetings Law requires that meetings of public bodies be conducted in public, unless 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 grounds for entry into executive session. While the Open Meetings Law does not require that a public body must pay to "advertise" its meetings, that statute requires that notice be posted and given to the news media prior to every meeting of a public body. Specifically, §104 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.

Documents prepared by a public body, minutes, and tape recordings of an open meeting, would fall within the scope of the Freedom of Information Law, which pertains to agency records. Section 86(4) of the Law defines the term "record" expansively to include:

> "...any information kept, held, filed, produced, reproduced by, with of or an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, 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 entity maintains minutes and/or a tape recording of a meeting, the minutes and the tape would constitute "records" that fall within the coverage of the Freedom of Information Law.

Finally, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, like minutes 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].

I hope that I have been of assistance.

CJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1597

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 16, 2005

E-MAIL

TO: Alistair Maclay

FROM: Camille Jobin-Davis, 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. Maclay:

This is in response to your request for advice concerning rights of access to certain trade confirmation records which document transactions directed by or made on behalf of the New York State and Local Employees Retirement System.

In your request, you indicate that the Retirement System has agreed to provide electronic copies of international equity trade confirmations from 2002 and 2003 to you, to the extent they are available and accessible under the law in four to six weeks. As you describe them, these are records, now dated, sent to the Retirement System or to its investment advisers when trades have been executed for the Retirement System. You wrote that you believe that any such records sent to the Retirement System will be provided to you.

You pose two questions tangential to your request to the Retirement System. The first is whether such records, if only sent to the Retirement System's investment advisors but not the Retirement System, would be available pursuant to the Freedom of Information Law. As you describe the process, investment advisors maintain trade confirmation records obtained from brokers, for inspection by their client (here the Retirement System), and make them available upon request to the client.

The second question is whether cost information, which can be made available to the investment advisors and the Retirement System upon request, but which has not been requested by either, is equally accessible. As you explained the matter, in cases where the broker who executes the trade charges certain costs or other revenues, the confirmation would indicate that such cost information is available upon request. In any event, the actual costs are ultimately incurred at the expense of the Retirement System.

In keeping with decisions rendered by the Court of Appeals, the state's highest court, I believe that the records in question must be made available, based on your representation that the Retirement System contracts with investment advisors to serve as its agents. In this regard, I offer the following comments:

First, while the records sought may not be in the physical custody of the Retirement System, based on the nature of the relationship between the Retirement System and the investment advisors, it appears that the trade confirmations are Retirement System records that fall within the framework of the Freedom of Information Law. That statute pertains to agency records, such as those of a state agency, and §86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Perhaps most significant is a decision rendered by the Court of Appeals in which it was found that materials maintained by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Insofar as records maintained by the investment advisors are "kept, held, filed, produced or reproduced...*for* an agency", such as the Retirement System, i.e., for the purpose of providing services that would otherwise be carried out by that entity, I believe that they would constitute

"agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform the investment advisors' firm into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it maintains are maintained for an agency, and that those records fall within the coverage of that statute. Records which the broker maintains for the investment advisors, to the extent that they are managing trades for their client, the Retirement System, would also be available under this analysis.

Next, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. In my view, records maintained or submitted by a broker acting on behalf of the Retirement System, either to the Retirement System or its agent, would, in the context of the information that you provided, ordinarily be available under the law, for none of the grounds for denial would appear to be pertinent or applicable.

In other circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency, as you did in this instance. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation you described, insofar as the investment advisors and the brokers maintain records for the Department, to comply with the Freedom of Information Law and the implementing regulations, the records access officer must either direct the advisors and the brokers to disclose the records in a manner consistent with law, or acquire the records from the advisors and the brokers in order that s/he can review the records for the purpose of determining rights of access.

To reiterate, the responsibility to give effect to or comply with the Freedom of Information Law would not involve the advisors or the brokers, but rather the government agency whose records are maintained by the investment agents on its behalf.

I hope that I have been of assistance in this matter.

CJD:tt

cc: Shelly Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1549B

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 26, 2005

Ms. Lisa Mevorach, Esq.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Mevorach:

I have received your letter in which you sought guidance concerning a situation in which an agency delays disclosing records or its response to requests.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: William Fox

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15499

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September 26, 2005

E-Mail

TO: H. Robert Merritt

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. Merritt:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

According to your letter, it seems to be standard operating procedure fro the Town of Harrietstown "to make the initial response on receiving a FOIL request (the five day period) and to ignore the request after that."

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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

RJF:jm

cc: Town Board
Hon. Patricia A. Gillmett, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15500

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September 26, 2005

Mr. Michael J. Neary
Senior VP, Administration
Pictometry International Corp.
100 Town Centre Drive - Suite A
Rochester, NY 14623

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Neary:

I have received your letter and apologize for the delay in response, which is the result of a substantial backlog of requests for advisory opinions. It is noted that no written advisory opinion was prepared in response to your earlier correspondence based on my belief that no written opinion was expressly requested. In the latter correspondence you asked that I review your earlier comments and sought "information that would assist [you] in the determination that FOIL is not applicable or is exempt to the service that Pictometry International Corp supplies."

You referred to an advisory opinion prepared at the request of the Office of Real Property Services (ORPS) concerning status under the Freedom of Information Law of an "online web application" developed by that agency and compared it to the product developed by Pictometry. ORPS indicated that:

> "The application will allow the assessment community to access this information over the internet. Access will be restricted to assessors who will only be able to sign on if the agency has provided a valid usercode and password. The application will provide powerful features to run reports and select specific sets of data anywhere in the state."

I concurred with ORPS' view that the application constituted a "delivery system" and not a "record" as that term is defined in§86(4) of the Freedom of Information Law, suggesting that:

> "The application, like calculators or computers that provide individuals with the means to create or use data, but which are not themselves "records", would not in my opinion constitute a record for purposes of that statute."

Further, although government agencies would have the ability to acquire data through the use of the Pictometry software, it was advised that ORPS is not required to make the data available via the internet to the public to comply with the Freedom of Information Law. It was added that:

> "...so long as ORPS gives effect to the Freedom of Information Law by making the data available on request in some sort of storage medium, whether it be paper, or computer tape or disk, for example, I believe that it would be acting in compliance with law."

In comparing the ORPS situation to yours, you wrote that:

> "The Pictometry product is a propriety software system and is the tool county agencies use to perform complex tasks relating to real property, it is not the data itself. Therefore as an information 'delivery' system, Pictometry should not be covered by FOIL."

A key element in consideration of the issues that you raised involves the term "record ", which is defined 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 indeed the Pictometry software system is analogous to that considered in the opinion addressed to ORPS, I do not believe that it would constitute a "record" subject to the Freedom of Information Law.

Even if it does constitute a record, the software system could likely be withheld. As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent to considering rights of access is §87(2)(d), which permits an agency to withhold records that:

> "...are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial

> enterprise and which if disclosed would cause 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. 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)."

Assuming that your contentions are accurate, the reproduction of the Pictometry system software, in consideration of the cost of its development and uniqueness, would appear to cause substantial injury to Pictometry's competitive position. If that is so, the "application" or "delivery system", even if it constitutes a "record", could, in my opinion, be withheld pursuant to §87(2)(d).

I believe, however, that there is a distinction between the status of the Pictometry delivery system and the products generated, used and acquired by agencies that use the system. In short, in my opinion, photographs generated for and provided to an agency, such as a county, are "records" subject to rights conferred by the Freedom of Information Law.

I point out that the state's highest court, 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.

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.

Moreover, 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.

Lastly, I do not believe that an agency 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. Any 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. Merely because Pictometry's software may be used to send an electronic image to an agency is of no moment relative to ability to charge a fee. 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.

In sum, 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 that 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 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-15501

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September 26, 2005

Ms. Samara F. Swanston
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Swanston:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You referred to a situation in which a proceeding was initiated against you as the owner of a vacant building in Albany. Although the house was accepted in the Vacant Buildings Program, the proceeding was dismissed, and you were given a year to renovate the property, the City "demolished" the house without prior notice to you or an indication of the reason for its action. You wrote that you were told that the records in possession of the Albany Civil Court" were sealed, and that the Fire Department "never responded" to your requests for records in its possession.

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 may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

You made reference to Judiciary Law, §255, which provides that:

> "...[A] clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

Based on the foregoing, unless court records are sealed or exempted from disclosure by statute, I believe that they are accessible.

You referred to records being sealed by "Albany Civil Court." If that is so, I am unaware of the basis of any such action. Part 216 of the Uniform Rules pertaining to trial courts entitled "Sealing of Court Records in Civil Action in the Trial Courts" 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 show, 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."

In consideration of the provision quoted above, it is suggested that you discuss the matter with the clerk of the court.

The Fire Department operates within City government and its records, therefore, are "agency" records that fall within the coverage of the Freedom of Information Law.

I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be made to that person. Although I believe that the Fire Department official in receipt of your request should have responded to you in a manner consistent with law or forwarded the request to the records access officer, it is suggested that you resubmit your request to the records access officer, the Albany City Clerk, Mr. John Marsolais.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. John Marsolais
Court Clerk, Albany City Court

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4038
FOIL-AO-15502

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September 26, 2005

Ms. Lynn Marsh
Advocate for Cherry Valley
P.O. Box 147
Cherry Valley, NY 13320

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Marsh:

I have received your letter and apologize for the delay in response.

According to your letter, officials of the Town of Cherry Valley, such as members of the Town Board, gather both prior to an after Board meetings "to further discuss and decide." You added that various requests for records under the Freedom of Information Law have been denied without justification.

In this regard, first, as a general matter, when a majority of a public body, such as a town board or a planning board, gathers to discuss public business, the gathering constitutes a "meeting" that falls within requirements of the Open Meetings Law. I point out the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings, such as "agenda sessions," held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official

> document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, when a majority of either of the boards to which you referred is present to discuss Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, any such gathering must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law.

Second, with respect to requests for records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It is noted to 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

I point out that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible.*" Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

In an effort to enhance their understanding and compliance with the Open Meetings and Freedom of Information Laws, copies of this opinion will be sent to the Town Board and the Planning Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 26, 2005

Ms. Claudia Schultz
Erie County Bar Association
Aid to Indigent Prisoners Society Inc.
Assigned Counsel Program
107 Delaware Avenue
Buffalo, NY 14202-2906

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Schultz:

I have received your letter and hope that you will accept my apologies for the delay in response.

You wrote that earlier this year you requested and paid for a copy of the Division of Parole Policy and Procedures Manual. Soon after, you received a copy of the manual with certain portions redacted and "labeled 'confidential'." Thereafter, when you contacted the Division, you were informed that a new manual had been prepared to replace the manual sent to you, that the new manual would be sent to you at no additional charge, and the reason for any redactions would be explained to you. As of the date of your letter to this office, you had received no further response.

In this regard, first, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the Freedom of Information Law, and §1401.2 (b)(3) states that an agency's records access officer is responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor." Based on the foregoing, the reasons for a denial of access must be stated in writing. Additionally, §1401.7 specifies that a person denied access must be informed of the right to appeal. I note, too, that amendments to the Freedom of Information Law pertaining to the time within which agencies must respond to requests became effective on May 3. Both prior to and following the enactment of the amendments, a failure to respond to a request in a manner consistent with law could be deemed a constructive denial of a request that may be appealed pursuant to §89(4)(a) of the Freedom of Information Law. Enclosed for your review is a copy of the regulations recently promulgated by the Committee on Open Government in accordance with the amendments to the Freedom of Information Law.

Second, based on several judicial decisions, an assertion, a request for or a promise of confidentiality, unless it is based upon a statute, is generally meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality, without more, would not in my view serve to enable an agency to withhold a record.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. I am unfamiliar with the contents of the manual in which you are interested. However, from my perspective, three of the grounds for denial may be relevant in determining 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 an employee manual 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 could be asserted.

A second provision of potential significance is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations of judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, it appears that most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of

> avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

While I am unfamiliar with the record in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v.

Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

The remaining ground for denial of possible relevance is section 87(2)(f). That provision permits an agency to withhold records when disclosure "could endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of parole officers or others, it appears that §87(2)(f) would be applicable.

In sum, even though some aspects of the manual might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 26, 2005

E-MAIL

TO: Ineli Zaloh

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr./Ms. Zaloh:

As you are aware, I have received your inquiry concerning the status of the New York Public Library under the Freedom of Information Law. Please accept my apologies for the delay in response.

By way of background, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a

> municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division in French v. Board of Education, in which the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

Having reviewed a variety of information on the New York Public Library's website, <www.nypl.org>, it is clear that that entity is a private, not-for-profit institution. It was founded in 1895 by the Astor, Lenox and Tilden foundations to provide "private philanthropy for the public good." That being so, I do not believe that it is subject to the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to non-governmental libraries open to the public has arisen in several instances, perhaps because its companion statute, the Open Meetings Law, is applicable to meetings of their boards of

trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries must be conducted in accordance with that statute, even though the records of those entities fall beyond the coverage of the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

RJF:tt

cc: Director, New York Public Library

STATE OF NEW YORK
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September 26, 2005

Mr. Joseph W. Sallustio, Jr.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sallustio:

I have received your letter concerning a request made under the Freedom of Information Law to the City of Rome.

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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Clerk

STATE OF NEW YORK
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September 26, 2005

E-Mail

TO: Raymond Duncan

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. Duncan:

I have received your letter in which you sought guidance concerning what constitutes a "reasonable" time within which an agency must respond to a request made pursuant to 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Since the school district, in receipt of your request sought clarification concerning the portion of the request involving the subject matter list, I point out that the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception that rule relates to the subject of your inquiry. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that

an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. It is suggested that you ask to review the retention schedule applicable to the District. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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September 26, 2005

E-Mail

TO: Joseph Latwin

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Latwin:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You have asked whether "a municipality [may] deny access to records showing security measures in place in public buildings", and whether "a municipality [may] deny access to those who hold burglar alarm permits."

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent with respect to both aspects of your inquiry is §87(2)(f). For more than twenty years that provision authorized agencies to withhold records insofar as disclosure "*would* endanger the life or safety of any person." Although an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more of the grounds for denial [see §89(4)(b)], in the case of the assertion of that provision, the standard developed by the courts 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 Divsion of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991), Fournier v. Fisk, 83 AD2d 979 (1981) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994], and it was determined in American Broadcasting Companies, Inc. v. Siebert that when disclosure would "expose applicants and their families to danger to life or safety", §87(2)(f) may properly be asserted [442 NYS2d 855, 859 (1981)]. Also notable is the holding by the Appellate Division in Flowers v. Sullivan [149 AD2d 287, 545 NYS2d 289 (1989)] in which it was held that "the information sought to be disclosed, namely, specifications and other data relating to the electrical and security transmission systems of Sing Sing Correctional Facility, falls within one of the exceptions" (id., 295). In citing §87(2)(f), the Court stated that:

> "It seems clear that disclosure of details regarding the electrical, security and transmission systems of Sing Sing Correctional Facility might impair the effectiveness of these systems and compromise the safe and successful operation of the prison. These risks are magnified when we consider the fact that disclosure is sought by inmates. Suppression of the documentation sought by the petitioners, to the extent that it exists, was, therefore, consonant with the statutory exemption which shelters from disclosure information which could endanger the life or safety of another" (id.).

In short, although §87(2)(f) referred to disclosure that *would* endanger life or safety, the courts have clearly indicated that *"would"* meant *"could."*

In an effort to ensure that agencies are able to deny access to records insofar as disclosure could reasonably be expected to endanger life or safety, the Committee on Open Government recommended that "would" be replaced with "could", and legislation was enacted in 2003 accomplishing that goal.

If a person seeks the building plans concerning my house, which is not unique, I do not believe that there would be any basis for a denial of access. If, however, in the case of records pertaining to a government facility, a bank, a power plant, etc., disclosure could endanger life or safety, and the records may be withheld, in my opinion, to that extent.

Lastly, of possible relevance with respect to residential burglar alarm permits is §89(2)(b), which includes examples of instances in which records or portions of records may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." One of the examples, subparagraph (iii), states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." Based on the foregoing, for example, a list of residential permit holders, or the equivalent of a list, may be withheld if the list or the equivalent would be used for a commercial or fund-raising purpose.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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September 26, 2005

E-Mail

TO: Dee Alpert

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. Alpert:

I have received your correspondence. Please accept my apologies for the delay in response.

You transmitted a request as follows:

> "Please provide, digitally, all documents, in whatever form and wherever situate, provided by any NYS Education Department officials, managers or employees, to the Regents, and separately, which were provided to any New York State Education Department official and/or manager, which mention, or refer to, in whole or in part, the New York State School for the Blind, for the period January 1, 2002 to date."

In response, the Department wrote that the request does not reasonably describe the records as required by §89(3) of the Freedom of Information Law and indicated that:

> "The Department does not have a filing or indexing system that would permit the retrieval of all records you requested. FOIL does not require an agency to search through its files for a record where no indexing or filing system exists to locate the record, and the task imposed on the agency is unreasonable."

In this regard, first, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could

not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Department, to 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.

I would conjecture that the Department has the ability to locate and retrieve, "digitally", *some* of the records of your interest. To that extent, I believe that the Department is required to do so. However, if, due to the nature of its search engines or other means of locating records maintained electronically, the Department lacks the ability to do so with reasonable effort, I would agree with its contention that the request, to that extent, would not reasonably describe the records sought.

Second, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state in relevant part that an agency's records access officer has the duty to:

> "Assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are files, retrieved or generated to assist persons in reasonably describing the records" [§1401.2(b)(2)].

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to Mr. Paul Tighe.

I hope that I have been of assistance.

RJF:jm

cc: Paul Tighe

STATE OF NEW YORK
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September 26, 2005

Yvonne E. Duryea, SCAA
Assessor
City of Port Jervis
P.O. Box 1002
Port Jervis, NY 12771

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Duryea:

I have received your inquiry and apologize for the delay in response.

In your capacity as assessor for the City of Port Jervis, you wrote that a property owner supplied information to you that included the following statement:

> "Under federal Privacy Act Laws I expect all such information submitted to you and your office to be held in a confidential manner."

You asked "[W]here do we now stand under the Freedom of Information Law vs. the Federal Privacy Act Laws?"

In this regard, first, the federal Privacy Act (5 USC §552a) applies only to records maintained by federal agencies. It does not apply to units of state and local government. Similarly, the New York Personal Privacy Protection Law applies only to state agencies and specifies that units of local government are not subject to that statute [see Public Officers Law, Article 6-a and definition of "agency", §92(1)].

Second, based on several judicial decisions, an assertion, a request for, or a promise of confidentiality, unless it is based upon a statute, is generally meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access

exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion or promise of confidentiality, without more, would not in my view serve to enable an agency to withhold a record. There is no statute in this instance that requires or permits the City to honor a request for confidentiality.

Third, I believe that any record maintained by or for the City falls within the coverage of the Freedom of Information Law. Section 86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals, 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).

In short, once records come into the custody or possession of the City, they are the property of the City and fall within the coverage of the Freedom of Information Law.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I note, too, that long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969), including assessment rolls. Moreover, even though the Freedom of Information Law authorizes an agency to withhold a list of names and addresses if the list is requested for commercial or fund-raising purposes, in a decision rendered more than twenty years ago, it was held that assessment rolls are accessible even though the request was made for a commercial purpose.

Section 89(6) of the Freedom of Information Law provides that records available under a different provision of law remain available, notwithstanding the grounds for denial of access appearing in the Freedom of Information Law. In Szikszay v. Buelow [436 NYS 2d 558 (1981)],the court found that assessment rolls or equivalent records are public records and were public before the enactment of the Freedom of Information Law. Specifically, it was found that:

> "An assessment roll is a public record (Real Property Tax Law [section] 516 subd. 2; General Municipal Law [section] 51; County Law [section] 208 subd. 4). It must contain the name and mailing or billing address of the owner of the parcel (Real Property Tax Law [sections] 502, 504, 9 NYCRR [section] 190-1(6)(1)). Such records are open to public inspection and copying except as otherwise provided by law (General Municipal Law [section] 51; County Law [section] 208 subd. 4). Even prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law [section] 66, repealed L.1974, c. 578, assessment rolls and related records were treated as public records, open to public inspection and copying (Sanchez v. Papontas, 32 A.D.2d 948, 303 N.Y.S.2d 711, Sears Roebuck & Co. v. Hoyt, 202 Misc. 43, 107 N.Y.S.2d 756; Ops. State Comptroller 1967, p. 596)" (id. at 562, 563).

One of the few instances in which records relating to the assessment of real property may be withheld would involve the submission of an income tax form in conjunction with a request for a senior citizen or agricultural exemption. In that circumstance, the form could in my opinion be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. However, to reiterate, other assessment records are generally accessible to the public.

If you would like to share this response with the person seeking confidentiality, please feel free to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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September 28, 2005

E-MAIL

TO: Patrick Schafer

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. Schafer:

As you are aware, I have received your correspondence. Please accept my apologies for the delay in response.

As I understand the situation, you requested and obtained a file last year through the use of the Freedom of Information Law pertaining to a grievance filed by your union. It is you belief, however, that some documents are missing and that others "seem added to mislead anyone reading the file." You have asked how you may "get to the truth."

In this regard, first, pursuant to §89(3) of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) state that when a request is denied in whole or in part, an agency's records access officer is required to insure that any such denial is given in writing with the reason for the denial. Additionally, §1401.7 of the regulations requires that the person denied access be informed of the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

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, you wrote that County officials have indicated that information relating to a grievance "can only be discussed through [your] union" due to the requirements of the Taylor Law. In my view, there is no law that requires that County officials "discuss" a grievance. However, any person may seek records pursuant to the Freedom of Information 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. I note, too, that it has been held that records accessible under the Freedom of Information Law must be made equally available irrespective of one's status or interest, [see Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976), M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)].

Lastly, since you referred to the assertion of the attorney-client privilege, I point out that 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)].

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in

> some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that records consist of legal advice or opinion provided by counsel to the client, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law. If, however, records falling within the scope of the privilege have been disclosed to a person other than the client or, as you suggested, "read to a roomfull [sic] of people, I believe that the privilege would be waived.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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September 28, 2005

Hon. Michael Berardi
Ulster County Legislator
P.O. Box 1163
Kingston, NY 12402

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Legislator Berardi:

I have received your letter and hope that you will accept my apologies for the delay in response.

According to your letter, in your capacity as a member of the Ulster County Legislature, you serve "as the Designee for the minority on the Executive Committee of the Ulster County Development Corporation (UCDC)", which is " a private not-for-profit corporation that receives a yearly stipend from the Ulster County Legislature as a contract agency performing tasks related to economic development."

You indicated that a request made to the UCDC was rejected based on the claim that the UCDC is "a private corporation and hence not subject to the FOIL requests." You also received a request from a reporter seeking minutes of UCDC executive committee meetings, and you asked whether you "should comply with the FOIL request."

From my perspective, any records that you receive or possess in your capacity as designee of the Legislature fall within the scope of the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law applies to agencies, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, an agency typically is an entity of state or local government; not-for-profit and other corporate entities are generally not subject to the Freedom of Information Law.

There are judicial decisions, however, that indicate that a not-for-profit entity may be an agency, despite its corporate status, if there is substantial governmental control over its operations. For instance, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, notwithstanding their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental

> and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

More recently, in Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

Your letter does not include detail concerning the creation of UCDC, i.e., whether it was created through the interest of the business community, or perhaps by government. If UCDC is a creation of government, I believe that it would fall within the coverage of the Freedom of Information Law. However, if there is no substantial governmental control, the conclusion may be different.

Second, and notwithstanding UCDC's status under the Freedom of Information Law, records pertaining to it may nonetheless be available. That statute is applicable to agency records, and §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Due to the breadth of the definition, when records involving UCDC come into your possession as the County Legislature's designee, I believe that they would constitute agency records that fall within

the coverage of the Freedom of Information Law. You would not obtain them but for your status as a County official.

Further, again despite its corporate status, insofar as UCDC maintains or prepares records *for* the County, I believe that they are County records that fall within the coverage of the Freedom of Information Law [see Encore College Bookstores, Inc. V. Auxiliary Service Corporation of the State University, 87 NY2d 419 (1995)]. In that circumstance, a request for records prepared or kept for the County should, in my view, be made to the County's records access officer. As you may be aware, the records access officer has the duty of coordinating an agency's response to requests (see 21 NYCRR §1401.2). In response to any such requests, I believe that the records access officer would be required to direct the UCDC to disclose County records in a manner consistent with the Freedom of Information Law, or obtain and review the records sought in order to determine rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chester Straub, Executive Director
Frank Murray, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15512

41 State Street, Albany, New York 12231
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September 28, 2005

E-Mail

TO: Ralph Kohler

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. Kohler:

I have received your letter and apologize for the delay in response. In brief, records used to revise an estimate of the square footage of a property in the City of Oneida that are now "important for zoning appeals" have been withheld. You wrote that you were informed that "[t]hey say that the revision is in the Planning Director's private files, and not FOIL'able, but they will be basing decisions on this number."

In my opinion, the "private files" to which you referred clearly fall within the requirements of the Freedom of Information Law.

In this regard, the Freedom of Information Law applies to agency records, and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", the matter involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980)].

Even though the Planning Director might prepare or maintain records outside of City offices, because they relate to the performance of his or her duties, again, I believe that they are City records subject to rights conferred by the Freedom of Information Law.

Lastly, I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency, such as a city, 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. I believe that the records access officer for the City of Oneida is the City Clerk, and it is suggested that you transmit a request to her. Her duty would involve directing the

person in possession of the records to disclose them to you in a manner consistent with law, or to obtain the records so that she can disclose them to you.

I hope that I have been of assistance.

RJF:jm

cc: Hon. Jane Mariani, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15513

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 28, 2005

Ms. Sarah Louise Harrey
[redacted]

The staff of the Committee on 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. Harry:

I have received your letter and apologize for the delay in response. You have sought guidance concerning your ability to gain access to records pertaining to yourself from the Chenango County Office of Child Protective Services.

As I understand the matter, the Freedom of Information Law would not serve as a basis for obtaining the records of your interest. However, I believe that a different provision of law would authorize, but not require, certain agencies or a court to disclose the records to you.

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.

Relevant to the matter is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §372 of the Social Services Law, which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4) of §372 states in relevant part that such records:

> "shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination or by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court or by a justice of the supreme court, or by a judge of the family court when such records are required for

> the trial of a proceeding in such court, after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information thus obtained without authorization so to do by the department, or by such judge or justice."

Based on the foregoing, I do not believe that records maintained by entities having duties involving child protective services can be disclosed, unless authorization to disclose is conferred by a court, by the County Department of Social Services or by the NYS Office of Children and Family Services.

It is suggested that you contact the appropriate agency or agencies in an effort to gain access to 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

FOIL-AO-15514

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 28, 2005

Mr. Fred Freiberg
Fair Housing Justice Center
5 Hanover Square, 17th Floor
New York, NY 10004

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Freiberg:

We are in receipt of your June 23, 2005 request for an opinion concerning the application of the Freedom of Information law to various records maintained by the New York State Division of Housing and Community Renewal.

The correspondence and the attachments which you submitted indicate that the Division of Housing and Community Renewal has denied your request for "a current list by community of all the rent regulated units covered under the Emergency Tenant Protection Act (ETPA) for Westchester County." You asked that the " list" should include the street address of each building with one or more rent regulated units, the total number of rent regulated units within each building, the name of each building (if any), and the name of the entity that owns each property. We are also requesting that the list include whether the regulated units are rent controlled or rent stabilized." The Division denied your request on the grounds that release of such materials would constitute an unwarranted invasion of personal privacy and that they were otherwise protected by the Rent Stabilization Code.

It is our view that the requested records are exempt from disclosure based on the provisions cited by the Division. In this regard, we offer the following comments.

First, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant in this instance is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." The Emergency Tenant Protection Act is found in the Unconsolidated Laws, Chapter 249-B. Section 12-a of Chapter 249-B, which is the same statute as that published in McKinney's as §8632-a of the Unconsolidated Laws, and set forth as §2528.5 of the Rent Stabilization Code, refers in subdivision (a) to rent registration. That provision requires that a variety of information be transmitted by "housing accommodations"

to the Division, such as the addresses of buildings, the number of housing accommodations within those buildings, the rents charged, the number of rooms and the like. Subdivision (b) specifies that:

> "Registration pursuant to this section shall not be subject to the freedom of information law, provided that registration information relative to a tenant, owner, lessor or subtenant shall be made available to such party or his authorized representative."

Based on the foregoing, we believe that the records of your interest are specifically exempted from disclosure by statute and are beyond rights of access conferred by the Freedom of Information Law.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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41 State Street, Albany, New York 12231
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September 28, 2005

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:

We are in receipt of your June 2, 2005 request for an opinion on the right of access to scrapbooks maintained by the Town Historian for the Town of Esopus.

According to your description of the matter, the Town Historian is employed to cut and paste articles from the *Daily Freeman* into scrapbooks. The subscription to the newspaper and the scrapbook supplies are paid for by the Town, and the collection of scrapbooks is maintained at an off-site storage location. You inquire as to whether the scrapbooks are accessible to the public, and whether they may be accessible during regular business hours at the Town Clerk's office.

In our opinion, the scrapbooks created by the Town Historian are " records" subject to the provisions of the Freedom of Information Law. In this regard, we offer the following comments:

The Freedom of Information Law is applicable to all agency records, and §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals, the state's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency

contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

More recently, the Court of Appeals found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. The Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY2d 410, 417 (1995)]. Therefore, when Town records are created or obtained by the Town Historian and stored at an off-site facility, they are Town records subject to the Freedom of Information Law.

Next, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In our view, records prepared by the Town Historian, would, in the context of the information that you provided, ordinarily be available under the law, for none of the grounds for denial would appear to be pertinent or applicable.

In response to a request for any such records, we believe that the records access officer, in carrying out his or her duty to "coordinate" the Town's response to requests, must either direct the Town

Historian to make the records available in a manner consistent with law, or acquire the records in order that they may be disclosed in accordance with law.

Finally, it is our opinion that the records must be made available to you during normal business hours of the Town, or in compliance with regulations

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural 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.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division. Among the issues was the validity of a similar limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information

Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Therefore, insofar as Town offices operate during regular business hours, I believe that the public must be given the opportunity to request and review records during those hours.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Esopus Town Clerk.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: Esopus Town Clerk

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

September 28, 2005

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 concerning your right to obtain various records pursuant to the Freedom of Information Law from the National Action Network, Inc., which is a not-for-profit corporation. Please accept my apologies for the delay in response.

In my view, the entity that is the subject of your inquiry is not required to disclose its records pursuant to the Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law is applicable to entities of state and local government. It does not ordinarily apply to not-for-profit entities, such as the National Action Network, Inc.

I hope that the foregoing serves to enhance your understanding of the scope of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1551?

41 State Street, Albany, New York 12231
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September 28, 2005

Mr. Philip Rumore
President
Buffalo Teachers Federation, Inc.
271 Porter Avenue
Buffalo, NY 14201

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rumore:

We are in receipt of your June 16, 2005 correspondence in which you request an advisory opinion concerning rights of access to records of the Buffalo Board of Education and the Education Innovation Consortium (EIC)/Center For Applied Technologies in Education (CATE) relating to expenditures and monies received or transferred. Specifically, you pose the following two questions:

1. Can EIC/CATE refuse to comply with the New York State Freedom of Information Law i.e., are they subject to said law?

2. What action must we take to obtain the information we requested from the school district? What are the penalties for non-compliance?

EIC/CATE is a not-for-profit corporation that contracts with the Buffalo Board of Education to carry out a variety of functions on behalf of and in conjunction with the Buffalo Public School System Leadership Institute, the Greater Buffalo Leadership Council and the ATLAS Project, including:

- helping school administrators to acquire the expertise they need to become instructional leaders;
- identifying and sharing promising practices and resources to advance the work of leadership;
- producing concrete products (articles, videotapes, resource materials, course work, etc.) to promote effective leadership ideas;
- providing a source of learning and growth for exploring new approaches to developing best practice in school leadership.

As part of Buffalo's "No Child Left Behind" initiative, the Buffalo Board of Education provides funding to EIC/CATE to further these goals within the confines of the Buffalo City School District.

From our perspective, based on judicial decisions, even if EIC/CATE has no independent responsibility to comply with the Freedom of Information Law, we believe that its records fall within the coverage of that statute. In this regard, we offer the following comments:

The Freedom of Information Law is applicable to agency records, and §86(3) defines the term"agency " to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

While the status of EIC/CATE as an "agency" has not been determined judicially, it is clear that the Buffalo Board of Education is an "agency" required to comply with the Freedom of Information Law.

In this regard, §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, the Court of Appeals, the state's highest court, found that documents maintained by the Auxiliary Services Corporation, a not-for-profit corporation providing services for a different branch of the State University, were kept on behalf of the University and constituted agency "record" falling within the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)]. Therefore, if a document is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency. In the context of the situation that you described, irrespective of whether EIC/CATE is an "agency", its records would be maintained for the Buffalo Board of Education and would, based on Encore, constitute agency records subject to the Freedom of Information Law.

Based upon the language quoted above, §86(4), 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).

Insofar as records maintained by EIC/CATE are "kept, held, filed, produced or reproduced...*for* an agency", such as the Board of Education, i.e., for the purpose of providing administrative services that would otherwise be provided by that entity, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform EIC/CATE into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it maintains are maintained for an agency, and that those records would fall within the coverage of that statute.

In other circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation that you described, if EIC/CATE maintains records for the Buffalo Board of Education, requests should be made to the Board of Education's records access officer. To comply with the Freedom of Information Law and the implementing regulations, the records access officer would either direct EIC/CATE to disclose the Board's records in a manner consistent with law, or acquire the records from EIC/CATE in order that he or she could review the records for the purpose of determining rights of access.

To reiterate, the responsibility to give effect to or comply with the Freedom of Information Law may not involve EIC/CATE, but rather the government agency whose records are maintained by EIC/CATE on its behalf.

Second, while profit or not-for-profit corporations would not in most instances be subject to the Freedom of Information Law because they are not governmental entities, there are several judicial determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are "agencies" that fall within the scope of the Freedom of Information Law.

In the first decision in which it was held that a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law, [Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their

status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the State's highest court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

In Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The

> Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

Perhaps most analogous to the situation described is a decision in which it was held that a community college foundation associated with a CUNY institution was subject to the Freedom of Information Law, despite its status as a not-for-profit corporation. In so holding, it was stated that:

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> "The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Verified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:
>
> > '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.
>
> "Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

In my opinion, if EIC/CATE would not exist but for its relationship with a Board of Education, and if it carries out its duties solely for or on behalf of the Board of Education, it, too, would constitute an "agency" required to comply with the Freedom of Information Law.

And finally, in response to your question about penalties for non-compliance, and your comment that "the school district has heaped paperwork on us that does not answer our requests", perhaps telephoning the District to inquire about the status of the remainder of the request would serve to clarify the situation. In addition, based on the information provided in your correspondence, in failing to provide requested information without explanation, it appears the school district may have constructively denied your request.

As you know, 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 acknowledgment 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 acknowledgment is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. Pursuant to newly enacted provisions of the Freedom of Information Law, §89(3) requires that if more than twenty additional business days are needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). A failure to comply with any of the time periods would constitute a denial of a request that may be appealed.

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 acknowledgment 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 acknowledgment of the receipt of a request fails to include an estimated date for granting or denying access, the request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [see §89(4)(b)].
Since you sought advice concerning a possible challenge to the school district's stance, one avenue, as inferred above, would involve the initiation of litigation under Article 78 of the Civil Practice Law and Rules. However, in an effort to avoid litigation and encourage the District to respond fully to your request, a copy of this opinion will be forwarded to Counsel to the Buffalo City School District for consideration.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: Counsel, Buffalo City School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4043
FOIL-AO-15518

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September 28, 2005

E-MAIL

TO: Larry Hogan

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. Hogan:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

According to your letter, in the town in which you own property:

> "The board of assessment review met in a private meeting room (the door was open) and the public was required to sit in the lobby until it was your turn to be heard. When I asked about sitting in the meeting I was told only when it was my turn. I have been attending assessment meetings in various town over the years and I was always under the impression that they were open to the public."

You asked whether your impression is correct.

In this regard, the Open Meetings Law 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."

In consideration of the foregoing, I believe that a board of assessment review is clearly a "public body" required to comply with the Open Meetings Law.

As a general matter, meetings of public bodies must be conducted in public, unless there is a basis for entry into executive session when an exemption from the Open Meetings Law is pertinent. From my perspective, which is consistent with your understanding, the portion of the meeting of a board of assessment review during which those challenging their assessments are heard must be conducted open to the public. Following oral presentations, a board's deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, oral presentations before the board, as well as the act of voting or taking action must in my view occur during a meeting held open to the public.

Additionally, I note that both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

The minutes are not required to indicate how the Board reached its conclusion; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes. I note, too, that since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

In short, because an assessment board of review is a "public body" and an "agency", I believe that it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of the votes of each member in conjunction with §87(3)(a) of the Freedom of Information Law. The minutes that you enclosed do indicate how the Board members voted.

Lastly, I point out that §525(2)(a) of the Real Property Tax Law entitled "Hearing and determination of complaints" states in part that:

> "The assessor shall have the right to be heard on any complaint and upon his request his or her remarks with respect to any complaint shall be recorded in the minutes of the board. Such remarks may be made only in open and public session of the board of assessment review."

Based on the foregoing, insofar as the assessor is present for the purpose of offering information or a point of view, I believe that the public, pursuant to the Real Property Tax Law, has the right to be present.

I hope that I have been of assistance.

RJF:tt

cc: Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15519

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September 28, 2005

Mr. Peter Brothers
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brothers:

We are in receipt of your August 24, 2005 request for an advisory opinion pertaining to the application of the Freedom of Information Law to the accessibility of "comparables sheets" relevant to individual properties subject to revaluation by the Town of Queensbury. You wrote that "comparables sheets offer valuable information such as 4 properties a given property in the town is compared to", to value them for assessment purposes. In response to your request the Town provided you a copy of the comparables used to value your own property but refused to provide others.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, in consideration of judicial decisions and an opinion issued by the State Office of Real Property Services, the records in question may be withheld. Pertinent is §87(2)(g), which authorizes an agency, such as a town, to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The worksheets that you describe refer to particular parcels as the focus and those other parcels that an assessor or consultant believes may be comparable in value. The selection of those other parcels essentially represents the opinion of the evaluator (an assessor or appraiser), and in a decision involving a request for records identifying "properties which he or she [an appraiser], subjectively, deems similar enough to warrant analysis", the Appellate Division upheld the agency's denial of access [General Motors Corporation v. Town of Massena, 262 AD2d 1074 (1999)]. Analogous to the issue that you raised is Gannett Satellite Information Network, Inc. v. City of Elmira, Supreme Court, Chemung County, August 26, 1994), which involved a request for "the suggested revaluation figure or property value estimate." The court sustained the denial of access, stating that:

> "...such appraisal figures are the professional opinions of...appraisers and are, therefore, not subject to disclosure....Such opinions are subjective, non-final and were prepared to assist the Assessor in her deliberative process. Although the suggested valuation figures... are expressed in numerical form, they are still professional opinions as to value and cannot be said to amount to simple statistical or factual tabulations."

Similarly, in 10 Op. Counsel SBRPS No.4 (rev.), it was advised by the State Board that "[o]pinion data (*e.g.*, a preliminary estimate of value made by an assessor or revaluation contractor) is not accessible..." until it is no longer preliminary.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 29, 2005

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:

We are in receipt of your June 10, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to the tax credit application form attached to your request.

You have submitted a copy of a blank New York State Empire State Film Production Credit & New York City Made In New York Film Production Tax Credit Initial Application Form A ("Application"). This document is apparently used by the City and State of New York to evaluate the administration of a tax incentive for entities producing films within the City and/or State of New York. It is assumed that when you request that document from the City or State of New York, you will request a form completed by a particular entity or individual. In addition, you inquire as to the availability of documents attached to the application, as indicated on the last page of the application.

Without being familiar with aspects of market competition within the film production industry, it is not possible to accurately advise whether a particular application, attachments, or portions thereof must be made available pursuant to the Freedom of Information Law. However, the following comments are offered in an attempt to illuminate the factors that merit consideration.

First, it appears that a completed Application would constitute a "record", subject to the provisions of the Freedom of Information Law. That statute pertains to agency records, such as those of a state agency, 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. Here, because the Application is submitted to and maintained by a particular State or City office, we believe that it constitutes an "agency record" for purposes of the Freedom of Information Law.

By way of background, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. As suggested on page 13 of the Application, in which the agency gives notice to all applicants that they may request that information be excepted from public disclosure, the only ground of denial of significance is §87(2)(d), which permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Therefore, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity. The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret

> exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

From my perspective, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the production entity to which the records relate.

Relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" [Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410(1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as

> the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420).

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421).

The foregoing is not intended to suggest that a blanket denial of access to such records would be appropriate. 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 our 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, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

Lastly, while commercial entities that submit records to state agencies are accorded certain protection when those records are requested, that statutory protection is inapplicable to an agency of the City of New York or any other municipality.

Accordingly, although we cannot render an advisory opinion on the availability of portions of a particular application, for we are unfamiliar with the nature of market competition within the production industry, we hope that this information is helpful to you.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 3, 2005

E-MAIL

TO: Debra Cohen

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. Cohen:

I have received your letter in which referred to an article published in the *Journal News* concerning a decision by the City of Yonkers Board of Education "to seek $12,727 from Angelo Petrone, saying the former schools superintendent wasn't entitled to 12 unused vacation days that he cashed in before he resigned." The article indicates that the Board took action "behind closed doors and later reported to the public."

From my perspective, there would likely have been no basis for entry into executive session. Further, I do not believe that the Board could validly have taken action in private. In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law specifies and limits the subjects that may properly be considered in executive session. Under the circumstances, it appears that only one of the grounds for conducting an executive session, §105(1)(f), the so-called "personnel" exception, would have been pertinent. However, the scope of that provision is limited and precise. Specifically, §105(1)(f) permits a public body, such as a board of education, to enter into executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."

language quoted above. If that is so, I do not believe that there would have been any basis for entry into executive session.

Second,only in rare instances may a board of education take action during an executive session. As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote.

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student. Since §102(2) of the Open Meetings Law states that minutes need not include information that may be withheld under the Freedom of Information Law, and since unproven charges and records identifiable to students may be withheld, minutes containing those kinds of information would not be accessible to the public.

In my opinion, which is based on judicial decisions, the Board could not validly have taken action during an executive session.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

FOIL-AO-15522

From: Robert Freeman
To: supervisor@clarksonny.org
Date: 10/3/2005 11:22:42 AM
Subject: Dear Supervisor:

Dear Supervisor:

I have received your inquiry and apologize for the delay in response.

The issue relates to a request by a law firm for the employment records pertaining to a named current or former Town employee, and attached to the request is a notarized release signed by the employee. You asked whether the request would "fall under the Freedom of Information Act."

In this regard, the Freedom of Information Law includes all government records within its coverage. That being so, the Town could choose to consider the request as having been made under that statute. To the extent that the employee has rights of access to the records at issue, by signing the authorization, he essentially has given the law firm the right to obtain those records. I note, too, that disclosure is not considered to constitute an unwarranted invasion of personal privacy "when the person to whom the record pertains consents in writing to disclosure" [see Freedom of Information Law, §89(2)(c)(ii)].

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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October 3, 2005

Ms. Betsy Combier
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Combier:

We are in receipt of your June 21, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to various requests you have made to the New York City Department of Education (the "Department").

According to the attachments to your correspondence, you initially wrote to the Department requesting the following records or portions thereof pertaining to:

> 1. The formal policies, procedures, and forms for evaluating the Chancellor, Deputy Chancellors, Regional Superintendents, Deputy Superintendents, Local Instructional Superintendents, and Community Superintendents.
>
> 2. The annual performance evaluations of Rudolph F. Crew, Harold O. Levy, and Joel Klein.
>
> 3. The annual performance evaluations of the Deputy Chancellors, Regional Superintendents, Deputy Superintendents, Local Instructional Superintendents, and Community Superintendents for 2003 and 2004.

Two days later, you added two more requests:

> 4. The employment contracts of Rudolph F. Crew, Harold O. Levy, and Joel Klein.

> 5. The employment contracts of the Deputy Chancellors, Deputy Superintendents, Local Instructional Superintendents, and Community Superintendents for 2003, 2004 and 2005.

In response to your requests, you were informed in writing that the records would be gathered by the "Records Access Officers of several offices" and then reviewed by Susan Holtzman in the Office of Legal Services, the "Central Records Access Officer, who will determine if the documents are releasable pursuant to FOIL." Subsequently, you were informed by telephone and correspondence dated June 9, 2005, that an employment contract for Chancellor Joel Klein does not exist.

In response to your request concerning the procedure described by the Department by which it processes answers to requests made pursuant to the Freedom of Information Law, we offer the following comments:

First, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, such as a Department, to adopt rules and regulations consistent with those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public form continuing from doing so."

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> (4) 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.
>
> (5) Upon request for copies of records:
>
> (i) make a copy available upon payment or offer to pay established fees, if any; or

(ii) permit the requester to copy those records.

In short, the records access officer has the authority and duty to "coordinate" an agency's response to requests. Because a "Central Records Access Officer" position does not exist in the Law or the regulations, we do not believe that there is any legal authority to automatically forward responses from records access officers to this person for review. On the other hand, where there is a question regarding rights of access that requires a legal opinion in attempting to determine the extent to which records should be disclosed or withheld, certainly consultation with an attorney would be appropriate.

While the Department's procedure may be reasonable in some instances, its implementation in relation to each and every response would delay granting access to records and thereby be inconsistent with the intent of the Freedom of Information Law. As you are aware, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

Please note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, we believe that the agency would have acted in compliance with law.

Notwithstanding the foregoing, in our view, every law must be implemented in a manner that gives reasonable effect to its intent, and we 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, we believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

As you note, the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgment must include an approximate date that indicates when an agency will grant or deny the request, which must be reasonable under the circumstances of the request, and in most instances, cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the

appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

Because your requests were made three months prior to the change in the law, the recent amendments to the law are not applicable.

Second, the following is provided in an effort to assist in an expeditious response to your underlying requests.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From our perspective, contracts, bills, vouchers, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff or outside contractors must generally be disclosed, for none of the grounds for denial could appropriately be asserted to withhold those kinds of records. Likewise, in our opinion, a contract between an administrator, for example, and a school district or board of education, if they exist, clearly must be disclosed under the Freedom of Information Law.

In analyzing the issue, the statutory provision of greatest significance is §87(2)(b). That provision permits the Department 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 and employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In a discussion of the intent of the Freedom of Information Law by the state's highest court in a case cited earlier, the Court of Appeals in Capital Newspapers, supra, found that the statute:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (67 NY 2d at 566).

In sum, we believe that a contract between the Department and an individual, like a collective bargaining agreement between a public employer and a public employee union, must be disclosed, for it is clearly relevant to the duties, terms and conditions reflective of the responsibilities of the parties. Because these documents should be relatively intact and accessible, we see no reason why disclosure of them should be delayed any further.

Portions of performance evaluations, on the other hand, may be protected from disclosure based on content, and would therefore require further scrutiny. In our experience, typical performance evaluations contain 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, we believe that those portions would be available. Also pertinent is §87(2)(g), which authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

As §87(2)(g) relates to a performance evaluation, 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, we believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. 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 our 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 our 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 our 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 our view result in an unwarranted invasion of personal privacy if disclosed.

In response to your query about the availability of observation reports, we note that the Appellate Division, Second Department, has determined that records apparently analogous to those mentioned above in the "second component" above, may be withheld, stating that:

> "The lesson observation reports consist solely of advice, criticisms, evaluations, and recommendations prepared by the school assistant principal regarding lesson preparation and classroom performance. As such, these reports fall squarely within the protection of Public Officers Law § 87(2)(g)" [Elentuck v. Green, 202 AD2d 425, 608 NYS2d 701, 702 (1994)].

If the contents, nature or function of the records at issue are different or distinguishable from the records considered in Elentuck, the result, in terms of the ability to deny access, may also be different. If, however, they are indeed analogous to those found to be deniable, we believe that the records may be withheld.

Finally, based on your attachments it appears you were denied a user-id and password request to access the Department's database "The Monitoring Unit". Without knowing exactly what the database contains, it seems likely that portions of the database are protected from disclosure pursuant to the Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). For purposes of disclosure to third parties, FERPA states in brief, that those portions of education records maintained by an educational agency that are personally identifiable to a student or students, cannot be disclosed without the consent of the parent of a minor student or the student if he or she has reached majority. If the statute applies, records may be withheld pursuant to the first ground for denial in the Freedom of Information Law, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute."

In addition, I point out that §87(2)(i) authorizes an agency to withhold records that:

> "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."

We can only speculate that records maintained on this database may also be protected from disclosure pursuant to §89(2)(f), and which if disclosed could endanger the life or safety of any person. In regards to the denial of electronic access to the database, there is no requirement in the Law that an agency provide online access to an electronic database.

In an effort to clarify these issues with the Department of Education, we are sending a copy of this response to that agency.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: Susan Holtzman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 3, 2005

E-MAIL

TO: Ryan Hoy

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. Hoy:

I have received your correspondence concerning a revision of a proposed law by the open space committee of the Town of New Paltz that was accomplished "in email rather than a public meeting." You have asked whether the foregoing would constitute "a violation of the open meetings laws."

In this regard, the initial issue is whether the open space committee is required to comply with the Open Meetings Law. That statute is applicable to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, it constitutes a public body [see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. For instance, in the case of a board of education consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting

public business would be a meeting that falls within the scope of the Law. If that board designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

Several judicial decisions, however, indicate generally that advisory bodies, other than those consisting of members of a particular governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In one of the decisions, Poughkeepsie Newspaper, supra, a task force was designated by then Mayor Koch consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (id., 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law..."(id.).

In the context of your inquiry, if the committee has no authority to take any final and binding action for or on behalf of a government agency, it would not apparently constitute a public body or, therefore, would be obliged to comply with the Open Meetings Law.

If it is a public body, I believe that voting and action may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference.

Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the Commission, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct

its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

The provisions in the Open Meetings Law concerning videoconferencing are newly enacted (Chapter 289 of the Laws of 2000), and in my view, those amendments clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law.

As indicated earlier, the definition of the phrase "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of e-mail.

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be

> subject to the Open Meetings Law. A meeting is defined as 'the official convening of a public body for the purpose of conducting public business' (Public Officers Law §102[1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions to invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner was formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 Affd 45 NY2d 947).
>
> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

If a majority of the members of the Commission engage in "instant e-mail" or communicate in a chat room in which the communications are equivalent to a conversation, it is likely that a court would determine that communications of that nature would run afoul of the Open Meetings Law. In essence, the majority in that case would be conducting a meeting without the public's knowledge and without the ability of the public to "observe the performance of public officials" as required by the Open Meetings Law (see §100).

In contrast, if e-mail communications are made via a listserve or other means through which the members receive them at different times, and there is no instantaneous or simultaneous communication, that circumstance would be equivalent to the transmission of inter-office memoranda. In that kind of situation, the recipients open their mail at different times and, in my view, the Open Meetings Law would not be implicated.

Lastly, I point out that the Freedom of Information Law is more expansive in scope than the Open Meetings Law. That statute pertains to all agency records, such as those of a town, and §86(4) defines the term "record" broadly to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing any email communications made by or on behalf of the Town would, in my view, constitute Town records that fall within the coverage of the Freedom of Information Law.

In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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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October 5, 2005

Mr. Eric Harris
03-B-0846
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. Harris:

I have received your letter in which you sought guidance in your efforts to obtain records from a county court. It appears from your correspondence that you were told to "procure said information from the County Clerk's Office."

In this regard, I point out that the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the

procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

As you may be aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. If your request involves records maintained by the County Clerk in his capacity as court clerk, the Freedom of Information Law, in my opinion, would not apply.

It is suggested that you write to the county clerk in her capacity as court clerk in an effort to obtain the records 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

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October 5, 2005

Mr. Derrick Council
03-A-1203
P.O. Box 1186
Moravia, NY 13118

Dear Mr. Council:

I have received your letter in which you appealed an apparent denial of access to certain records by the Inmate Records Coordinator at your facility.

Please be advised that 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, to compel an agency to grant or deny access to records, or to obtain records on behalf of an individual.

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."

It is suggested that you review the response to your request to attempt to ascertain the name of the person to whom an appeal may be made.

I hope that the foregoing serves to clarify your understanding of the law.

Sincerely,

Janet M. Mercer
Administrative Professional

JMM:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 5, 2005

Mr. Prince Pilgrim
92-A-8847
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. Pilgrim:

I have received your letter in which you complained that you were denied access to records because you could not pay the fees for copying.

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

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October 5, 2005

Mr. Cory Sparrow
88-B-1643
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. Sparrow:

I have received your letter in which you indicated that you had sent Freedom of Information Law requests to the City of Rochester Police Department and that, as of the date of your letter to this office, you had not received any responses.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could

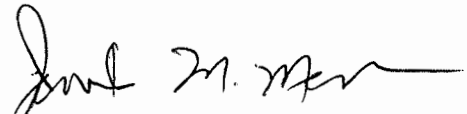
initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15529

41 State Street, Albany, New York 12231
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October 5, 2005

Mr. Mark James
96-A-2884
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. James:

I have received your letter in which you indicated that you are having difficulty in obtaining records concerning an incident at your facility that resulted in your transfer.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I point out that the 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 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-15530

41 State Street, Albany, New York 12231
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October 5, 2005

Mr. Kenneth Bradley
04-06202
Albany County Correctional Facility
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. Bradley:

I have received your letter in which you indicated that you submitted a Freedom of Information Law request to the Queens County Criminal Court. As of the date of your letter to this office, you had not received a response.

In this regard, I point out that the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the

procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you resubmit a request to the court clerk 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15531

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 5, 2005

Mr. Jose Borrero
98-A-4636
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. Borrero:

I have received your letter in which you indicated that you have submitted a Freedom of Information Law request to the New York County District Attorney's Office and that, as of the date of your letter to this office, you had not received a response.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could

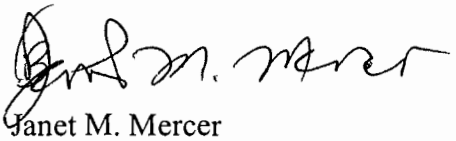
initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15532

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October 5, 2005

Mr. Joseph Miceli
84-A-6855
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 information presented in your correspondence.

Dear Mr. Miceli:

I have received your letters in which you indicated that you requested a variety of records from the Department of Correctional Services, including an Inspector General's report. With respect to some of the records that you requested, you were informed that the "records are not maintained in an manner in which allows [the Department] to search for them". With respect to the Inspector General's report, you were denied access as the "investigation is currently open and ongoing."

In this regard, I offer the following comments.

First, a key issue appears to involve extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. As you may be aware, it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability

> under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Department, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the Department can locate the records sought with a reasonable effort analogous to that described above, i.e., by reviewing perhaps hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Department maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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.

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
Administrative Professional

JMM:RJF:jm
cc: Anthony Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FPPL-AO-316
FOIL-AO-15533

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October 5, 2005

Mr. Carl Jackson
90-B-1304
Green Haven Correctional Facility
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. Jackson:

I have received your letter in which you requested records pertaining to other inmates, including information relating to an incident involving an inmate, as well as a crisis intervention report concerning the incident.

In this regard, I offer the following comments.

Two statutes, the Freedom of Information Law and the Personal Privacy Protection Law (respectively Articles 6 and 6-A of the Public Officers Law), are pertinent to the matter. Due to the language of those statutes, they must be construed together and in relation to one another.

By way of background, the Freedom of Information Law includes within its coverage all agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of that statute, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves a situation in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter." Section 89(2)(b) of the Freedom of Information Law includes examples of unwarranted invasions of personal privacy, and §89(2-a) states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter." Therefore, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law.

I note that a similar issue was reviewed in Kavanagh v. Department of Correctional Services (Supreme Court, Albany County, April 22, 1986). In brief, in that case, a district attorney requested misbehavior reports and their final dispositions pertaining to particular inmate, and it was held that the reports, which included allegations that were not substantiated, could be withheld on the ground that disclosure would result in "personal hardship" to the inmate and constitute "an unwarranted invasion of personal privacy" pursuant to §89(2)(b)(iv) of the Freedom of Information Law.

On the other hand, however, if an inmate was found to have engaged in a violation or misconduct, a final determination reflective of such a finding would, in my view, be accessible. In numerous contexts, it has been advised that records relating to unsubstantiated charges, complaints or allegations may be withheld to protect the privacy of the accused. But when there is a determination indicating misconduct with respect to public employees (with the exception of those employees subject to §50-a of the Civil Rights Law), licensees and others, it has consistently been advised that the determination is accessible, for there is a finding or admission of wrongdoing, and disclosure in those instances would constitute a permissible rather than an unwarranted invasion of personal privacy.

The regulations promulgated by the Department of Correctional Services appear to bolster such a conclusion. In 7 NYCRR §5.21(a), public rights of access are conferred with respect to a variety of items relating to inmates, including commitment information and "departmental actions regarding confinement and release." Frequently a departmental action based on a finding of misconduct will result in placement in a special housing unit or in solitary confinement. In Bensing v. LeFevre, the issue involved a request for a list of inmates held in a special housing unit, "an area primarily used for housing inmates who have been segregated from the general population for punitive reasons", and the court rejected contentions under both the Freedom of Information and Personal Privacy Protection Laws that disclosure would constitute an unwarranted invasion of personal privacy [506 NYS2d 822, 823 (1986)]. As such, the court confirmed that the names of those found to have engaged in misconduct, as well as the sanction, placement in a segregated unit, must be disclosed.

In sum, I believe that records involving unsubstantiated allegations may be withheld, but that final determinations reflective findings of misconduct must be disclosed.

I hope that I have been of assistance.

Sincerely,

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-4053
FOIL-AO-15534

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 6, 2005

Mr. James Kurkowski
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Kurkowski:

On July 1st of this year, we received two requests from you for advisory opinions concerning (1) the ability of a village board to conduct meetings in private, and (2) the responsibility of a village attorney to formalize his opinions in writing.

In response to your first request, according to your letter, you have determined that although regular monthly meetings of the Village Board are advertised on the community bulletin board, "sometime during the month, no set schedule, the board and the departments meet in the Village Library and take care of the rest of the Village Affairs. These meetings are not advertised because as one Trustee stated we don't want interruptions from the public so we can get our business done." From our perspective, meetings held for that purpose would clearly fall within the Open Meetings Law.

In this regard, the Open Meetings Law applies to meetings of public bodies, and §102(1) of the Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Inherent in the definition is the notion of intent. A chance gathering or a social function, for example, would not in our view constitute a meeting, for there would be no intent on the part of those present to conduct public business, collectively, as a body. Similarly, in situations in which members of a public body are part of a large audience and are present as members of the audience, and not to conduct business as a body, we do not believe that the Open Meetings Law would apply, even though a majority of a public body may be present.

Nevertheless, 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)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

In short, based upon the direction given by the courts, if a majority of the public body, such as a village board, gathers to conduct the business of the body, in their capacities as board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. In addition, if it is true that the village board has approved the tentative budget at such a meeting, §106(1) specifically states that "minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

While a work session may be informal, and there may be no votes or action taken at such a gathering, it is clear that the subject matter described involves the consideration of public business and the development of public policy. Consequently, again, we believe that the kinds of gatherings to which you referred would constitute "meetings" that fall within the coverage of the Open Meetings Law.

In response to your second request, please be advised that the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. We would speculate that the Village Attorney has not prepared a written legal opinion in response to your request, and if that is so, your request would not involve existing records, and the Freedom of Information Law would not apply.

However, if you have submitted a request for records which you believe to exist, and if the appointed records access officer has not responded to your request in a timely fashion, it is our opinion that the Village would not have complied with the Freedom of Information Law. If that is so, we 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

In an effort to enhance compliance with and understanding of the Open Meetings Law and the Freedom of Information Law, copies of this response will be forwarded to Village officials for consideration.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15535

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October 6, 2005

E-MAIL

TO: Roberta Russell

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on 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. Russell:

We are in receipt of your e-mail requests for an opinion concerning the public's rights of access to a tape recording of a public meeting maintained by the Town of Harrietstown.

In response to your request to listen to the audio tape and make a duplicate of the tape with your own recording equipment, you received correspondence from the Harrietstown Zoning Administrator/Code Enforcement Officer indicating that you will be provided the opportunity to listen to the audio tape but not duplicate the tape "on the basis that the Town itself does not have the technical equipment to make a duplication of the tape."

It is our opinion because the Town does not have the ability to reproduce the tape recording, the Town must make the tape available for listening and copying. In this regard, we offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In our view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

Lastly, if the Town has the ability to prepare a duplicate recording, I believe that it would be obliged to do so [see §89(3)] upon payment of the requisite fee. We note that §87(1)(b)(iii) indicates that the fee for copies of records other than photocopies should be based on the actual cost of reproduction. If the Town cannot copy the tape recording, an applicant would have the right to listen to the tape and copy it. In our view, the Town would not be required to relinquish custody of a tape recording or any record; however, in this instance, as you have explained, you can place your tape recorder next to the Town's recorder, and simply permit your machine to record the sound that emanates from the Town's machine.

In the interest of expediting final resolution of this matter, we will provide a copy of this response to the Harrietstown Zoning Administrator/Code Enforcement Officer.

I trust this meets with your request. Should you have any further questions, please contact me directly.

CSJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15536

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October 6, 2005

Ms. Mary Neagle Smith
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Smith:

We are in receipt of your June 30, 2005 request for an advisory opinion concerning the right to appeal a "non-responsive" response to a request for records made to the Village of Tuckahoe, pursuant to the Freedom of Information Law.

As you describe the matter, and based on the correspondence which you attach to your request, it appears that the Village responses to your requests for records have not been answered to your satisfaction. We note, however, that the Village Attorney has indicated that copies of at least some of the records you request are available at Village Hall, upon receipt of the appropriate dollar amount.

Because we believe that to the extent that the Village maintains certificates of insurance, a written policy pertaining to the collection of such certificates, ADA grievance procedures and/or an ADA transition plan, such documents are public records, we offer the following comments:

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Second, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency need not create a record in response to a request. If indeed the

Village does not maintain the records sought, the Freedom of Information Law would not apply. For instance, if there is no Village policy pertaining to the collection of certificates of insurance for an individual or group using "any Tuckahoe facility", there is nothing to be disclosed under the Freedom of Information Law, and the Village would not be obliged to prepare a record containing the information sought on your behalf.

That being said, we 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, for §89(3) provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

The documents which you have attached to your request, although incomplete, do not reflect that the Village has failed to meet any of the above-described time frames. In addition, it may be that the documents you seek, to the extent that they exist, have already been made available to you. Accordingly, we are unable to issue an advisory opinion indicating the likelihood of a judicial decision in your favor.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15537

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October 6, 2005

Mr. Joseph Fischer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fischer:

We are in receipt of your June 27, 2005 letter and a variety of related correspondence concerning your effort to obtain records maintained by the Department of Health and Mental Hygiene of the City of New York ("Department").

You seek an advisory opinion pertaining to the rights of access to any and all medical records maintained by the Department with respect to a particular child, identified by number, violation orders against two apartments for which you are registered as the managing agent, violation orders issued against two other apartments in Brooklyn, and all records of any communication between the Lead Poisoning Prevention Program ("LPPB") and the NYC Housing Preservation and Development's Emergency Repair Services ("HPDERS") concerning any of the four mentioned apartments.

In response, at first the Department denied your request in full, but on appeal, it granted your request in part and denied it in part. As you indicated, the Department referred your request to the LPPB to provide you with copies of records, including correspondence, pertaining to the violations placed on the two apartments you manage, with all personal identifying information redacted, refusing to release any medical information.

The Department further denied access to records pertaining to the other two Brooklyn apartment addresses, without written authorization from the owner, managing agent or tenant of those apartments, without providing a legal basis for such refusal. Thereafter, you sought written clarification of the Department's position, and you submitted two additional requests to the Department which presumably have not been answered.

In this regard, we offer the following comments.

First, because the Department has not provided any legal basis on which it can rely to deny access to violation records and/or personal information contained therein, and because we are unaware of any law or statute prohibiting the release of such information, we believe the Department has denied access to violation records in error, 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.

As you may be aware, §87(2)(g) allows an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> I. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld.

One of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter

> of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is predecisional or 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 our view, notices of violation and intra-agency communications reflecting the statistical or factual information upon which they are based must be disclosed based, respectively on subparagraph (i) and (iii) of §87(2)(g) to the extent that they are not otherwise protected from disclosure pursuant to law.

Third, to the extent that the Department has denied your request for medical records, we believe that it has complied with law, for §87(2)(a) permits an agency to withhold records that "are specifically exempted from disclosure by state or federal statute."

One such statute is §18 of the Public Health Law, which deals specifically with access to patient records, and in brief, 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."

Because you are not a "qualified person", we believe that the requested medical records would be exempt from disclosure, and that the Department properly denied your access to them.

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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is

reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see, §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

> explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

To the extent that your requests for Notices of Violations and intra-agency communications have gone unanswered, and also that the denial of access to such records has been declared without legal authority, it is our opinion that your requests have been constructively denied.

Finally, the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In short, we believe that the Department 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 made pursuant to that law.

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, we believe that when a request is directed back to the LPPB, with a direction to disclose, the LPPB must respond in a manner consistent with the Freedom of Information Law, or forward the records to the records access officer for response.

In the interest of expediting final resolution of this matter, we will provide a copy of this response to the Department of Health and Mental Hygiene.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: Rena Bryant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15538

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 6, 2005

Mr. Erwin Williams
90-C-1288
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Williams:

I have received your letter in which you wrote to the Onondaga County Sheriff's Department and raised questions concerning whether evidence pertaining to a certain case still exists or has been destroyed. The Sheriff's Department advised you it is not their job "to provide information in response to questions which require it to analyze information; its obligation is to provide access to existing records."

In this regard, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request.

Therefore, Department officials in my view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive. In short, in the future, rather than seeking information or raising questions, it is suggested that you request existing records. Enclosed is "Your Right to Know", which explains the Freedom of Information Law and includes a sample letter of request that may be useful to you.

I hope that 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15539

41 State Street, Albany, New York 12231
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October 6, 2005

Mr. Paul Kingsley
01-B-2025
Woodbourne Correctional Facility
P.O. Box 1000
Woodbourne, NY 12789-1000

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. Kingsley:

I have received your letter in which you complained that you have sent numerous Freedom of Information Law requests to various entities and, as of the date of your letter to this office, you had not received any responses. Having reviewed your correspondence, it appears that you sent requests to Prisoners' Legal Services, a private attorney, a court clerk, a district attorney's office, and a county jail in North Carolina.

In this regard, first, the statute within the advisory jurisdiction of the Committee on Open Government, the New York State Freedom of Information Law, pertains to records maintained by agencies in New York State. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Therefore, in general, the Freedom of Information Law is applicable to entities of state and local government in New York State. As such, it would not be applicable to county jail in North Carolina or a private attorney.

Second, 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.

Third, it is my understanding the there are a variety of entities within New York that provide legal services to persons arrested or inmate. Some are a part of the federal Legal Services Corporation, some may be private not-for profit corporations, and some may be parts of units of local government. While legal aid societies which are agencies of local government may be subject to the Freedom of Information Law, most are not "agencies" as that term is defined in the Freedom of Information Law and, as such, are not subject to that statute.

I believe that Prisoners' Legal Services 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, its records in which you are interested are outside the scope of public rights of access.

Lastly, with respect to requests made before May 3 to entities of state and local government, such as an office of a district attorney, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15540

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 6, 2005

Mr. Anthony D. Amaker
89-T-2815
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. Amaker:

I have received your letter in which you requested a copy of an audio tape but were denied access on the ground that you had insufficient funds in your account. You contend that your account could be encumbered for the amount of the cost of the records based on an Appellate Division decision [Dawes v. Selesky, 286 AD2d 806 (2001)].

In this regard, I offer the following comments.

Having reviewed the decision that you cited, it appears that that decision relates to copies of medical records and the inability to pay. I point out that §18 of the Public Health Law governs rights of access to medical records and the fees that may be charged, not the Freedom of Information Law. Section 18(2)(e) of that statute states in relevant part that:

> "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider, provided, however, that a provider may not impose a charge for copying an original mammogram when the original has been furnished to any qualified person and provided, further, that any charge for furnishing an original mammogram pursuant to this section shall not exceed the documented costs associated therewith. However, the reasonable charge for paper copies shall not exceed seventy-five cents per page. A qualified person shall not be denied access to patient information solely because of inability to pay."

As such, copies of medical records cannot be denied on the basis of an inability to pay.

In my view, your request for an audio tape would fall within the coverage of the Freedom of Information Law. I point out that there is nothing in that statute 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 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-15541

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 6, 2005

Mr. Ronald Diggs
04-R-3906
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. Diggs:

I have received your letter in which you complained that you were denied access to records because you could not pay the fees for copying.

In this regard, 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-15542

41 State Street, Albany, New York 12231
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October 6, 2005

Mr. Terry Jones
04-B-1953
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. Jones:

I have received your letter and the correspondence attached to it. It appears that you requested a copy of a report contained in the statewide central register of child abuse and maltreatment. The request was denied by the NYS Office of Children and Family Services because the report was determined unfounded and sealed pursuant to §422(5) of the Social Services Law.

In this regard, 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 (5) of §422 states in relevant part that:

> "Unless an investigation of a report conducted pursuant to this title or subdivision (c) of section 45.07 of the mental hygiene law determines that there is some credible evidence of the alleged abuse or maltreatment, all information identifying the subjects of the report and other persons named in the report shall be legally sealed forthwith by the central register and any local child protective services or the state agency which investigated the report.

As such, I believe that the report was withheld in accordance 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-15543

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October 6, 2005

Mr. German Rios Davila
03-A-3078
Green Haven Correctional Facility
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Davila:

I have received your letter in which you indicated that you requested records from the New York City Department of Correction, which sought extensions to its time of respond. As of the date of your letter to this office, you still have not received the records.

In this regard, with respect to requests made before May 3, 2005, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added]. In the context of your correspondence, it appears that approximate dates have been given, but that the agency has repeatedly gone beyond those dates.

In a case that described an experience similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a "Catch 22" position. The petitioner, relying on the respondent's representation, anticipated a determination to her request...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89 (3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming.
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the agency "is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law, §89(4)(a)."

Based on the foregoing, I believe that your requests have been constructively denied and that you may appeal the denial pursuant to §89(4)(a). That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reason for further denial, or provide access to the record sought."

Alternatively, based on the holding in Bernstein, it appears that you could seek judicial review of the denials now.

I point out that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and

may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended (see attached), and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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

Enc.

cc: Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15544

41 State Street, Albany, New York 12231
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October 6, 2005

Mr. Joshua J. Minix
04-A-3854
Washington Correctional Facility
Box 180
Comstock, NY 12821-0180

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Minix:

I have received your letter in which you wrote that you were denied access to records relating to your arrest by the Village of Hudson Falls Police Department as the result of an investigation.

In this regard, first and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The state's highest court, the Court of Appeals, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly

> here 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, 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.

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.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1554/5

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 11, 2005

Mr. Charles D. Booker
99-A-3192
Clinton Correctional Facility
P.O. Box 2000
Dannemora, NY 12929

Dear Mr. Booker:

I have received your letter in which you requested your "sentencing transcript" from this office.

In this regard, first, the Committee on Open Government is authorized to offer advice and opinions pertaining to the Freedom of Information Law. The Committee does not have custody or control over records generally.

Second, the courts are not subject to the Freedom of Information law. That statute is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

The foregoing is not intended to suggest that court records may not be available. On the contrary, other provisions of law often grant broad rights of access to court records (see e.g., Judiciary Law, §255). That being so, it is suggested that you submit a request for the records to which you referred to the clerk of the court in which you were sentenced, citing an applicable provision of law as the basis for your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15546

41 State Street, Albany, New York 12231
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October 11, 2005

Mr. Anthony Atkinson
96-A-4870
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

Dear Mr. Atkinson:

I have received your letter in which you requested a variety of information from this office.

In this regard, first, the Committee on Open Government is authorized to provide advice and opinions pertaining to the New York Freedom of Information Law. The Committee does not maintain custody or control of records generally, and we have no records falling within the scope of your request.

Second, when a request is made for agency records, it should be directed to the agency "records access officer." The records access officer has the duty of coordinating an agency's responses to requests made under the Freedom of Information Law.

Third, as inferred above, the Freedom of Information law applies to agency records. Section 86(3) of that law defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the Freedom of Information Law does not apply to the courts. When seeking court records, it is suggested that any such request be made to the clerk of the court in possession of the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1555 47

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 11, 2005

Mr. Joseph G. Cipolla
02-A-1315
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cipolla:

I have received your letter in which you questioned why it is difficult to obtain a copy of your pre-sentence report.

In this regard, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. It is suggested that you review that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15548

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 11, 2005

Mr. Daryl Kelly, Sr.
99-A-1265
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. Kelly:

I have received your letter in which you request an opinion concerning "judicial misconduct" and raised questions concerning "live evidence" and "live testimony."

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. That being so, we have neither the jurisdiction nor the expertise to respond to your questions concerning live evidence and live testimony.

With respect to records concerning allegations of judicial misconduct, I believe that such records are generally confidential.

As a general matter the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant in this instance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §45 of the Judiciary Law, which deals with records of the Commission on Judicial Conduct and is entitled "Confidentiality of records." Subdivision (1) of that statute provides that:

> "Except as hereinafter provided, all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential and shall not be made available to any person except pursuant to section forty-four of this article, the commission and its designated staff personnel shall

> have access to confidential material in the performance of their powers and duties. If the judge who is the subject of a complaint so requests in writing, copies of the complaint, the transcripts of hearings by the commission thereon, if any, and the dispositive action of the commission with respect to the complaint, such copies with any reference to the identity of any person who did not participate at any such hearing suitably deleted therefrom, except the subject judge or complainant, shall be made available for inspection and copying to the public, or to any person, agency or body designated by such judge."

The provision in §44 relating to public access to records states in relevant part that:

> "After a hearing, the commission may determine that a judge be admonished, censured, removed or retired. The commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the chief judge of the court of appeals who shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the judge involved. Upon completion of service, the determination of the commission, its findings and conclusions and the records of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the court of appeals."

Based on the foregoing, only after the completion of a proceeding and service upon a judge who is the subject of a proceeding in which it is determined that he or she should be "admonished, censured, removed or retired" would records of the Commission be accessible to the public. If no such determination has yet been reached, or if a complaint is dismissed, I believe that the records must remain confidential.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO - 15549

From: Janet Mercer
To: Susan Mick
Date: 10/12/2005 10:48:33 AM
Subject: Re: FOIL Act

Dear Ms. Mick:

I have received your inquiry in which you asked to whom you may address a request under the Freedom of Information Law.

In this regard, requests generally should be made to the "records access officer" at the agency that you believe maintains the records of your interest. Pursuant to the regulations promulgated by the Committee on Open Government (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.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
41 State Street
Albany, NY 12231
Phone: (518) 474-2518
Website: www.dos.state.ny.us/coog/coogwww.html

>>> "Susan Mick" [redacted]> 10/6/2005 10:04:59 AM >>>
Whom do I address a FOIL request to?

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15550

41 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 12, 2005

Ms. Diane Ress
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Ress:

We are in receipt of your June 28, 2005 request and a variety of related correspondence evidencing requests and appeals which you have made to the Town of Brookhaven pursuant to the Freedom of Information Law. You have requested an advisory opinion concerning responses from the Town to your requests and to your appeals, some of which remain outstanding. In this regard, we offer the following comments.

First, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. 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 our 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.

On the other hand, in a decision involving a request for thousands of records, 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).

To the extent that you have requested "any and all records of the Town since 1990", "any and all records of the Town's Industrial Development Authority since its inception", and "all records of complaints (by citizens and other agencies), fines citations, tickets, infractions, hearings, legal proceedings, permits, registrations, exemptions, site plans, CO's, and taxes for [two commercial entities]... from 1990 to present", we believe your requests fail to meet the standard of reasonably describing records, and that they were properly rejected by the Town.

Second, as you know, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

New language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state,

> in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

When an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it now states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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)].

Perhaps most pertinent to the question is a decision in which an agency's "two-tiered" appeal procedure included within a local law was found to be invalid. As stated by the court:

> "Given the scope, history and legislative declaration of FOIL, it is apparent that the Legislature has evidenced its intent to preempt the field of regulation. Additionally, the 'prerequisite 'additional restrictions' on rights under State law (F.T.B. Realty Corp. v. Goodman, 300 NY 140,147-148) which Local Law No. 8-1978 imposes, namely, a two-tiered appeals procedure before Article 78 CPLR review can be had, would be sufficient to invalidate the local law (See Con Ed v. Town of Red Hook, 60 NY2d 99), as being inconsistent with the state law's single tier appeals procedure. Accordingly, respondents' reliance upon the local law in support of their argument that petitioners have failed to exhaust their administrative remedies is misplaced" (Reese v. Mahoney, Supreme Court, Erie County, June 28, 1984).

If an appeal is denied, or if an agency fails to determine the appeal within ten business days as required by law, the applicant would have exhausted his or her administrative remedies. At that point, the applicant could seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. In such a proceeding, the issue is whether a government agency or official acted unreasonably, i.e. was arbitrary and capricious, or failed to perform a duty required to be performed by law. An Article 78 proceeding is initiated in Supreme Court in the county in which the agency's determination was made.

It is our opinion, based on the records which you have submitted, that the Town of Brookhaven failed to comply with the provisions of the Freedom of Information Law which require it to timely acknowledge and/or respond to requests for records. In regards to the June 3, 2005 appeal, it is our opinion that the Town responded on the 10th business day after receipt of the appeal, as evidenced by the letter dated June 8, 2005 from the Town Clerk indicating receipt, in keeping with the provisions of §89(4)(b).

In regards to your May 10, 2005 request (05-466), based on the evidence which you provided, it appears that the Town responded to your request, not by denying public access to the financial disclosure statements, but by requesting that you complete individual requests for each statement, indicating the years for which you seek records. To the extent that you have submitted these forms to the Town, along with a copy of the requested photo identification, and have received no response, we offer the following comments.

By way of background that §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In short, we believe that the Town Board has the overall responsibility of ensuring compliance with the Freedom of Information Law and that the records access officer has the duty of coordinating responses to requests.

Section 1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.

(4) Upon request for copies of records:
(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the requester to copy those records..."

Based on the foregoing, again, the records access officer must "coordinate" an agency's response to requests. Therefore, we believe that when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

In an effort to enhance compliance with understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Town Officials.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Hon. John Jay LaValle
Hon. Stanley Allan
Thomas Ventura

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15551

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October 12, 2005

Ms. Suzanne J. Young
[redacted]

Dear Ms. Young:

I have received your latest correspondence in which you indicated that Lewis County officials have not yet responded to your requests for records. Having reviewed the opinion addressed to you on August 22, I do not believe that I can add anything of substance to the comments offered then.

However, it is reiterated that under §89(3) of the Freedom of Information Law, an agency must respond to a request in some manner within five business of its receipt of a request, and that a failure to do so constitutes a denial of access that may be appealed. Section 89(4)(a) 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 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, too, that §89(4)(b) specifies that a failure to determine an appeal within ten business days of its receipt constitutes a denial of the appeal. In such a case, the person denied access has the right to seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Graham, County Attorney
L. Michael Tabolt, Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4055
FOIL-AO-15552

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October 12, 2005

E-Mail

TO: Ronald McLain

FROM: Camille S. Jobin-Davis CSJ

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. McLain:

As you know, we are in receipt of your July 9, 2005 request for an advisory opinion concerning public access to minutes of meetings of the Town of Caroga ("Town"). In this regard, we offer the following comments.

As you may be aware, §106(3) of the Open Meetings Law pertains to minutes of meetings of public bodies and states that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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."

Subdivision (3) deals specifically with the time within which minutes must be prepared and made available, a period of two weeks with respect to minutes of open meetings, and one week when action is taken during executive sessions.

In keeping with these provisions, it is our opinion that the Town must make available minutes of a meeting which occurred in the recent past and more than two weeks ago (or more than one week ago concerning action taken in executive sessions), on demand. To do otherwise would, in our opinion, fail to comply with the Open Meetings Law.

There is nothing in the Open Meetings Law or any other statute of which we are aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public

bodies approve minutes of their meetings. In the event that minutes have been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, we believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

To the extent that you requested to review minutes from previous years, although it seems unlikely, it is possible that historical records are maintained in a manner or place which prevents the Town from making them available immediately. In this regard, the provisions of the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

I trust this meets with your request. Should you have any further questions, please contact me directly.

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15553

41 State Street, Albany, New York 12231
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October 12, 2005

E-MAIL

TO: Janet Liotta

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. Liotta:

I have received your letter in which you asked whether the Freedom of Information Law may be used to determine whether violators of a village code have paid fines that were imposed.

From my perspective, records indicating the names of those found to have engaged in violations and whether they paid fines would be accessible, either from the administrative offices of the village or from the village justice court.

I note that there is a distinction in terms of rights of access between those situations in which a person has been found to have engaged in a violation of law, and those in which charges against an individual have been dismissed in his or her favor. In the latter case, records relating to an event that did not result in a conviction ordinarily become sealed pursuant to §160.50 or perhaps other provisions of the Criminal Procedure Law. However, if it is determined that a person has engaged in a violation, i.e., of a building code, the records would be available from the court in which the proceeding occurred, such as the village justice court (see Uniform Justice Court Act, §2019-a). Further, the Court of Appeals, the State's highest court, determined in 1984 that traffic tickets issued and lists of violations of the Vehicle and Traffic Law compiled by the State Police during a certain period in a county must be disclosed, unless charges were dismissed and the records sealed pursuant to provisions of the Criminal Procedure Law [see Johnson Newspaper Corp. v. Stainkamp, 61 NY2d 958).

Although that decision did not pertain to the kinds of violations to which you referred, I believe that the principle would be applicable in this instance. In short, unless they have been sealed pursuant to statute, the records in question, including the names and addresses, would in my opinion be accessible from either the court or other village office that maintains the records.

Lastly, I point out that the courts are not subject to the Freedom of Information Law. Nevertheless, court records are generally available, and the statute referenced above, §2019-a of the Uniform Justice Court Act, states that justice court records are accessible, except when a different statute specifies that certain records are confidential, as in the case of §160.50 of the Criminal Procedure Law. If you choose to request records from the justice court, it is suggested that you do so, citing the Uniform Justice Court Act as the basis for the request.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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October 12, 2005

E-MAIL

TO: Michael P. McCooey

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. McCooey:

I have received your email and again apologize for the misinterpretation of our initial discussion. You have requested "a letter stating that the Town of Lumberland Police Constabulary's Policies and Procedures Manual is NOT confidential" (emphasis yours).

Without familiarity with the content of the manual, I cannot advise that there may not be portions of its content that might properly be withheld. Nevertheless, it is likely that much of the manual should be accessible to the public. 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. In consideration of your request, several of the grounds for denial may be pertinent to an analysis of rights of access. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). 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 exceptions are pertinent to an analysis of rights of access.

First, there is no question but that the records sought constitute intra-agency materials that fall within the scope of §87(2)(g). However, due to its structure, that provision frequently requires substantial disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;

> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the records sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

A 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, relatively little of the manual could be characterized as "non-routine", and that much of the manual must be disclosed.

The remaining provision of possible significance as a basis for denial is §87(2)(f), which 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 the Town 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.

RJF:tt

cc: Town Board

STATE OF NEW YORK
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October 13, 2005

Mr. Gregory Anthony
03-B-0336
Oneida Correctional Facility
P.O. Box 44580
Rome, NY 13442-4580

Dear Mr. Anthony:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records under the Freedom of Information Law concerning your divorce from an attorney.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. That statute is applicable to agency reocrds, and §86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, records of a private attorney would not fall with the coverage of the Freedom of Information Law.

I regret that I cannot be of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
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October 13, 2005

Mr. Michael Clancy
00-A-0981
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. Clancy:

I have received your letter in which you indicated that you submitted a request to the New York City Police Department and that, as of the date of your letter to this office, you had not received a response.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

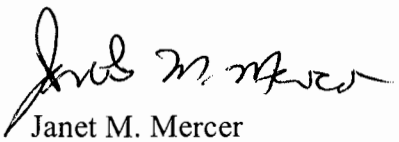
The person designated to determine appeals by the New York City Police Department is Jonathan David.

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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
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COMMITTEE ON OPEN GOVERNMENT

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October 13, 2005

Mr. Dennis Wurthman
02-B-1317
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. Wurthman:

I have received your letter in which you indicated that you requested a copy of a video tape from the Erie County District Attorney's Office and asked that the fees be reduced or waived. You were denied access on the basis that you refused to pay the required fees. You again wrote to the District Attorney's Office and indicated that you would pay the fees. Since you did not receive a response to that letter, you wrote again requesting the video tape and agreed to pay the fees. 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, 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)].

Second, since you resubmitted your request and indicated that you would be the fee and have received no response, I note that the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, with requests made prior to May 3, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949,

950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

In an effort to enhance compliance with law, a copy of this opinion will be forwarded to the District Attorney's Office.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm
cc: J. Michael Marion

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 13, 2005

Mr. Orlando Montalvo
91-A-8518
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. Montalvo:

I have received your letter and the correspondence attached to it. You have requested a "specific listing of the individual items in [your] file", as well as a copy of the "file cover sheet" relating to a particular indictment from the New York City Police Department, the Bronx County District Attorney's Office and the Bronx County Supreme Court. You asked how should proceed if your are denied access to this information.

In this regard, first, it is emphasized that the Freedom of Information Law is applicable to agency records, and that §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the

procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable. When seeking records from a court, it is suggested that a request be made to the clerk of the court, citing an applicable provision of law as the basis for the request.

Second, insofar as you requests involve agencies, such as the Police Department and the Office of the District Attorney, the Freedom of Information Law pertains to existing records and that §89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if there is no "listing" of each item in the file, an agency would not be required to create such a list on your behalf.

Lastly, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I point out that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or

complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15559

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 13, 2005

Mr. Alfonso Rizzuto
00-A-2600
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. Rizzuto:

I have received your letter in which you indicated that, as of the date of your letter to this office, you had not received any responses to your requests directed to the New York State Division of Parole.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could

initiate a challenge to a constructive denial 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.

I point out that the Freedom of Information Law was recently amended, and as of May 3, when
an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15560

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October 13, 2005

Mr. Daryl Jackson
03-A-0777
Attica Correctional Facility
Box 149
Attica, NY 14011

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jackson:

I have received your letters in which you indicated that you requested a variety of records concerning your arrest but were denied access by the New York County Office of the District Attorney.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records sought might properly be withheld, relevant is a decision by the Court of Appeals concerning complaint follow-up reports and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 633 NYS2d 54, 89 NY2d 267 (1996); emphasis added by the Court].

Based on the foregoing, neither a police department nor an office of a district attorney can claim that complaint follow-up reports or similar documentation 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 AD2d 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Records Access Officer, New York County Office of the District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15561

41 State Street, Albany, New York 12231
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October 13, 2005

Mr. Emile Moreau
04-A-1588
Five Points Correctional Facility
Caller Box 400
Romulus, NY 14541

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Moreau:

I have received your letter in which you indicated that you requested records from the New York City Fire and Police Departments and that, as of the date of your letter to this office, you had not received any responses.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

In an effort to enhance compliance with law, copies of this opinion with be forwarded to the Fire Department and the Police 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: Records Access Officer, New York City Fire Department
Records Access Officer, New York City Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15562

41 State Street, Albany, New York 12231
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October 14, 2005

Mr. Tyrone N. Murphy
81-D-0276
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. Murphy:

I have received your letter in which you indicated that you notarized a "Power of Attorney" for another person to obtain an indictment file pertaining to you. You stated that the Albany County Clerk and the District Attorney's Office denied access on the basis that only an attorney could obtain those files. You also indicated that you need the entire file.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested or the effects of their disclosure, I cannot offer specific guidance concerning rights of access to the entirety of the file. 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 a police department 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 could be withheld in their entirety on the ground that they constitute intra-agency materials; some portions of those records clearly consisted of factual information. 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)].

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

Also 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.

Assuming that no other ground for denial is applicable, I do not believe that a request made by the subject of a request for records pertaining to him, or by his representative who has obtained a written release authorizing disclosure to the representative, could be denied on the basis of §87(2)(b). As stated in §89(2)(c) of the Freedom of Information Law:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision...
>
> ii. when the person to whom a record pertains consents in writing to disclosure..."

Lastly, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was previously made available to you or your attorney, i.e., in conjunction with a criminal proceeding, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

cc: Hon. Thomas Clingan, Albany County Clerk
Albany County District Attorney's Office

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15563

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October 17, 2005

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:

We are in receipt of your July 6, 2005 request for a written advisory opinion concerning the Wading River Fire District's failure to respond to requests you have made pursuant to the Freedom of Information Law. As you correctly note, we have previously written to you on this exact issue in March of 2004.

To reiterate, with respect to requests made before May 3, 2005, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

We note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny

a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, we believe that the agency would have acted in compliance with law.

Notwithstanding the foregoing, in our 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a

challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Based on the Fire District's failure to respond to your requests and your appeals, it is our opinion that you are now permitted to commence an action against the Fire District for its failure to comply with the Freedom of Information Law.

We note that the Freedom of Information Law was recently amended, and as of May 3, 2005, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgment must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

I hope that this is helpful. Should you wish to forward copies of the underlying requests we would be able to issue an advisory opinion concerning public access to the requested documents that could enhance the Fire District's compliance with and understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15564

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 17, 2005

Mr. Stephen A. Tiska
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Tiska:

We are in receipt of your July 8, 2005 request for a written advisory opinion concerning your request that the Supervisor of the Town of Masonville provide you with a certified statement that he had authorization to reappoint the entire Town Board into office. Having previously discussed this matter with our Executive Director, Robert Freeman, it is our opinion that you may have misunderstood the advice given to you by Mr. Freeman.

In this regard, we point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information Law 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.

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.

Accordingly, while the Law requires that an agency employee certify, upon request, the lack of records, or that a diligent search for records was not successful, there is no corresponding requirement that a public employee create a certified statement attesting to the basis for his or her action.

I hope this is helpful. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15565

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October 17, 2005

Mr. Jeff Williams
CSEA - Unit President
215 Main Street
Whitesboro, NY 13492

The staff of the Committee on Open 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:

We are in receipt of your July 8, 2005 request for a written advisory opinion concerning three requests and appeals made pursuant to the Freedom of Information Law to the Utica Municipal Housing Authority ("Housing Authority").

As you relate, the receipt of the three requests was acknowledged by letters in which the Executive Director of the Housing Authority indicated that his office "has less staff due to subsidy reductions and is now responding to two grievances, one improper practice charge and three Freedom of Information requests recently submitted by the CSEA." He indicated he would examine your requests and "respond when able." Thirty days later, receiving no response, you appealed the Housing Authority's constructive denial of your requests to the Chairwoman of the Housing Authority. As of the date of your letter to this office, you had not received any response. Subsequently, however, the Executive Director of the Housing Authority sent you an explanation of temporary salary changes pertaining to two employees at the Housing Authority.

Based on the information presented, it appears the Housing Authority constructively denied your requests for records.

In this regard, with respect to requests made before May 3, 2005, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

We note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, we believe that the agency would have acted in compliance with law.

Notwithstanding the foregoing, in our view, every law must be implemented in a manner that gives reasonable effect to its intent. 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in our opinion, would

be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, we believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could initiate a challenge to a constructive denial 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 therefore our opinion that you may now initiate a judicial challenge to the constructive denial of your requests.

We note that the Freedom of Information Law was recently amended, and as of May 3, 2005, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgment must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

We note that the Housing Authority's most recent correspondence to you, dated June 27, 2005, offers the Executive Director's explanation of certain salary changes. While this may be helpful to you, we note that the Freedom of Information Law provides for access to and the production of records, not answers to questions. To that extent, it is our opinion that your request has not yet been fulfilled.

Please note that the Committee on Open Government, while authorized to issue advisory opinions on the application of the Freedom of Information Law and Open Meetings Law to situations such as this has no authority to intervene in the matter, as you request. Because we are authorized to render opinions, we offer the following comments concerning the substance of your underlying requests.

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 our 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, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Most pertinent is the first ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared or imparted pursuant to an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with such an attorney-client relationship may be considered privileged under §4503 of the CPLR. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In the first decision of which we are 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 sum, as you suggested, a blanket denial of access by the Authority would be inconsistent with the language of the Freedom of Information Law and judicial interpretations of that statute. 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 our view, the key word in the foregoing is "detailed." Certainly we would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client. Similarly, because the Public Housing Law (§159) prohibits a Housing Authority from disclosing information identifiable to tenants, we believe that references to identifiable tenants of public housing may be properly deleted. As suggested in both Knapp and Orange County Publications, however, "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.

Second, in regard to cell phone bills requested, pertinent provisions of the Freedom of Information Law are §§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].

When a public officer or employee uses a telephone in the course of his or her official duties, that fact is, in our opinion, relevant to the performance of that person's official duties. On that basis, we believe that the use of a cell phone, i.e., the times and amount of time that cell phones are used, directly relates to the accountability of public employee. In short, if a cell phone is overused, for example, the public in my view has the right to know that to be so. In another decision rendered by the Court of Appeals, Capital Newspapers, supra, in which it considered the intent and utility of the Freedom of Information Law, it was found that that law:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of the state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence or abuse on the part of government officers" (id. at 566).

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 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 our 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, we 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 our opinion, be justifiably deleted.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Housing Authority officials.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Steve Kambic
Madeline Barlow

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15566

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October 17, 2005

Mr. William D. Burdge
04-B-1297
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051-0975

Dear Mr. Burdge:

I have received your letter in which you indicate that you have encountered difficulty in obtaining your medical records from the Social Security Administration.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the New York Freedom of Information Law. That statute 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."

As such, the New York Freedom of Information Law, the statute within the Committee's jurisdiction, applies to records maintained by entities of state and local government in New York; it does not apply to a federal agency, such as the Social Security Administration. It is suggested that you submit a request to the Freedom of Information Officer at the Social Security Administration, citing the federal Freedom of Information and Privacy Acts. The address of that agency is FOIA Office, Room 3-A-6 Operations, 6401 Security Boulevard, Baltimore, MD 21235.

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-15567

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October 18, 2005

Ms. Maureen Cohn
[redacted]

The staff of the Committee on 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. Cohn:

As you are aware, we have received your fax of July 13, 2005 and the materials related to it. You wrote that you had requested copies of property tax maps and a list of property owner names, but that the request was not granted in its entirety. As you later informed this office, the Town Assessor's opinion is that the printout of properties with owners' names was too difficult to copy.

From our perspective, the foregoing raises several issues. In this regard, we 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

New language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Second, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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)].

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)]. Nevertheless, §89(2)(b)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such list would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses or its equivalent may be relevant, and case law indicates that an agency can ask that an applicant certify that the list would not be used for commercial purposes as a condition precedent to disclosure [see Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980); also, Siegel Fenchel and Peddy v. Central Pine Barrens Joint Planning and Policy Commission, Sup. Cty., Suffolk Cty., NYLJ, October 16, 1996].

In the case of a request for an assessment roll, §89(6)is pertinent, for that provision states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

Therefore, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In Szikszay v. Buelow [436 NYS 2d 558, 583 (1981)], it was determined that an assessment roll maintained on computer tape must be disclosed, even though the applicant requested the tape for a commercial purpose, because that record is independently available under a different provision of law, Real Property Tax Law, §516. Since the assessment roll must be disclosed pursuant to the Real Property Tax Law, the restriction concerning lists of names and addresses in the Freedom of Information Law was found to be inapplicable.

Lastly, if the "list" that you requested is maintained or stored electronically, we believe that it could easily be printed. We note, too, that the fee to produce a printout would involve the "actual cost of reproduction" [see Freedom of Information Law, §87(1)(b)(iii)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Town Clerk and the Town Assessor.

I hope that this is helpful. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Town Clerk
Town Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15568

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October 19, 2005

Craig L. Frank, Ph.D.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Dr. Frank:

We are in receipt of your July 12, 2005 request for an advisory opinion concerning public access to individual achievement test answers generated by your son, a sixth grade student in the Webutuck Central School District.

It is our understanding based on the materials you have provided that the District has denied access to a manual outlining administration guidelines for the achievement test, and has refused to provide copies of your son's test answer booklets, based on their assertion that the booklets are copyright protected, however, the District has offered to allow you to review the test answer booklets upon appointment.

First, with respect to the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in our 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, we agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

In our opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department may properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted material would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that

an agency could preclude reproduction of the work. Because the manual and test booklets are disclosed to numerous persons, including students, teachers, administrators and others, it is our view that there is no basis for denying a request to inspect or copy these documents.

At your request, and in an effort to enhance compliance with and understanding of the Freedom of Information Law, we will forward a copy of this opinion to the Superintendent of the Webutuck Central School District, as well as the Board of Education.

I hope that this is helpful. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: Dr. Richard N. Johns, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15569

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October 19, 2005

Mr. Samuel Smolen
c/o Maldonado
5 West Farms Square Plaza - Apt. 5E
Bronx, NY 10460

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Smolen:

We are in receipt of your July 6, 2005 request for an advisory opinion concerning your attempts to gain access to records you made of the Yonkers Police Department and the Office of the Mayor of the City of Yonkers pursuant to the Freedom of Information Law.

Based on the materials which you provided, you requested "copies of all records pertaining to any reported breakins [sic] and damage to parked cars - that were parked and or stored in a garage located at the dead end of Oak Street (#146 Oak Street?) Yonkers - New York, between June 1985 and May 2004?" Having received no response from the Yonkers Police Department, you forwarded a letter to the Mayor's Office requesting his involvement in the matter. To date you have not received a response from either entity.

First, in regard to the lack of response, we 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

New language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Second, with respect to the substance of the request for break-in and property damage records, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. 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 our 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 we are unfamiliar with the record keeping systems of the City of Yonkers, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the City can locate the records sought with reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Department maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Based on our experience, it may be that the City does not maintain the records you requested by address or property owner name, or even by type of incident. If, for example, records pertaining to incidents reported by or to the police are maintained chronologically, not by means of the nature of an incident or its location, the request in our view would not "reasonably describe" the records.

Finally, although we are not authorized to enforce the Freedom of Information Law, in an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this advisory opinion will be forwarded to the Police Department and the Mayor's Office.

I hope that this is helpful. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 19, 2005

Hon. Kathy Vendel
Village Clerk
Village of Webster
28 West Main Street
Webster, NY 14580

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Vendel:

I have received your fax and the materials relating to it. You indicated that you were told by this office that you could not charge a research fee for locating and preparing copies of building permits, but you stated that other municipalities charge such a fee. You asked whether you and the other municipalities may charge such a fee.

In this regard, I offer the following comments.

From my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for searching for records or charging more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fee may be assessed. In this instance, I know of no statute that would authorize a municipality to do so.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute',

> thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

You may distribute this opinion to any person or municipality.

I hope that the foregoing serves to clarify your understanding of the matter that 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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October 19, 2005

Mr. Ismael Gonzalez
04-A-0818
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600

Dear Mr. Gonzalez:

I have received your letter in which you requested information pertaining to "the Supplementary Merit Board."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have custody or control of records generally, and we have no information concerning the Supplementary Merit Board.

When seeking records under the Freedom of Information Law, a request should be directed to the records access officer at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

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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October 19, 2005

Mr. Lloyd M. Weiss
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Weiss:

We are in receipt of your July 18, 2005 request for an advisory opinion concerning your attempts to gain access to transcripts of emergency "911" tape recordings and/or the tape recordings themselves, pursuant to requests you have made to the City of New York under the Freedom of Information Law. Please accept our apologies for the delay in responding.

As you correctly point out, the provisions of Article 6 of the County Law, which includes §308, indicates that §308 does not serve as a basis for a denial of access in this circumstance. That being so, we believe that the provisions of the Freedom of Information Law govern and must be used to determine rights of access, and conversely, the ability of the City to deny access to the records sought.

Subdivision (4) of §308 states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

Although the term "municipality" most often would include a town, city or village, that is not so in this instance. Section 301 of the County Law contains a series of definitions applicable to the provisions that follow, and subdivision (1) defines "municipality" to mean "any county except a county wholly contained within a city and any city having a population of one million or more

persons." That being so, §308(4) applies only to counties outside of New York City and does not apply to the City itself.

Again, since §308 does not apply, the Freedom of Information Law governs rights of access. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. As we understand the facts, two of the grounds for denial are potentially relevant.

Section 87(2)(b) states that an agency may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Clearly you could not invade your own privacy. However, it is possible that disclosure of a tape recording or transcript of a 911 call made by a person other than yourself, or perhaps related records, might result in an unwarranted invasion of that person's privacy. To that extent, records may properly be withheld.

The other exception of significance pertains to communications between an employee of the agency in receipt of an emergency call and another public employee, i.e., a law enforcement officer or emergency services employee, both of whom would be "agency" employees. Specifically, §87(2)(g) authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. In our experience, the communications at issue typically consist of factual information (i.e., fire at 210 Main St.), or perhaps an instruction to staff that affects the public, both of which would be available unless a different exception applies, such as §87(2)(b) concerning unwarranted invasions of personal privacy. On occasion, the communications may also include opinions or recommendations ("I think that a person may be hurt"), which an agency may withhold.

To the extent that you were denied access to redacted portions of the records provided, the Assistant Counsel to the New York City Fire Department correctly pointed out that you had thirty days to appeal to the Deputy Counsel. To the extent that you have received no response from the Fire Department in regards to your request for "the caller's words re that particular 911 call", it is our opinion that your request has been constructively denied, and that you may appeal to the Deputy Counsel.

In an effort to enhance understanding of and compliance with the Freedom of Information Law, a copy of this advisory opinion will be forwarded to the Assistant Counsel and Deputy Counsel of the New York City Fire Department.

I hope that this is helpful. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: Elena Ferrera, Deputy Counsel
John Tsanas, Assistant Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 21, 2005

E-MAIL

TO: John Fitzgerald

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on Open 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:

As you know, we are in receipt of your July 15, 2005 e-mail request for an advisory opinion concerning public access to records of the Office of the State Comptroller's relating to its "Fill for Fields" audit of the Valhalla Union Free School District, as well as those referencing your request for a full audit. As we understand it, your request for a full audit was based on two concerns, (1) the 2003-2004 contingency budget, and (2) lease of the Columbus Avenue School.

It is our understanding based on the materials you have provided that the Comptroller sent a preliminary audit report to the school in January of 2005, and that the Comptroller released a letter in April of 2005 clearing the school of any wrongdoing concerning the two issues you identified. The final audit report has not yet been released. Your requests were denied on the grounds that the materials were "non-final", intra-agency and inter-agency material.

In this regard, we offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the law defines the term "record" expansively to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the breadth of the language quoted above, we believe that the preliminary report in question and the underlying work papers consist of "information...produced...for an agency" and, therefore, constitute "records" subject to rights of access, irrespective of their physical location.

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. Moreover, it is emphasized that the introductory language of §87(2) refers to the authority of an agency to withhold "records or portions thereof" that fall within one or more of the grounds for denial that follow. The language quoted in the preceding sentence indicates that a single record or report might be both accessible or deniable, in whole or in part. We believe that it also requires that agency officials review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

From our perspective, only one of the grounds for denial would be relevant to rights of access. Due to its structure, however, that provision often requires disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld.

There is no exception for "non-final" records. When the report becomes final, we believe that it could be characterized as an external audit and accessible in its entirety pursuant to §87(2)(g)(iv). In our view, insofar as the preliminary report and the underlying work papers consist of statistical or factual data, they would be accessible under §87(2)(g)(iv) [see Polansky v. Regan, 81 AD 2d 102 (1981)], and must be provided.

One of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals was that certain reports could be withheld because they are not

final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is predecisional or in Mr. Brook's words "non-final", 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 addition, in a situation in which opinions and factual materials were "intertwined" within intra-agency materials, Ingram v. Axelrod, a decision rendered by the Appellate Division, Third Department, indicated 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)]; see also Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 48 NY 2d 706, motion of leave to appeal denied (1979); Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985)].

In short, even though statistical or factual information contained within a record may be "intertwined" with opinions, the statistical or factual portions, if any, would in our opinion be available under §87(2)(g)(iv).

I trust this meets with your request. Should you have any further questions, please contact me directly.

CSJD:tt

STATE OF NEW YORK
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October 24, 2005

Mr. Jessie Engles
03-A-4237
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

Dear Mr. Engles:

I have received your letter in which you complained that photographs sent to you were confiscated by the Department of Correctional Services, and you asked for copies of "the law, policy, directive, rule, etc., that protects [your] rights or states such item is not allowed."

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions pertaining to the Freedom of Information Law. The Committee does not have possession or control of records generally, and we do not maintain the information or records that you requested.

When seeking records under the Freedom of Information Law, a request should be made to agency that maintains the records of your interest. Pursuant to the regulations promulgated by the Department of Correctional Services, it is suggested that a request be made to the Superintendent or his designee.

I point out as a general matter, that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

To the extent that the information in question exists in the form of a record or records, most pertinent in my view would be §87(2)(g). Although that provision potentially serves as a basis for denying access, due to its structure, it often requires disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

From my perspective, if there is a policy or rule dealing with the matter that you raised, it would likely be accessible under §87(2)(g)(iii).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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October 24, 2005

Mr. Ernest Hutchins
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hutchins:

As you are aware, I have received your letter and the correspondence attached to it. The materials indicate that you have unsuccessfully attempted to gain access to records pertaining to water levels in the Carry Falls reservoir project. The Federal Energy Regulatory Commission (FERC) asserted that it does not maintain records containing the information of your interest, and the Department of Environmental Conservation (DEC) also informed you that it does not maintain the records that you requested. You also wrote to Brascan Power New York (Brascan) and were informed that it is not subject to the Freedom of Information Act. It is apparently your belief that FERC maintains the records in question.

In this regard, I offer the following comments.

First, the advisory jurisdiction of this office relates to the New York Freedom of Information Law. That law applies to agencies of state and local government, 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, while the DEC clearly is an "agency" subject to this state's Freedom of Information Law, a federal agency, such as FERC, falls outside the coverage of that law. However, FERC is subject to the federal Freedom of Information Act, which applies to federal agency records. Brascan, a private company licensed by FERC, also falls outside the coverage of the New York and federal freedom of information statutes. In short, Brascan is not a government agency.

Second, under the New York Freedom of Information Law, when agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification from the DEC.

Lastly, if you believe that FERC or the DEC maintain records concerning the project, but perhaps not the exact records that you requested, it is suggested that you contact the officials who responded to your requests to attempt to learn of the kinds of records that those agencies maintain. It is possible that those other records may contain information of value to you.

I hope that the foregoing serves to clarify your understanding and regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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October 25, 2005

Mr. William J. McCoy
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McCoy:

We are in receipt of your July 15, 2005 request for an advisory opinion concerning the application of the Open Meetings and the Freedom of Information Laws to the proceedings and records of the County of Monroe Industrial Development Authority ("Authority"). For your information, in 1996 we issued an advisory opinion concerning some of the same issues you raise regarding the Authority (copy attached). In this regard, we offer the following comments.

The definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)]. This is still the law.

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings, such as "agenda sessions," held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature

> intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, when a majority of the Authority is present to discuss Authority business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

We also direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote by phone, by mail, or by e-mail.

Please note that the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as an industrial development authority. 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.

The second issue you raise involves whether the Authority is required to maintain minutes of its proceedings. 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.

We note, too, that there is nothing in the Open Meetings Law or any other statute of which we are 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.

The remainder of your questions relate to the Freedom of Information Law, and specifically, public access to records including e-mails which may have been generated between Authority members, the charter creating the Industrial Development Corporation, and subsidy applications.

In this regard, the Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, we believe that e-mail communications between Authority board members, and the charter of the Industrial Development Authority would clearly constitute "records" that fall within the coverage of the Freedom of Information Law.

As a general matter, and perhaps most importantly, that law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Most pertinent is §87(2)(g), which enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, in our opinion, those portions of inter-agency or intra-

agency e-mails that are reflective of opinion, advice, recommendation and the like could be withheld; the charter, on the other hand, must be disclosed in its entirety, for it consists of factual information and final agency policy or determinations.

There does not appear to be an exception under the Freedom of Information Law which would exempt subsidy applications from disclosure in their entirety. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In our 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, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Department contended that certain reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception different from the provision that might apply in this instance. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection

> of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

It is unlikely that subsidy applications would be exempt from public access in their entirety. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by that agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof...* as long as the requisite particularized showing is made" (id., 277; emphasis added).

The only ground of denial of significance is §87(2)(d), which permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause a 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 submitting the application. 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 our view, the nature of the record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

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" Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410(1995). In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as

> the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

Finally, we point out that the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Open Meetings Law and the Freedom of Information Law. The Committee is not empowered to enforce that statute or compel an agency to grant or deny access to records. In that regard, we offer the following comments.

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, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

New language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of

Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance,

the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: County of Monroe Industrial Development Authority

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1557

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 25, 2005

Mr. Franklin Marone
04-A-5019
Bare Hill Correctional Facility
Caller Box 20
181 Brand Road
Malone, NY 12963

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Marone:

I have received your letter in which you complained that you were denied access to letters written by two named individuals to the Department of Correctional Services which resulted in determination prohibiting you from writing to those individuals. It appears your request was denied because the release of the records could endanger the life or safety of an individual.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective and in the context of the information that you provided, two of the grounds for denial are pertinent.

First, it appears that the records in question are in the nature of complaints or critical comments pertaining to you. In that context, it has generally been advised that the substance of a complaint is available, but that those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy pursuant to §§87(2) and 89(2)(b). I point out that the latter states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or

> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be deleted.

Since the identity of the complainants are known, the letters might properly be withheld in their entirety if indeed, due to its contents, disclosure would constitute an unwarranted invasion of personal privacy. In that situation, for obvious reasons, the deletion of a name or other identifying details would not serve to protect privacy.

Second, also of relevance is §87(2)(f) of the Freedom of Information Law, which states that an agency may withhold records which "could endanger the life or safety of any person." Since the letters appear to have resulted in an action against you, that provision may also be applicable as a basis for withholding the letters.

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-15578

41 State Street, Albany, New York 12231
(518) 474-2518
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October 26, 2005

Mr. Richard E. Sloane
83-A-1845
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

Dear Mr. Sloane:

I have received your letter in which you asked for assistance concerning events that have transpired at your facility concerning yourself and an employee of the facility. You also requested a variety of records from this office concerning that event.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee has neither the expertise nor the jurisdiction to assist you with respect to the events that transpired. I also point out that the Committee does not have control of records generally, and we do not maintain the records that you requested.

Please note that a request for records should be directed to the "records access officer" at the agency that you believe maintains the records. In this instance, the request should addressed to the inmate records coordinator at your facility. That person has the duty of coordinating an agency's response to requests. In such a request, you should provide sufficient detail to enable agency staff to locate the records 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-15579

41 State Street, Albany, New York 12231
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October 26, 2005

Mr. Kevin Smith
87-A-9373
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. Smith:

I have received your letter in which you indicated that you have encountered difficulty in receiving responses to your Freedom of Information Law requests and appeals submitted to the Kings County District Attorney's Office

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could

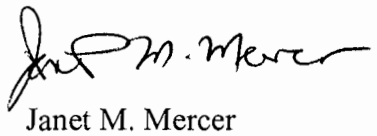
initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15580

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October 26, 2005

Mr. Leopold Siao-Pao
82-B-1697
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508-8245

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Siao-Pao:

I have received your letter in which you asked whether you may consider a failure to respond to an appeal within ten business days of its receipt by an agency a "constructive denial" of the appeal. You also asked if a bill had been passed concerning time limits for responses to requests under the Freedom of Information Law.

In this regard, amendments concerning time limits for responses to requests were added on May 3, 2005 (Chapter 22, Laws of 2005). The amendments relate only to requests made after May 3.

The Freedom of Information Law has long provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

New language added to that provision states that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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-15581

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 26, 2005

Mrs. Dorothy Getman
[redacted]

The staff of the Committee on 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. Getman:

As you are aware, I have received your letter and the materials relating to it. You requested from the City of Gloversville " a copy of the form submitted to the payroll department" by a named employee "for payment of his Holiday buyouts in 2004." You were informed by the Deputy Commissioner of Finance that the information sought "is not in document form."

You have sought an opinion on the matter, and in this regard, I offer the following comments.

First, attendance records pertaining too public employees are clearly available, irrespective of the form in which they exist. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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 records containing the information sought must be disclosed under the Freedom of Information Law.

Second, the response suggests that the records of your interest are not maintained on paper but that the information sought may be stored electronically. Based on the language of the law and its judicial interpretation, I believe that the City is required to disclose the information if it has the ability to do so.

The Freedom of Information Law pertains to agency records, such as those of a city, and §86(4) of the Law defines the term "record" expansively to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations,

> memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than twenty years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disc. On the other hand, if information sought can be generated only through the use of new programs, so doing would in my opinion represent the equivalent of creating a new record.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, I believe that an agency must do so.

Illustrative of that principle is a case 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 employee 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 would conjecture that if the City has the ability to add the information of your interest to its electronic records, it also has the ability to extract it. Further, again, if the City has the ability to extract or generate the information sought with reasonable effort, I believe that it is required to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Janette Ryder, Deputy Commissioner of Finance

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15582

41 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, 2005

Mr. Samuel Diaz
01-A-1950
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. Diaz:

I have received your letter in which you asked if you could obtain copies of your disciplinary records even though you are unable to pay the fees for copying.

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-15583

41 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, 2005

Mr. David Wood
84-A-4819
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. Wood:

I have received your letter in which you indicated that the Nassau County Supreme Court granted you access to an autopsy report. You received a copy of the autopsy report and believe that it was altered.

In this regard, §89(3) of the Freedom of Information Law states in relevant part that, in response to a request for a record, "the entity shall provide a copy of such record and certify to the correctness of such copy if so requested..." From my perspective, the certification required by the Freedom of Information Law does not involve an assertion that the contents of a record are accurate, but rather that a copy of a record made available in response to a request is a true copy. In essence, the certification is supposed to signify that the applicant received an actual copy of a record maintained by an agency, irrespective of the accuracy or the "factuality" of the contents of the record. It is suggested that you seek such a certification.

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-15584

41 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, 2005

Mr. Rodney Walton
96-A-1030
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. Walton:

I have received your letter in which you indicated that you requested records from your facility, but as of the date of your letter to this office, you had not received a response.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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 acknowledged the receipt of a request because more than five business days may have been needed

to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial 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-15585

41 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, 2005

Mr. Augusta Smith
01-A-4227
Green Haven Correctional Facility
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. Smith:

I have received your letter in which you indicated that you requested a copy of a transcript of a 911 call from the Nassau County Police Department and, as of the date of your letter to this office, that you had not received a response.

In this regard, with respect to requests made before May 3, the Freedom of Information Law provided direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law stated in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 was required to 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 was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

I note that there was no precise time period within which an agency must grant or deny access to records. The time needed to do so would be dependent upon the volume of a request, the 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

acknowledged the receipt of a request because more than five business days may have been needed to grant or deny a request, so long as it provided an approximate date indicating when the request would be granted or denied, and that date was reasonable in view of the attendant circumstances, I believe that the agency would have acted 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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial could be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal was made but a determination was not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant exhausted his or her administrative remedies and could

initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

Lastly, with respect to your requests for a transcript of a 911 call, relevant in terms of rights of access is the first ground for denial in the Freedom of Information Law, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308(4), which states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

Based on the foregoing, "records...of calls" means either a recording or a transcript of the communication between a person making a 911 emergency call, and the employee who receives the call. Records of that nature are, in my view, exempted from disclosure by statute.

I 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-15586

41 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, 2005

Mr. Gabriel Midalgo
97-A-7235
Attica Correctional Facility
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Midalgo:

I have received your letter in which you have sought assistance in obtaining your medical records from a correctional facility.

In this regard, the Freedom of Information Law is based upon presumption of access. Stated differently, all records of an agency are available, except to the 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.

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 facility and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

From: Robert Freeman
To: Jill Warner
Date: 10/26/2005 11:54:50 AM
Subject: Re: Question

Hi - -

Section 677 of the County Law (which applies to every county outside of New York City) states, in brief, that autopsy reports and related records prepared by the coroner or medical examiner are available as of right only to a district attorney or the next of kin. I note that the law does not prohibit the disclosure of those records, but rather specifies that only those persons mentioned above have the right to obtain them. In instances in which a request for the autopsy report not sought by the district attorney or next of kin is rejected, the person denied access may seek a court order, which can be granted upon a showing of a "substantial interest" in the records.

I 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

>>> "Jill Warner" <jill_warner@thruway.state.ny.us> 10/26/2005 11:47:07 AM >>>
Sorry to be a pest - am I correct in assuming that autopsy reports are not releasable under FOIL? I tried to find an example on your site but didn't see anything that applied. Thanks.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15588

41 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, 2005

Mr. Barry Alston
93-A-4472
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. Alston:

I have received your letter in which you asked if you could request the same records more than once under the Freedom of Information Law.

It is unclear from you correspondence whether the records were made available to you or whether they were withheld. However, I offer the following comments.

First, if the records were denied, due to the structure of the Freedom of Information Law and the fact that the grounds for withholding records are frequently based on the effects of disclosure, because those effects may change, an initial request for a record might properly be denied, but a second request might have to be granted due to changes in circumstances. For purposes of illustration, such changes may occur in a variety of situations. For instance, if a matter is currently under investigation, disclosure of records might interfere with the investigation and be withheld under §87(2)(e)(i) of the Freedom of Information Law. However, when the investigation has concluded, the records that were properly withheld in the first instance may become accessible, for disclosure would no longer result in any interference.

Second, if the records were made available, nothing in the Freedom of Information Law pertains specifically to repeated requests made by an applicant for records that have already been disclosed. However, in those circumstances, it has been advised that an agency inform the applicant that the records sought have been made available and that ensuing requests for the same items will be considered moot and will not be answered.

Lastly, the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)] may also be relevant to the situation. In Moore, it was found that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence" (id., 678).

I hope that I have been of 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-15589

41 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, 2005

Mr. Leonard Feldman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Feldman:

We are in receipt of your July 21, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to records maintained by the Village of Briarcliff Manor.

Based on the information you provided, it appears that the Village now requires you to put all your requests for records in writing. In this regard, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a *written request* for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Based on the foregoing, it is our opinion that an agency may require that a request be made in writing.

Nevertheless, we believe that every law must be implemented in a manner that gives reasonable effect to its intent. In its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure.

That being so, the regulations promulgated by the Committee on Open Government, which have the force of law, provide in part that an agency may accept oral requests [see 21 NYCRR

§1401.5 (a)]. In our view, agencies should be consistent in treatment of requests. If a request for certain records is required to be made in writing by one person, others, in our opinion, should be required to do the same. When a request is routine and requires no search, an agency can waive the requirement of submitting a written request. For instance, if a clerk's minute book is kept close at hand, and a person asks to inspect the minutes, there may be no reason for making or requiring a written request. On the other hand, if a request involves numerous records, a substantial search, or the need to review records to determine the extent to which they must be disclosed, it is clear that a written request may be required.

It has been advised that an agency cannot require that a request be made on a prescribed form. To reiterate, the Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (21 NYCRR 1401.5), require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Neither the Law nor the regulations refers to, requires or authorizes the use of standard forms. Accordingly, it has long been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records.

Based on the information you provided, you have requested a copy of a "document for the Village personnel" which was prepared by an outside consultant. Without knowing more about the nature of the document, we offer the following general 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, although §87(2)(g) potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> I. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could be withheld.

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals, the State's highest court, stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][I], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

In a more recent case that reached the Court of Appeals, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that the report "was never adopted" or may not have been "relied upon or cited" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" (id. 276-277).

It may be that at least some elements of the document requested, in accordance with the direction offered by the Court of Appeals, would consist of statistical or factual information that must be disclosed, irrespective of its status as draft or non-final.

In an effort to enhance their understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Village officials.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: Hon. Stephanie Ippoliti, Village Clerk
Mr. Michael S. Blau, Village Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4063
FOIL-AO-15590

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October 26, 2005

E-MAIL

TO: Barry E. Lamb

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. Lamb:

I have received your letter concerning actions of the Village of Bayville Zoning Board of Appeals. You indicated that the Board on May 25 "heard an application" for a variance and thereafter approved a motion "to close the hearing and reserve judgement." On June 10, a "Notice of Decision granting the variance was issued, stating that the motion to grant the variance was made and unanimously approved at this same meeting." You wrote that you "FOILed the transcript for this case and none was provided, and that it is your belief "that whether they reserved decision and then approved without a public vote or closed the case and then re-opened it after all opposition had left, that they have violated the Open Meetings Law."

From my perspective, the facts as you presented them are unclear. However, I offer the following general remarks.

First, 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. If there is no transcript of the hearing, there would be no obligation to prepare such a record on your behalf.

Second, in my view, the Board's decision could only have been made in public at a meeting held in accordance with the Open Meetings Law.

Lastly, I note that numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards of appeals. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those

deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law.

Due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than §108(1). Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a zoning board of appeals must conduct its business in public.

I hope that I have been of assistance.

RJF:tt

cc: Zoning Board of Appeals
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 26, 2005

Hon. Julia Guerrieri
Geneva Town Clerk
3750 County Road 6
Geneva, NY 14556

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Guerrieri:

I have received your letter and the materials relating to it. You have raised the following two questions:

> "1) If Paychex handles the Town payroll; must they comply with FOIL requests for W-2?
>
> 2) The Town hires a private company of certified public accountants; must they comply with FOIL requests for 1099 forms?"

In this regard, first, the Freedom of Information Law applies to agencies, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law is applicable entities of state and local government; it does not apply to private companies, such as Paychex or a firm of certified public accountants.

Second, however, the scope of the Freedom of Information Law often expands beyond the physical possession of records by agencies, because §86(4) defines the term "record" to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Perhaps most significant is a decision rendered by the Court of Appeals in which it was found that materials maintained by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Insofar as records maintained by Paychex or a CPA firm are "kept, held, filed, produced or reproduced...*for* an agency", such as the Town, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform a private company into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it maintains are maintained for an agency, and that those records fall within the coverage of that statute.

In circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation described in the correspondence, insofar as a private company maintains records for the Town, to comply with the Freedom of Information Law and the implementing regulations, the records access officer must either direct the company to

disclose the records in a manner consistent with law, or acquire the records from the company in order that he or she can review the records for the purpose of determining rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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October 27, 2005

Mr. Eric Claudio
97-A-2128
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Claudio:

I have received your letter in which you complain that you have encountered difficulty in obtaining a copy of a death certificate from a district attorney's office. You indicated that the death certificate was introduced as an exhibit during your trial and that portions were redacted. You also stated that you have a copy of the death certificate without redactions.

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."

One such statute, §4174(1)(a) of the Public Health Law, pertains to access to death records, and 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, when accessible, are available only under the circumstances prescribed in the Public Health Law.

Second, 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

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 27, 2005

Mr. Timothy Vail
89-C-1513
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. Vail:

I have received your letter in which you indicated that you requested records under the Freedom of Information Law from the court clerk in Broome County and that, as of the date of your letter to this office, you had not received a response.

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) of the Law defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, courts are outside the coverage of the Freedom of Information Law.

That is not to suggest that court records are not available to the public, for there are other provisions of law that may require the disclosure of court records. For instance, §255 of the Judiciary Law states generally that a clerk of a court must search for and make available records in his custody. It is suggested that your resubmit your request to the court clerk who maintains custody of the records, citing an appropriate provision of law 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
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October 27, 2005

Mr. Randy S. Campney
03-A-3264
Bare Hill Correctional Facility
Caller Box 20, 181 Brand 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. Campney:

I have received your letter in which you complained that you were denied access to an investigation report and other records pertaining to your arrest by the New York State Police. You also indicated that you that there are other records that were not made available. You stated that you have copies of those records because you previously obtained them from that agency.

Having researched our files, I have located a copy of the determination of your appeal sent by the New York State Police. The records or portions of the records were denied on the basis that they were complied of law enforcement purposes which would reveal non-routine investigative techniques and procedures and would also constitute an unwarranted invasion of personal privacy of persons other than yourself. It also appears that other records responsive to your request could not be found.

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.

Reports prepared by an agency would 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. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Perhaps most significant is §87(2)(e) which authorizes an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

It is likely that subparagraph (iv) would be most pertinent to the matter. In a recent decision, it was held that the purpose of §87(2)(e)(iv):

> "is to prevent violators of the law from being apprised of nonroutine procedures by which law enforcement officials gather information (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572, 419 N.Y.S.2d 467, 393 N.E.2d 463). 'The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe' (id., at 573, 419 N.Y.S.2d 467, 393 N.E.2d 463). '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 [law enforcement] personnel***' (id., at 572, 419 N.Y.S.2d 467, 393 N.E.2d 463 [citations omitted]). Even though

> a particular procedure may be 'time-tested', it may nevertheless be nonroutine (id., at 573, 419 N.Y.S.2d 467, 393 N.E. 2d 463). Likewise, a highly detailed step-by-step depiction of the investigatory process should be exempted from disclosure" [Spencer v. New York State Police, 591 NYS 2d 207, 209-210, 187 AD 919 (1992)].

Additionally, the Court found that:

> "petitioner is not entitled to disclosure of portions of the file relating to the method by which respondent gathered information about petitioner and his accomplices from certain private businesses because the disclosure of such information would enable future violators of the law to tailor their conduct to avoid detection by law enforcement personnel" (id. 210).

As such, to the extent that the kinds of harmful results described by the Court could arise by means of disclosure, the records in question could in my opinion be withheld.

Second, assuming that the records sought involving interviews of witnesses have not been previously disclosed, I believe that the §87(2)(b) would be applicable. That provision 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.

Third, 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).

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 27, 2005

Mr. Patrick Dwyer
05-A-1800
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. Dwyer:

I have received your letter in which you asked whether you may obtain records from the Westchester County District Attorney's Office or a court clerk that had previously been turned over to your attorney. You indicated that your requests to your attorney for the records have not been answered.

In this regard, I offer the following comments.

First, 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. I believe that you may seek and obtain records from a court, and it is suggested that any such request be made to the clerk, citing an applicable provision of law as the basis for the request.

Second, with a respect to a request made to an "agency" subject to the Freedom of Information Law, 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)].

It is suggested that you submit a request for the records to the Office of the District Attorney explaining that your attorney has not responded to your requests for 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
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October 27, 2005

Mr. James B. Kelly
02-A-5527
Bare Hill Correctional Facility
Caller Box 20, 181 Brand 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. Kelly:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records pertaining to your arrest from a variety of agencies. At the time of your arrest, you were known by another name, but since then you have legally changed your name. One agency denied your request for the records because it would constitute "an unwarranted invasion of personal privacy." Another agency denied your request because the records were previously released to your attorney. You also stated that several agencies never responded 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible.*" Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Third, §89(2)(c)(iii) states that unless a different ground for denial can properly be asserted, "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy...when upon presenting reasonable proof of identity of a person seeking access to records pertaining to him." As such, it is suggested that you resubmit your request and provide proof of your identity.

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

FOIL-AO-15597

41 State Street, Albany, New York 12231
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October 27, 2005

Mr. Frederic Jennings
71-A-0441
Arthur Kill Correctional Facility
2911 Arthur Kill Road
Staten Island, NY 10309

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jennings:

I have received your letter in which you asked for assistance in obtaining a copy of the sentencing judge's recommendations, as well as the recommendation from the District Attorney's Office.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant under the circumstances is the first ground for denial, §87(2)(a), which states that an agency may withhold records or portions that "are specifically exempted from disclosure by state or federal statute. I would conjecture that the recommendations may fall within the coverage of §390.50 of the Criminal Procedure Law concerning pre-sentence reports. 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 is governed by the same rules of confidentiality. Any person, public or

> private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. It is suggested that you review that statute.

I hope that I have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

STATE OF NEW YORK
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October 27, 2005

Mr. Lee Ross
788 Haverstraw Road
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 facts presented in your correspondence.

Dear Mr. Ross:

We are in receipt of your July 18, 2005 "complaint" against the Town of Ramapo for failing to provide records requested pursuant to the Freedom of Information Law. Please be advised that the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Freedom of Information Law and the Open Meetings Law. The Committee is not empowered to enforce the Law or penalize a public body for any failure to comply.

That being said, we offer the following comments in regard to your concerns.

First, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Third, to the extent that the Supervisor maintains "a calendar, date book, or appointment book", §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals 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).

Similarly, 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, based upon the language of the Law and its judicial interpretation, we believe that a datebook would constitute a record subject to rights conferred by the Freedom of Information Law.

Fourth, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From our perspective, two of the grounds for denial are relevant to an analysis of rights of access.

Section 87(2)(g) enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could be withheld.

Also relevant is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In our opinion, schedules indicating appointments, meetings and the like in which the a public employee has engaged are relevant to the performance of that person's official duties. Therefore, to the extent that the record in question pertains to the performance of the Superintendent's official duties, we believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy with respect to the public employee who maintains or is the subject of the datebook.

We direct your attention to a decision that described the intent and utility of the Freedom of Information Law. Specifically, in Capital Newspapers v. Burns, the Court of Appeals, in considering the routine functioning of government held 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" (supra, 565-566).

Perhaps the most direct precedent is Kerr v. Koch (Supreme Court, New York County, NYLJ, February 1, 1988). A newspaper reporter was granted access to the "public schedules" of New York City's former Mayor, Edward Koch. However, other more detailed "private" schedules were withheld. In that decision, the court posed the following question: "Will granting access to the Mayor's appointment calendars without redaction urged by respondents as proper, result in an unwarranted invasion of personal privacy?" In response to the question, it was stated that:

> "Avoidance of disclosure under FOIL cannot be had by simply placing in documents the unilateral description, 'private' as this would '*** thwart the entire objective of FOIL by creating an easy means of avoiding compliance.'"

Further, in granting access to the records, the Court found that:

> "It appears that some private appointment calendar material has been produced for petitioner, with redactions that reduce the worthiness of those documents.
>
> "There is no suggestion of scandal attached to those who are associates of the Mayor, whether they be servants of the public or private individuals. Accordingly there is nothing unwarranted,

> excessive or unjustifiable in revealing the names of those with whom the Mayor had appointments from time to time. As a public person invested with a public trust, he should be accountable for his associations."
>
> "The passion for secrecy found in the redaction of names from private schedules of the respondents, where luncheon meetings have been billed to the Mayor's expense account, is not justified under the circumstances described here. Mixed, as they appear to be with public documents and records, all kept by the agency of the Mayor's Office, the private schedules are vulnerable under the Freedom of Information Law. Otherwise, liberal construction of FOIL is forfeited and the exemptions in the law are at the mercy of a narrow interpretation."

If an entry in an appointment book is unrelated to the performance of one's official duties, for example, as in the cases of a reference to an appointment with a doctor or spouse, we believe that those portions of the record could be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Fifth, one of your questions concerns access to records involving expenditures and reimbursements, particularly those of the Supervisor's and Finance Director's. In our opinion, only one of the grounds for denial is pertinent to an analysis of rights of access to those kinds of documents. While §87(2)(a) through (i) might permit that certain aspects of the records in question may be withheld, we believe that the remainder must be disclosed.

In the context of the records at issue, we believe that they are clearly relevant to the performance of the official duties of the Superintendent and other Town officials. Consequently, with the exception of personal details, they must in our view be disclosed. Examples of the kinds of personal details that could be deleted prior to disclosure of the remainder of the records would be such items as home addresses, social security numbers and personal credit card numbers. It also noted that although the front side of cancelled checks have been found to be public, it has been held that the back of the checks may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. The court found, in essence, that inspection of the back of a check could indicate how an individual chooses to spend his or her money, which is irrelevant to the performance of that person's duties(see Minerva v. Village of Valley Stream, Supreme Court, Nassau County, May 20, 1981).

The last issue you raise is the accessibility of cellular phone records of the Supervisor. 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 our view, this phrase 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, we believe that it also imposes an obligation on an agency to review

records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of the situation that you described, we do not believe that a "blanket denial" of access would be consistent with law, and we are not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in

the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: Hon. Chris Sampson
Hon. Christopher P. St. Lawrence
Ilan Schoenberger

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 27, 2005

Mr. Michael P. McCooey
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McCooey:

As you know, we are in receipt of your July 27, 2005 e-mail request for an advisory opinion concerning the applicability of the Freedom of Information Law to the Town of Lumberland's "manual".

According to the information you provided, the Town of Lumberland has indicated that its manual is confidential, and that while you were employed as the Town Constable you were disciplined for, among other things, discussing constable policy and procedures.

In this regard, there is little decisional law that deals directly with those provisions. Although, in a letter to the Executive Director of the Committee on Open Government, dated July 21, 1977, written by the sponsor of the revised Freedom of Information Law, former Assemblyman Mark Siegel indicated that §87(2)(g) is intended to insure that "any so-called 'secret law' of an agency be made available", such as the policy "upon which an agency relies" in carrying out its duties. Typically, agency guidelines, procedures, staff manuals and the like provide direction to an agency's employees regarding the means by which they perform their duties. Some may be "internal", in that they deal solely with the relationship between an agency and its staff. Others may provide direction in terms of the manner in which staff performs its duties in relation to or that affects the public, which would ordinarily be public. To be distinguished would be advice, opinions or recommendations that may be accepted or rejected. An instruction to staff, a policy or a determination each would represent a matter that is mandatory or which represents a final step in the decision making process.

While instructions to staff that affect the public and final agency policies or determinations are generally accessible, there may be instances in which those records or portions thereof may be withheld.

Perhaps most relevant would be §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a

> specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. It may be that there are some investigative techniques or procedures contained in the records which could be characterized as "non-routine", but it is unlikely that disclosure of the entire manual would result in the harmful effects of disclosure described above.

The other provision that may be pertinent as a basis for denial is §87(2)(f). That provision permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." If, for example, disclosure of an instruction to staff or policy would jeopardize the lives or safety of public employees or others, the cited provision might be applicable.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: Supervisor Ligreci
Brian Edwards, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 27, 2005

Ms. Jean A. Black
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Black:

We are in receipt of your July 26, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to records requested from the Batavia City School District.

Based on the information you provided, you have requested a copy of the list of names, addresses, titles and salaries of all District employees, as is required to be maintained pursuant to the Freedom of Information Law, §87(3)(b). The District has indicated that it will provide the list to you either in paper form, for $.25 per page, or in electronic format for $25.00, based upon a previous opinion issued by this office.

In this regard, §87(1)(b)(iii) of that statute provides that agencies, by rule, may establish fees "which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute." Based on the foregoing, there are two standards for charging fees. One involves photocopies up to nine by fourteen inches, in which case an agency may charge up to twenty-five cents per photocopy, irrespective of its cost; and the second involves "other records", those that cannot be photocopied (i.e., tape recordings, computer disks and tapes, etc.), in which case the fee is based on the actual cost of reproduction. If another statute, an act of the State Legislature, authorizes an agency to charge a different fee, that provision would supersede the Freedom of Information Law.

With respect to clerical or other costs associated with responding to a request for copies of records, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. In addition to §87(1)(b) of the Law, the regulations state in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

(a) There shall be no fee charged for the following:
(1) inspection of records;
(2) search for records; or
(3) any certification pursuant to this Part" (21 NYCRR 1401.8).

Further, §1401.8(c)(3) states in relevant part that "the actual reproduction cost...is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries."

Based upon the foregoing, I believe that a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or disk) to which data is transferred.

Although allusion has been made to personnel costs in some judicial decisions, none specifies that those costs may clearly be assessed. Moreover, unless and until a court finds to the contrary, the regulations promulgated by the Committee have the force and effect of law. That being so, I do not believe that an agency may charge for its personnel or administrative costs in determining the amount of a fee based on the actual cost of reproduction when responding to a request made under the Freedom of Information Law.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Mr. Rozanski at the Batavia City School District.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: Scott C. Rozanski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15601

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, 2005

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:

We are in receipt of your July 31, 2005 request for an advisory opinion concerning the applicability of the Freedom of Information Law to certain records maintained by the City of Buffalo.

Based on the information you have provided, the City has asked that you clarify your request for records indicating hazardous conditions by identifying the type of hazard in addition to an address. Apparently you previously requested all hazard records pertaining to a list of certain property addresses. It is unclear from the City's denial of your request how records are maintained, but it could be that records are maintained by address, in which case, to the extent that they are required to be made available under the Freedom of Information Law, we offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if, for instance, there is no "list of hazards" the City would not be required to prepare a list on your behalf.

Second, however, if the records are kept by address in the manner that you suggested, we believe that a request to obtain copies of the hazard materials would "reasonably describe" the records as required by §89(3) of the Freedom of Information Law. As you may be aware, it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In our 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.

To extent that the records sought can be located with reasonable effort, we believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files as requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

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 City Clerk.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt
cc: Hon. Gerald Chwalinski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15602

41 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, 2005

Mr. Jeffrey Armentrout
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Armentrout:

We are in receipt of your July 21, 2005 request for an advisory opinion concerning access to records maintained by the Chautauqua County Sheriff's Academy.

It appears that you seek access to records which reflect the Academy's investigation into your employment background, based on information which you provided to the Academy in a background questionnaire.

In this regard, it is noted at the outset that this office is authorized to provide advice and opinions relating to public access to government records. Neither the Committee nor its staff is empowered to compel an agency to grant or deny access to records, to issue a "ruling", or to determine that an agency failed to comply with the law. However, in an effort to provide guidance, and assuming that the records were prepared for Chautauqua County, we 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 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 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 and the content of those materials serve as the primary factor in ascertaining rights of access. Nevertheless, 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 our view, this means that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

In sum, the denial of your request may have been overbroad and it is possible that various aspects of the records sought must be disclosed. Further, while the Academy *may* withhold records in accordance with the grounds for denial, the Court of Appeals has pointed out that the Freedom of Information Law is permissive; an agency may choose to disclose, notwithstanding its ability to deny access to records [Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562 (1986)].

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15603

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 28, 2005

Ms. Theresa Murphy
[redacted]

Dear Ms. Murphy:

In response to your telephone request earlier this morning, enclosed please find copies of two advisory opinions which I hope will be helpful to you.

In addition, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Please call if you have any further questions.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15604

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 28, 2005

Mr. Ismael Gonzalez
04-A-0818
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600

Dear Mr. Gonzalez:

I have received your letter in which you requested information pertaining to a variety of records.

In this regard, as you are aware, 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 have no materials concerning the records of your interest.

When seeking records under the Freedom of Information Law, a request should be directed to the records access officer at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. I note, too, that §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

Lastly, the statute that you cited is the federal Freedom of Information Act, which applies only to federal agencies. While that Act authorizes an agency to waive fees in certain circumstances, there is no similar provision in the New York Freedom of Information Law. Therefore, an agency subject to the New York Freedom of Information Law may charge its established fees, even if a request is made by an indigent inmate (see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that 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-15605

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

October 28, 2005

Mr. Frank D'Antuono
96-B-1852
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. D'Antuono:

I have received your letter in which you indicated that you have encountered difficulty in obtaining records from the Nassau County Civil Court.

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. It is suggested that you resubmit your request to the court clerk, 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

BY: Janet M. Mercer
Administrative Professional

JMM:RJF:jm

From: Robert Freeman
To: [redacted]
Date: 11/1/2005 9:16:01 AM
Subject: Good morning - -

Good morning - -

The issue that you raised is addressed in §87(1)(b)(iii) of the FOIL concerning fees. In brief, that provision authorizes an agency to charge a maximum of twenty-five cents per photocopy up to nine by fourteen inches. The fee for copying any other kind of record, such as tape recordings or information maintained electronically, would be the actual cost of reproduction. When information is transferred onto a disk, for example, the actual cost would likely involve computer time (which would be minimal) and the cost of the disk.

I hope that this helps.
Bob

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-1560 7

41 State Street, Albany, New York 12231
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November 1, 2005

Mr. Gregory Radcliffe
96-A-7960
Wende Correctional Facility
P.O. Box 1187
Alden, NY 14004

Dear Mr. Radcliffe:

I have received your letter in which you requested your "visitation list from the Westchester County Jail" from this office pursuant to the federal Freedom of Information and Privacy Acts.

In this regard, first, the federal acts that you cited apply only to federal agencies. The applicable statute in this instance is the New York Freedom of Information Law.

Second, 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 of records generally. In short, we cannot provide the record of your interest because we do not possess it.

Third, if a list is maintained that pertains only to your visitors, I believe that it would be accessible. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, if such a list exists, none of the grounds for denial would be applicable.

If, however, no separate visitors list is maintained with respect to each inmate, rights of access may be different. For instance, if a visitor's log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the facility have the ability to locate portions of the log of your interest, I believe that those portions of the log would be available. If such records are not kept in plain sight and cannot ordinarily be viewed, it is my opinion that those portions of the log pertaining to persons other than yourself could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In short, the identities of those with whom a person associates is, in my view, nobody's business.

A potential issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records sought. In considering that standard, the State's highest court has found that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

I am unaware of the means by which a visitors log, if it exists, is kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors, it would likely be easy to retrieve that information, and the request would reasonably describe the records. On the other hand, if there are chronological logs of visitors and each page would have to be reviewed in an effort to identify visitors of a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

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, which shall be reasonable under the

> circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Sheriff, Westchester County

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1560 8

41 State Street, Albany, New York 12231
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November 1, 2005

Mr. Ralph Ratto
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Ratto:

We are in receipt of your July 30, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to a list of names and addresses maintained by the Village of Floral Park.

Based on the information provided, you have been denied access to the Aircraft Noise Abatement Mailing List on the ground that the Village Records Access Officer is "unable to determine whether an unwarranted invasion of privacy will result from its disclosure."

It is our opinion that because the Village has denied access to the list, it has determined that disclosure would result in an unwarranted invasion of personal privacy. In that regard, we offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law.

As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

The only exception to the principles described above involves a provision pertaining to the protection of personal privacy. 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)].

As indicated earlier, the status of an applicant and the purposes for which a request is made are irrelevant to rights of access, and an agency cannot ordinarily inquire as to the intended use of records. Due to the language of §89(2)(b)(iii), however, 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 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.).

In this instance, since you apparently provided assurances that the list would not be used for commercial or fund-raising purposes, we believe that the list must be disclosed. Such a list would not divulge intimate personal information about those whose names are included. When a list of names and addresses pertains to individuals bearing certain characteristics (i.e., race or ethnicity, age, medical

condition, interest in certain health related matters, etc.), disclosure of names associated with those characteristics would likely constitute an unwarranted invasion of personal privacy, irrespective of the intended use of a list. Nevertheless, there is no indication that the list that you seek would identify individuals by means of an association with a characteristic of an intimate or highly personal nature. In short, there appears to be no basis for withholding the list.

Second, the only other example of an unwarranted invasion of personal privacy relevant to the facts presented is §89(2)(b)(iv), which states that an unwarranted invasion of privacy includes:

> "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it..."

In construing that provision, it has been found that its language is conjunctive. As stated by the state's highest court, the Court of Appeals, in Gannett Co. Inc. v. County of Monroe, which considered the same provision in the original Freedom of Information Law, "the exception...is available only if there is both proof of such hardships and it is established that the records sought are not relevant or essential to the ordinary work of the agency or municipality. The latter branch of this conjunctive requirement cannot be met in this instance" [emphasis added by court, 45 NY 2d 954, 955 (1978)]. Similarly, in another case that involved §89(2)(b)(iv), the court cited the Gannett decision and found that the application of that provision required that the "test" of finding that disclosure would result in personal or economic hardship and that the information was not relevant to the work of the agency could not be met. Therefore, it was held that the records were required to be made available [Flatbush Development Corp. v. Insurance Department, Sup. Ct., New York County, NYLJ, October 7, 1983].

In our opinion, whether a person supports the abatement of aircraft noise hardly represents an intimate or personal detail that could, if disclosed, result in personal or economic hardship. Moreover, the records appear to be relevant to the work of the agency. Consequently, again, we believe the list must be disclosed.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15609

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November 1, 2005

E-MAIL

TO: Mr. Matthews

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. Matthews:

I have received your inquiry concerning a request for a tape of a 911 call relating to an accident in which your daughter was involved, as well as a police officer's field notes pertaining to the accident.

In this regard, first, as a general matter the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant with respect to a tape recording of a 911 call is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308(4), which states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

Based on the foregoing, "records...of calls" means either a recording or a transcript of the communication between a person making a 911 emergency call, and the employee who receives the call. Records of that nature are, in my view, exempted from disclosure by statute. As §308(4) is

written, the County Sheriff's office cannot disclose the tape, even though it may relate to your daughter.

Second, with respect to the officer's notes, relevant is a decision rendered by the Court of Appeals, the state's highest court, that dealt in part with police officers' memo books [Gould v. New York City Police Department, 89 NY2d 267 (1996)]. In short, although it was contended that the memo books were the personal property of police officers, the Court determined that they constitute "records" that fall within the coverage of the Freedom of Information Law.

Perhaps most pertinent in considering rights of access to the officer's notes based on the facts as you provided them would be §87(2)(g). That provision authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Third, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), require that each agency designate one or more "records access officers." The records access officer has the duty of coordinating an agency's response to requests. While I believe that the person in receipt of your request should either have responded directly in a manner consistent with law or forwarded your request to the records access officer, it is suggested that you contact the County's public information office to ascertain the name of the records access officer and that you resubmit your request to that person.

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

> the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Lastly, if you have not done so already, it is suggested that you obtain a copy of the motor vehicle accident report, for it may include information of interest to you.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4069
FOIL-AO-15610

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November 1, 2005

E-MAIL

TO: Bill Murawski

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. Murawski:

I have received your letter concerning the status of the Humane Society of New York under the Freedom of Information and Open Meetings Laws. You wrote that the Society is a not-for-profit organization and a member of the Mayor's Alliance for New York City Animals.

In this regard, the Freedom of Information and Open Meetings Laws apply to governmental entities. Specifically, the former pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since the Society 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 Society. As such, although the Society may choose to disclose records, it would not be required to do so by the Freedom of Information Law.

Similarly, 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."

Again, based upon my understanding of the Society, it would not constitute a public body, for it does not perform a governmental function. Therefore, meetings of the Society and its Board would not be governed by the Open Meetings Law and the Board could, in its discretion, choose to conduct public or private meetings.

Lastly, while the Society may not be required to give effect to the Freedom of Information Law, that statute includes all agency records within its scope, 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, records transmitted by or pertaining to the Society that are maintained by or for an agency fall within the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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November 1, 2005

Mr. Ethan Emery
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Emery:

I have received your letter in which you referred to a request made under the Freedom of Information Law to the City of Mt. Vernon Police Department that has not been answered.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period,

> depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15612

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November 2, 2005

Ms. Loretta M. Berger
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Berger:

I have received your letter in which you questioned the propriety of a request made under the Freedom of Information Law to Knickerbocker Village, Inc., which is a limited dividend housing company.

From my perspective, the primary issue involves whether Knickerbocker Village is subject to and required to comply with the Freedom of Information Law. As you indicated, it was formed pursuant to Article IV of the Private Housing Finance Law. Having reviewed Article IV, I do not believe that limited dividend housing companies fall within the scope of the Freedom of Information Law. That statute is applicable to agencies, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, in general, the Freedom of Information Law pertains to entities of state and local government. The receipt of government funds or, as in this instance, the regulation or oversight of private entities by a government agency, does not transform those private entities into government agencies. In short, based on the terms of Article IV of the Private Housing Finance Law, I do not believe that Knickerbocker Village or other limited dividend housing companies constitute "agencies" or that, therefore, they are required to give effect to the Freedom of Information Law.

I note, however, that records pertaining to Knickerbocker Village that are maintained by an agency, such as the Division of Housing and Community Renewal, clearly fall within the coverage

of the Freedom of Information Law. Consequently, while Knickerbocker Village may not be required to disclose its records, the Division's records pertaining to Knickerbocker Village would be subject to rights of access conferred by the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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November 3, 2005

Mr. Kenneth A. Blanchard
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Blanchard:

We are in receipt of your August 10, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to requests and appeals you have made regarding certain records and information from the Village of Lindenhurst.

Based on the information you provided, the Village has failed to respond to your request to set forth Village Code and New York State Code provisions pertaining to particular issues of interest to you, on a grid which you supplied with your request.

In this regard, we point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information Law 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.

Also, from our perspective, a request for a law that may applicable might not be viewed as a request for a record, but rather an interpretation of law that requires a judgment. Depending on the nature of the matter, any number of provisions might be applicable, and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Further, two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 10 of the Village Ordinances", no interpretation or judgment is necessary, for sections of the law appear numerically and can readily be identified. That kind of request, in our opinion would involve a portion of a record that must be disclosed. Again, a request

for laws that might be applicable is not, in our view, a request for a record as envisioned by the Freedom of Information Law.

We suggest that you contact the Village clerk for the purpose of either reviewing the Village Code or seeking an index to or table of contents in order that you might find whether any applicable provisions of law exist.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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November 3, 2005

Mr. Robert E. O'Connor
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. O'Connor:

We are in receipt of your August 9, 2005 request for an advisory opinion concerning the application of the Personal Privacy Protection and Freedom of Information Laws to requests you have made for records of the New York State Department of Transportation.

Based on the information you provided, the Department "enclosed copies of 197 pages of documents, but access to others was denied, and certain that were provided were redacted," citing sections 87(2)(b) and 89(2)(b) of the Public Officers Law. The Department responded to your appeal, concluding that "the sections cited were proper authority" and "[i]t is clear . . . that the withheld documents could also properly fall within this [§87(2)(g)] category of records."

While it is possible that some elements of the records sought might justifiably be withheld, the expressed basis for the affirmance of the denial is, in our opinion, inadequate. In this regard, we offer the following comments.

First, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and requires that an agency's determination of an appeal must either grant access to the records or "fully explain in writing... the reasons for further denial." In this instance, the determination following your appeal merely repeated citations referenced in the initial denial of access and added another. From our perspective, the response to the appeal could not be characterized as having "fully explained" the reasons for further denial. We note that the New York City Department of Investigation was criticized in Lewis v. Giuliani (Supreme Court, New York County, NYLJ, May 1, 1997) for a denial of access also based merely on a reiteration of the statutory language of an exception, stating that "DOI may not engage in mantra-like invocation of the personal privacy exemption in an effort to 'have carte blanche to withhold any information it pleases'". In this instance, the unwarranted invasion of personal privacy exception appears to have been used in much the same manner.

Second, it is apparent that you may have misinterpreted a conversation that you had with our Executive Director with respect to the identification of documents which an agency refuses to provide. In that regard, there is nothing in the Freedom of Information Law or judicial decisions 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, we are 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)].

Based on the August 3, 2005 correspondence from the Department denying your appeal, it appears you have exhausted your administrative remedies and may initiate a challenge under Article 78 of the Civil Practice Law and Rules. Although the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Freedom of Information Law, this office is not empowered to determine appeals or compel an agency to grant or deny access.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Mr. Peter Loomis.

I trust this meets with your request. If you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt
cc: Peter Loomis

STATE OF NEW YORK
DEPARTMENT OF STATE
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November 3, 2005

Mr. Dan Rundle
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Rundle:

I have received your letter concerning problems relating to the Town of Ava and the Town Board.

You wrote that, during the "comment period" at Town Board meetings, you requested information involving the amount of money expended "to fight the dump being built in [y]our town" and for attorneys retained by the Town. However, you were told by the Supervisor that "there is no way they will go through the Town records to give [you] that information." You added that a different resident requested the same information and received no response. You also referred to petitions submitted "to get a referendum vote on whether the Town should keep spending money on the dump fight", but that there has been no response.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions pertaining to the Open Meetings and Freedom of Information Laws. We do not have the knowledge or jurisdiction to offer advice concerning the obligation of a Town to conduct a referendum. However, insofar as the issues that you raised relate to the statutes within the Committee's advisory jurisdiction, I offer the following comments.

First, although an agency, such as a town, may accept a request for records that is made verbally, it may require that requests be made in writing. When an appropriate 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Second, a possible issue involves the requirement in §89(3) of the Freedom of Information Law, which states that an agency must "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Town, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the Town can locate the records sought with a reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Town maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Third, insofar as a request reasonably describes records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except

to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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.

As a general matter, books of account, bills, invoices, contracts, and similar records relating to expenditures by a government agency are accessible, for none of the grounds for denial would apply. With respect to records involving payments to attorneys, it is possible that portions of those records might be withheld. Most pertinent in my view is the first ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared or imparted pursuant to an attorney-client relationship [see e.d., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with such an attorney-client relationship may be considered privileged under §4503 of the CPLR. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.)...

> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters being communicated and, consequently, was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)"

In short, in Knapp, portions of the records containing the time billed and the amount paid for the time were found to be available, and it was also 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.

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-1506

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 3, 2005

Mr. Timothy Dane Cooper
99-A-1690
Mohawk Correctional Facility
6100 School Road
Rome, NY 13442-8451

Dear Mr. Cooper:

As you requested, your letter of October 31 addressed to several officials, including the Secretary of State, has been forwarded to the Committee on Open Government. Please be advised that Mr. Daniels resigned from his position of Secretary of State. Having reviewed your letter, I offer the following comments.

First, the Freedom of Information Law of New York does not require that agencies supply information *per se* or that agency staff provide information in response to questions. Rather, the Freedom of Information Law pertains to requests for existing records, and §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. Further, in my view, a request for bonds "used to underwrite [your] time in prison" is not a request for a record that involves the Freedom of Information Law.

Second, the same provision requires that an applicant must "reasonably describe" the records sought. Therefore a request must include sufficient detail to enable agency staff to locate and identify the records in which an applicant is interested. From my perspective, insofar as your letter might involve a request for records, it does not reasonably describe the records of your interest.

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-15017

41 State Street, Albany, New York 12231
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November 3, 2005

Mr. Eric DeLeon
96-A-6822
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

Dear Mr. DeLeon:

I have received your letter in which you asked for the name of the person at the New York City Police Department to whom you should direct an appeal. You indicated that, as of the date of your letter to this office, you had not received a response to your request from the Police Department.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

The person designated by the New York City Police Department to determine appeals is Jonathan David.

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-15618

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November 3, 2005

Mr. Augustine Papay, Jr.
Private Investigator
P.O. Box 528
Port Jervis, NY 12771

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Papay:

We are in receipt of your August 4, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to various records which you have requested from the Office of the Special Commissioner of Investigation for the New York City School District.

Based on the information you provided, including responsive correspondence from the Commissioner's Office, your request for 57 separate records has been denied, with the exception of one partially redacted intra-agency letter, which was considered a final agency determination. The appeal officer's letter affirms the denial of access by repeating the record access officer's reference to Public Officers Law §§87(2)(e)(i), 87(2)(e)(iii) and 87(2)(e)(iv), adding, "I find that this information is exempt from disclosure under §87(2)(g), with the exception of the document previously provided to you pursuant to subsection (iii) of that section."

While it is possible that some elements of the records sought might justifiably be withheld, the expressed basis for the affirmance of the denial is, in our opinion, inadequate. In this regard, we offer the following comments.

First, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and requires that an agency's determination of an appeal must either grant access to the records or "fully explain in writing... the reasons for further denial." In this instance, the determination following your appeal merely repeated citations referenced in the initial denial of access. From our perspective, the response to the appeal could not be characterized as having "fully explained" the reasons for further denial. We note that the New York City Department of Investigation was criticized in Lewis v. Giuliani (Supreme Court, New York County, NYLJ, May 1, 1997) for a denial of access also based merely on a reiteration of the statutory language of an exception, stating that "DOI may not engage in mantra-like invocation of the personal privacy

exception, stating that "DOI may not engage in mantra-like invocation of the personal privacy exemption in an effort to 'have carte blanche to withhold any information it pleases'". In this instance, the "law enforcement purposes" exceptions appear to have been used in much the same manner.

Second, in a related vein, the denial appears to be inconsistent with the language and intent of the Freedom of the Freedom of Information Law and its judicial construction. In short, it appears to evince a refusal to follow or recognize the clear direction provided by not only in Lewis, but also by the Court of Appeals in Gould v. New York City Police Department, [87 NY 2d 267 (1996)].

Perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In our 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, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the Commissioner's Office has engaged in a denial of access in a manner which, in our view, is equally inappropriate. We are 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 Commissioner's Office for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

Several provisions were cited to justify the denial of your request. Subparagraphs (iii) and (iv) of §87(2)(e) indicate that an agency may withhold records "compiled for law enforcement purposes" to the extent that disclosure would:

> "iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Although we am unaware of the contents of the records withheld under the provisions quoted above, as is so in conjunction with other exceptions to rights of access, they, too have been construed in a manner that would maximize disclosure while enabling agencies to deny access to prevent some sort of harm or impediment to law enforcement functions.

For example, to qualify as a confidential source, it has been held that an individual must have been given a promise of confidentiality. In a case involving records maintained by the New York City Police Department relating to a sexual assault, it was held that:

> "NYPD has failed to meet its burden to establish that the material sought is exempt from disclosure. While NYPD has invoked a number of exemptions with might justify its failure to supply the

> requested information, it has failed to specify with particularity the basis for its refusal...
>
> "As to the concern for the privacy of the witnesses to the assault, NYPD has not alleged that anyone was promised confidentiality in exchange for his cooperation in the investigation so as to qualify as a 'confidential source' within the meaning of the statute (Public Officers Law §87[2][e][iii]" [Cornell University v. City of New York Police Department, 153 AD 2d 515, 517 (1989); motion for leave to appeal denied, 72 NY 2d 707 (1990).

The leading decision concerning §87(2)(e)(iv), Fink v. Lefkowitz, involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

From our perspective, as the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques, which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. Insofar as those potentially harmful effects would not arise by means of disclosure, however, §87(2)(e)(iv) would not serve as a basis for a denial or access.

The remaining ground for denial cited by the Commissioner's Office, §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 our view be withheld.

The Court of Appeals in Gould, supra, analyzed the provision quoted above and found that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).
>
> "Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions

> of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.
>
> "However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials.

In sum, in consideration of the preceding commentary, we believe that the denial of your request was overbroad and that various aspects of the records sought must be disclosed. Further, the Commissioner's Office may disclose records, even though there may be authority to deny access. As the Court of Appeals has pointed out, the Freedom of Information Law is permissive; an agency may choose to disclose, notwithstanding its ability to deny access to records [Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562 (1986)].

Finally, to the extent that the Commissioner's Office has denied your request for copies of records submitted by your client, it is our opinion that there is no basis in the law for non-disclosure, upon receipt of payment of the appropriate fee.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15619

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November 4, 2005

Mr. Joseph Roulhac
99-A-3096
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. Roulhac:

I have received your letter in which you sought guidance concerning a request made under the Freedom of Information Law to the Mt. Vernon Hospital that was not answered.

In this regard, the Freedom of Information Law generally applies to entities of state and local government. The Mt. Vernon Hospital is a not for profit private institution and, therefore, is not subject to the requirements of that law. Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15620

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 4, 2005

E-MAIL

TO: Paul Jacobs

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jacobs:

We are in receipt of your August 22, 2005 e-mail request for an advisory opinion concerning the application of the Freedom of Information Law to records which have been requested from the Conklin Volunteer Fire Department.

In your capacity as records access officer, you are generally concerned with the accessibility of records reflecting personal information on "calls" made, including medical information, and Fire Department data, and the application of fees to a requesting party. In that regard, we offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Further, the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. This phrase indicates that a single record or report may contain both accessible and deniable information. In our opinion this phrase imposes an obligation upon agencies to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Second, of primary relevance is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

> "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article...."

In addition, §89(2)(b) lists a series of examples of unwarranted invasions of personal privacy, the first two of which pertain to:

> "i. disclosure of employment, medical or credit histories or personal references or applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

From our perspective, a record of a medical emergency call consists in great measure of what might be characterized as a medical record or history relating to the person needing care or service (see Hanig v. NYS Department of Motor Vehicles, 79 NY 2d 106 (1992)]. Therefore, in our opinion, portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, for disclosure of a name coupled with those details in our view represents a personal and somewhat intimate event in the individual's life. We believe that other aspects of the records, however, such as the locations of calls or addresses, should be disclosed. In our view, an emergency call, particularly when sirens or flashing lights are used, is an event of a public nature. When a fire truck or ambulance travels to its destination, that destination is or can be known to those in the vicinity of the event. In essence, we believe that event is of a public nature and that disclosure of an address or a brief description of an event would not likely constitute an unwarranted invasion of personal privacy. Nevertheless, the personally identifiable details described earlier could in our view be withheld.

Also potentially relevant may be §87(2)(e), which enables an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

On rare occasions, as in the case of arson, it is possible that portions of the reports might be withheld, for example, on the ground that disclosure would interfere with an investigation.

In response to your second query about the accessibility of data which is not "compiled" by the Fire District, it is noted that the Freedom of Information Law pertains to agency records, such as those of a fire district, and §86(4) of the Law defines the term "record" expansively to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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, doing so would in our opinion represent the equivalent of creating a new record.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, we 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 FOIL request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

Perhaps most pertinent is a decision rendered a year ago concerning a request for records, data and reports maintained by the New York City Department of Health regarding "childhood blood-level screening levels" (New York Public Interest Research Group v. Cohen and the New York City Department of Health, Supreme Court, New York County, July 16, 2001; hereafter "NYPIRG"). The agency maintained much of the information in its "LeadQuest" database. In that case, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'
>
> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

When requests involve similar considerations, in our 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 regard to your third question about fees, §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. In addition to §87(1)(b) of the Law, the regulations state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR 1401.8)."

Further, §1401.8(c)(3) states in relevant part that "the actual reproduction cost...is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries."

Based upon the foregoing, we believe that a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or disk) to which data is transferred.

Although allusion has been made to personnel costs in some judicial decisions, none specifies that those costs may clearly be assessed. Moreover, unless and until a court finds to the contrary, the regulations promulgated by the Committee have the force and effect of law. That being so, we do not believe that an agency may charge for its personnel or administrative costs in determining the amount of a fee based on the actual cost of reproduction when responding to a request made under the Freedom of Information Law.

Lastly, when a record is available in its entirely under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, as suggested earlier, 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, we 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, we believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record.

When accessible and deniable information appears on the same page, preparing a redacted copy and charging the established fee, in our opinion, is justifiable. Further, it has been held that an agency may seek payment for copies in advance of preparing the copies (see Sambucci v. McGuire, Supreme Court, New York County, Nov. 4, 1982).

I trust this meets with your request. Should you have any further questions, please contact me directly.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15621

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November 4, 2005

E-MAIL

TO: Ervin R. Piner

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Piner:

We are in receipt of your August 22, 2005 e-mail request for assistance in obtaining statistical information regarding the pass rate for a particular "content specialty test". Please note that the Committee on Open Government is authorized to issue advisory opinions pertaining to the application of the Freedom of Information Law. This office is not empowered to determine appeals or compel an agency to grant or deny access. Similarly, the Committee does not have custody or control of records.

Based on your description of the matter, it appears that the test was administered by the New York State Education Department, however, it is not known whether the Education Department maintains the statistical information you require. Accordingly, by copy of this letter we direct your request to the Records Access Officer of the Education Department, Nellie Perez. If the Department has prepared statistics relating to the exam, we believe that they would be accessible pursuant to §87 (2)(g)(i) of the Freedom of Information Law.

I trust this meets with your request. Should you have any further questions, please contact me directly.

CSJ:tt

cc: Nellie Perez
NYS Education Department
Education Building
Albany, NY 12234

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15622

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 7, 2005

Michael J. Skoney
Lewis & Lewis, P.C.
800 Cathedral Park Tower
37 Franklin Street
Buffalo, NY 14202-4107

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Skoney:

I have received your letter and the correspondence attached to it. The materials indicate that you submitted a request to the City of Batavia on May 16 for building permits and an application to construct a drugstore. Following the receipt of your request, you were asked to complete the City's request form. You did so on June 21, but as of the date of your letter this office, you had received no response to the request.

You have asked for an opinion on the matter, and in this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Second, 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 short, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

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, your request is routine in nature, and I do not believe that any of the grounds for denial of access would be applicable.

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: City Council
Michael P. Smith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15623

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November 7, 2005

Mr. Rodney Walton
96-A-1030
P.O. Box 2001
Malone, NY 12953

Dear Mr. Walton:

I have received your recent letter. Although its content is not entirely clear, it appears that you are appealing a denial of access to records by the New York City Police Department to the Committee on Open Government.

In this regard, the Committee 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. Further, this office does not have custody or control of records generally.

The provision concerning the right to appeal a denial, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

For your information, the person designated to determine appeals at the New York City Police Department is Mr. Jonathan David, whose office is also located at One Police Plaza.

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-4073
FOIL-AO-15624

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 7, 2005

Ms. Molly M. Roach
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Roach:

We are in receipt of your August 18, 2005 request for an advisory opinion concerning the applicability of the Open Meetings and Freedom of Information Laws to your local board of education meetings and records.

In particular, you seek advice concerning the grounds for entering into an executive session, the accessibility of records evidencing spending by the school district and district policies, and statistical information which may be maintained by the district. In that regard, we offer the following comments.

Every meeting of the school board must be convened as an open meeting, and §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

In our opinion, it is likely that a court would find that the ground cited by your local school board for entering into executive session, "the structure of high school and middle school departments" would not qualify for discussion in an executive session. Further, we offer additional remarks concerning one of the grounds for entry into executive session that arises frequently.

Although it is used often, the word "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. By way of background, in its original form, §105(1)(f) of the Open Meetings Law 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. The Committee consistently advised, however, 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 now 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 section 105(1)(f), we 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 one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, or, as in this instance, the structure of departments, we do not believe that §105(1)(f) could be asserted, even though the discussion related to "personnel". For example, if a discussion involves staff reductions or layoffs which can be accomplished according to seniority, the issue in our view would involve matters of policy. Similarly, 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. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in our view be appropriately held.

Further, due to the insertion of the term "particular" in §105(1)(f), 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 our 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.

With regard to your requests for records, the Freedom of Information Law is applicable to all agency records and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

New language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days

indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Finally, with regard to your question about the accessability of records reflecting the number of student suspensions and the number of students suspended in a particular school year, it is not known whether the district maintains such records, and a school district is not required to create a record in response to a request. Further, it is important to remember that statistical records maintained by a school district which would otherwise be accessible pursuant to §87(2)(g)(I) of the Freedom of Information Law, may be made confidential in part due to the application of the Family Educational Rights and Privacy Act (20 USC §1232g; "FERPA").

In brief, as you may be aware, 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 our view be withheld from the public in order to comply with federal law. Accordingly, insofar as disclosure of the statistics or other records pertaining to the numbers of suspensions you have identified above would make a student's identity easily traceable, the records cannot be disclosed to the public.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 8, 2005

Mr. Rey Olsen
WSGNY, Inc.
P.O. Box 7022
New York, NY 10150

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Olsen:

We are in receipt of your August 25, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to redacted portions of a cost-benefit analysis report prepared by the New York City Department of Environmental Protection, and other related documents.

In particular, you contend that the underlying "studies" were performed during the period from 1990 to 1993, and that due to their age, their release would not impact imminent contract awards. You assert that appraisals performed "12 to 15 years ago would be of no value today as the market has changed so dramatically for the better." These observations, in our opinion, would not render the materials accessible.

To reiterate our position with regard to the accessibility of opinions and advice after a decision has been made or a determination reached, there is only one instance, in our opinion, in which records reflecting opinion and advice must be released. As indicated by the court in Miller v. Hewlett-Woodmere Union Free School District, Supreme Court, Nassau County, NYLJ, May 16, 1990, when the decision maker clearly indicates that a certain opinion or recommendation was adopted as the decision, disclosure would be required. Absent that kind of endorsement, the opinions, advice or recommendations contained within inter-agency or intra-agency materials may be withheld.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
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November 8, 2005

Mr. Frederick A. Jones
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jones:

We are in receipt of your request for an advisory opinion concerning the application of the Freedom of Information Law to certain records requested from the New York City Department of Housing Preservation and Development.

To the extent that you may not have received records in response to your request, or that the Department has failed to send them, we 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Further, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Based on the information you have provided concerning your conversation with the Deputy Counsel, it may be that the Department has not denied your request, but provided all responsive documents. It is our hope in issuing this opinion and forwarding a copy of Mr. Appel and Ms. Rifenburg that the matter will be clarified appropriately. Please note that while the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Freedom of Information Law, this office is not empowered to enforce the provisions and/or to compel an entity to comply with the law.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Mr. Donald M. Appel
Ms. Mary-Lynne Rifenburg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 8, 2005

Mr. Craig Bloom
NBC Universal
30 Rockefeller Plaza
New York, NY 10112

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Bloom:

We are in receipt of your September 2, 2005 request for an advisory opinion concerning the availability of certain documents which were the subject of a decision by Justice Charles Ramos in People v. Grasso, Index No. 401620/04 (Supreme Court, New York County, April 4, 2005).

Based on the materials you provided, your request to the Attorney General involved "[t]ranscripts and/or notes of interviews conducted in the preparation of 'Report to the New York stock Exchange on Investigation Relating to the Compensation of Richard A. Grasso'" transmitted to his office, along with "[o]ther supporting materials transmitted to [his] office in connection with said report, as referenced in the footnotes to the report." Your request was denied on the ground that such documents were compiled for law enforcement purposes and disclosure would interfere with law enforcement investigations or judicial proceedings.

The transcript of proceedings before Justice Ramos, which you submitted to this office, reflects Justice Ramos' decision to deny the New York Stock Exchange's motion to mark interview memos confidential. The memos were produced by the NYSE during its internal investigation and interview of 60 or 70 witnesses (id., at 34-40). Not having a copy of the above referenced Report, it is not clear whether the documents you requested from the Attorney General are the same as the interview memos Justice Ramos refused to declare confidential on April 4, 2005. Nevertheless, we offer the following remarks.

It is emphasized at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The Attorney General relies on paragraph (e)(i) to deny access, which states that an agency may withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings..."

From our perspective, the exception quoted above is limited in its application. First, we believe that it pertains only to records that were "compiled for law enforcement purposes." There are many instances in which records are prepared in the ordinary course of business but later are used in or are relevant to a law enforcement investigation. In our view, the character of the records does not change due to their significance to an investigation. For instance, in a case in which minutes of meetings of a municipal board were subpoenaed by a district attorney for presentation before a grand jury and were later requested under the Freedom of Information Law, the court rejected the district attorney's contention that the records were compiled for law enforcement purposes. On the contrary, because the minutes were prepared in the ordinary course of business and had been accessible to the public prior to their use in an investigation, they were no less accessible thereafter merely because they were being used in conjunction with an investigation (King v. Dillon, Supreme Court, Nassau County, December 19, 1984).

Second, even when records have been compiled for law enforcement purposes, the ability to deny access is limited to those portions of the records which if disclosed would result in the harmful effects described in subparagraph (i). As the transcript reveals, while present at the hearing, the Attorney General's Office failed to object to Justice Ramos' determination that the records were not confidential. It seems, therefore, that the issue of whether there is any appreciable impact on the Attorney General's functions has already been judicially determined and cannot validly be asserted at this time.

With regard to the remainder of the documents requested, it is questionable whether materials collected by the NYSE and transmitted to the Attorney General in the same manner as the interview memos may be protected from disclosure pursuant to §87(2)(e)(i). No evidence was offered by the Attorney General to suggest that disclosure would interfere with the investigation of or judicial proceeding involving Mr. Grasso. In fact, as we understand the situation, the records were disclosed to the defendant, Mr. Grasso.

If that is so, it is difficult to envision how or the extent to which §87(2)(e) could serve as a basis for denying access. Although not relied on by the Attorney General at the hearing or in denial of your request, §87(2)(e)(iii) permits an agency to withhold records "compiled for law enforcement purposes and which if disclosed", would "identify a confidential source or disclose confidential information relating to a criminal investigation." In consideration of the kinds of records at issue, this office has in the past advised that §87(2)(e)(iii), as well as two other exceptions, may be pertinent in ascertaining rights of access or, conversely, an agency's authority to deny access. Those other exceptions are §87(2)(b) and (f), which respectively permit an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" or "could endanger the life or safety of any person."

In many instances, the deletion of names or other identifying details is sufficient to protect privacy and safety and to safeguard against the possibility of identifying a witness or informant. Based on the information you have provided, however, the Attorney General did not consider or assert those exceptions. That being so, we offer the following remarks relative to the appeal process following a denial of a request for records.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Ms. Stacey B. Rowland.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Stacey B. Rowland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 9, 2005

Mrs. Mee Jo
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mrs. Mee Jo:

We are in receipt of your August 27, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to certain records have requested from the Corning City Police Department.

Based on your request and accompanying materials, the Police Department denied your request for "a NYS Statues [sic] that Corning PD adopted and using [sic] for its guidelines and/or policy instead of its own", stating that it does not have its own regulations, that it is bound by state statutes, and that is it prohibited from reproducing any NYS statutes due to copyright issues. Rather than appealing the denial of your request, you modified your request to read "All of the Section Numbers of NYS Statues [sic] that Corning PD adopted and uses instead of its own."

It is our opinion that a request for copies of laws, and/or a list of laws that may be applicable might not be viewed as a request for records, 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 General Municipal Law", no interpretation or judgment is necessary, for sections of the law appear numerically and can readily be identified. That kind of request, in our opinion would involve a portion of a record that must be disclosed. Again, a request for laws that might be applicable is not, in our view, a request for a record as envisioned by the Freedom of Information Law.

It is suggested that you contact the City Clerk for the purpose of reviewing New York State statutes, or visit a local library to gain access and review statutes of your interest.

We hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15629

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November 9, 2005

Mr. David A. McKerrow, 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. McKerrow:

This is in response to your September 1, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to certain records which you have requested from the City of Utica.

Based on the information you provided, while the City has represented to you that it has provided to you "each and every document maintained by The City of Utica that pertains to any pothole or defect that may exist on South Park Dr. in the City of Utica", you continue to believe that the City has not provided all responsive documents. You characterize the records which the City has provided as "summaries" based on records maintained by various departments.

If the City provided summaries of documents that are required to be made available under the Freedom of Information Law, we believe that the underlying records would be accessible. While we see no evidence which would indicate the existence of underlying 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.

We hope that this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 9, 2005

Mr. Brian Harrod
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Harrod:

We are in receipt of your September 2, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to certain requests for records which you have made to the Village of Port Chester. According to the dates on the materials which you attached, it appears that you wrote to this office before giving the Village enough time to respond to your requests of August 25, 2005. Although there may already have been a response from the Village, we 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, the agency must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

We trust this meets with your request.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15631

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November 9, 2005

E-MAIL

TO: Howard Schuman

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. Schuman:

I have received your letter concerning a denial of access to a certain record by the Town of Washington. According to your letter, the chairman of a "wetlands ordinance" committee who is also a Town Board member indicated during an open meeting that the Town Attorney wrote notes on the committee's latest revision of an ordinance. Since the Board member made the announcement in public, it is your view that the attorney's notes must be made public.

The receipt of the document and the announcement made by the Board member do not, in my view, lead to a conclusion that the notes must be disclosed. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Two of the grounds for denial, those referenced in your letter, are pertinent to an analysis of rights of access.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged

under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101(c) of the Civil Practice Law and Rules. In my view, there need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that the notes consist of legal advice or opinion provided by counsel to the client, they would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

The other ground for denial of potential significance, §87(2)(g), permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical

or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the notes consist of an expression of opinion or advice. If that is so, they may be withheld under §87(2)(g).

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 10, 2005

Ms. Lorre Rasmussen
[redacted]

The staff of the Committee on 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. Rasmussen:

We are in receipt of your September 9, 2005 correspondence in which you request an advisory opinion concerning application of the Freedom of Information Law to certain records requested from the Town of Hamptonburgh.

It is your understanding that the Town "restricts access of documents to the public until after the Planning Board has seen them." This unwritten practice has been confirmed by the Town Attorney, David Donovan, who has asked you to request an advisory opinion from this office.

There is nothing in the Freedom of Information Law which permits the Town to restrict access to records based on their receipt of or review by the Planning Commission. In this regard, we offer the following comments.

First, the Freedom of Information Law pertains to all agency records. Section 86(4) of the Law defines the term "record" expansively to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In a case in which an agency claimed, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that contention. As stated by the Court of Appeals:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

A claim that the materials are not records subject to the Freedom of Information Law, or not records yet, would in our opinion clearly conflict with the interpretation of that statute by the State's highest court.

Second, in a related vein, 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 the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in our view serve to enable an agency to justify withholding a record. In this instance, we are unaware of any statute that would render the records you request exempted from disclosure by statute. It is also noted that it has been held that a rule or regulation promulgated by an agency cannot be cited as a "statute" that would serve to exempt records from disclosure [see 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) and Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976)].

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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant

access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond

twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Mr. David Donovan.

We hope that this has been helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: David Donovan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 10, 2005

Mr. John Kwasnicki
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.Dear

Mr. Kwasnicki:

We are in receipt of your September 29, 2005 e-mail and your October 3, 2005 fax requests for advisory opinions pertaining to the application of the Open Meetings and Freedom of Information Laws to various proceedings and records of the Town of Tuxedo and Village of Sloatsburg.

By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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 our 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 ability to enter into executive sessions.

"Hearings" on the other hand, are distinct from meetings. The former involves a gathering of a majority of a public body for the purpose of conducting public business collectively, as a body. As such, meetings are ordinarily held for the purpose of discussion, deliberation, taking action and the like. A "hearing" typically is held to enable members of the public to express their views on a particular subject, i.e., a budget, the proposed comprehensive plan, etc. While meetings of public bodies are subject to quorum requirement pursuant to the Open Meetings Law, we are unaware of any general requirements that a quorum of a public body must be present at a public hearing. Further, woth respect to your questions, our review of Town Law 272-a(6) and Village Law §7-722(6) governing public hearings for comprehensive plans, reveals no such requirement.

With respect to minutes of "workshops", as well as other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear in our 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. Similarly, we are unaware of any requirement that the Town or the Village maintain minutes of public hearings.

Finally, you inquire as to whether provisions of the federal Homeland Security Act require Village and Town Clerk to "schedule and document date" all meetings taking place within municipal public buildings, and whether such a schedule would be accessible to the public pursuant to the Freedom of Information Law. We are not aware of any such provision in the Homeland Security Act. If there were such a provision, requiring the creation of such a record, it is our opinion that the Freedom of Information Law would apply and require that record to be accessible to the public barring any applicable exception.

We hope that this helps clarify your understanding of these matters.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
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November 10, 2005

Mr. David Cole
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cole:

We are in receipt of your September 12, 2005 and November 4, 2005 correspondence, in which you request an advisory opinion concerning the application of the Freedom of Information Law to certain records which you have requested from the Chemung County Jail.

Based on the materials attached to your requests, the County provided numerous records to you and interpreted your request to include 43 pages which you then later determined you did not wish to receive. Although the Committee on Open Government is not authorized to determine whether the County's interpretation was reasonable, based on our experience, it is our opinion that a court would find such interpretation reasonable.

There is nothing in the Freedom of Information Law that requires the County to provide copies of materials prior to receiving payment for them. Conversely, there is nothing in the Law which requires payment for copies prior to making them. Based on our experience, however, the County responded in a professional manner to your request. As a general matter, we often recommend that agencies require the receipt of payment prior to releasing copies. In an effort to avoid unnecessary copies, the alternative would be for you to make an appointment to visit the Chemung County Jail and review the documents before they are copied, in order to determine their relevancy to your request.

With regard to your request for our advice concerning the time frame within which the County is required to respond to your request, we 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

As you note, there is a provision in §89(4)(a) that requires the County to forward a copy of an appeal and the ensuing determination to the Committee on Open Government.

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Per your request, we will forward copies of this response to the Chemung County Jail.

We hope this has been helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Karen Miner
Michael Krusen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15635

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 10, 2005

Mr. Timothy Dane Cooper
99-A-1690
Marcy Correctional Facility
P.O. Box 8451
Rome, NY 16442

Dear Mr. Cooper:

I have received your letter of November 8 and the materials attached to it. As your comments pertain to my response to you of November 3, I cannot add to the remarks made in that letter. However, with respect to your request to a clerk of a court, I note that the Freedom of Information Law is not applicable.

That statute pertains to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "...the courts of the state, including any municipal or district court, whether or not of record."

Based on the foregoing, the courts are beyond the coverage of the Freedom of Information Law. Since you also cited the federal Freedom of Information Act, I note that it pertains only to federal agencies and also excludes the courts from its coverage.

This is not to suggest to that court records are not accessible to the public. On the contrary, many are available under different provisions of law (see e.g., Judiciary Law, §255). When seeking records from a court clerk, it is suggested that you do so by citing an applicable provision of law as the basis for the request.

Enclosed, as you requested, is your original request to the clerk of the court.

I hope that the foregoing serves to clarify your understanding.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15636

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 10, 2005

E-MAIL

TO: John Visentin

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. Visentin:

I have received your letter in which you described agencies' recalcitrance in honoring your request that certain records requested under the Freedom of Information Law be emailed to you.

Based on §305(1) of the State Technology Law, an agency is not required to do so. That provision states in part that "government entities are authorized and empowered, but not required, to produce, receive, accept, acquire, record, file, transmit, forward and store information by use of electronic means."

As you may be aware, the Freedom of Information Law is expansive in its scope, for §86(4) defines the term "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v.

Buelow, 436 NYS2d 558 (1981)]. "Form" or "format" in my view involves the medium by which information is stored; whether information is stored on paper or on a computer tape or in a computer disk, it constitutes a "record."

In what may be the leading decision relating to an agency's obligations regarding disclosure in an electronic medium, Brownstone Publishers Inc. v. New York City Department of Buildings [166 AD2d 294 (1990)], the question involved an agency's duty to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division:

> "The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" (id. at 295).

In another decision, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" [Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992); aff'd 190 AD2d 1067 (4th Dept., 1993)].

In short, assuming that the conversion of format can be accomplished, that the data sought is available under FOIL, and that the data can be transferred from the format in which it is maintained to a format in which it is requested, an agency would be obliged to do so.

In this instance, however, you are asking that records 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 fax or e-mail. Again, based on §305(1) of the State Technology Law, 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 clarify your understanding and that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15637

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 14, 2005

E-Mail

TO: Peter Golden

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. Golden:

As you are aware, I have received your letter of September 29. You indicated that you are a member of the Guilderland School District Board of Education, and that you are having difficulty obtaining information concerning "a number of expenditures", including "retainer payments" and agreements.

In this regard, first, when a member of a public body, such as a board of education, seeks records unilaterally, and not at the direction of the body, I believe that he or she has the same rights as a member of the public.

By way of background, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a

board, member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

Second, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create or prepare a record in response to a request. Therefore, if there are no records, figures or breakdowns containing information of your interest, District staff would not be required to create new records on your behalf.

Third, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Records such as retainer agreements, contracts, invoices and the like are accessible, for none of the grounds for denial would be applicable or pertinent.

Lastly, each agency is required to designate one or more persons as "records access officer" (see 21 NYCRR Part 1401). The records access officer has the duty of coordinating an agency's response to requests, and requests should generally directed to that person.

I hope that I have been of assistance.

RJF:jm

cc: Records Access Officer
Gregory Aidala, Superintendent

FOIL AO 15638

November 16, 2005

Mr. Thomas Koehler
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Koehler:

We are in receipt of your e-mail request for an advisory opinion concerning limits placed on public participation at a hearing conducted by Fairport Central School District.

Based on the information you provided, the District held a "Public Scope Hearing for the District 2005 Capital Improvement Project .... as part of the State Environmental Quality Review Act process." You noted that the Superintendent directed that those making public comments limit their comments to five minutes. You specifically inquired about the Superintendent's ability to limit the number of times a member of the public could speak, albeit, in your estimation, still within the five minute limit.

Although public bodies have the right to adopt rules to govern their own proceedings [see e.g., Education Law §1709(1)], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in our view, would be unreasonable.

Here, the Superintendent permitted you to speak, as he did everyone else who wished to do so. Since you were given the opportunity to speak for up to five minutes, but chose not to do so, it does not appear that your treatment would have been unreasonable.

We hope this helps clarify the matter.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15639

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November 16, 2005

Michael L. Saltzman, Esq.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Saltzman:

We are in receipt of your September 30, 2005 e-mail "complaint" and request for assistance concerning the application of the Freedom of Information Law to certain records requested from the Town of Yorktown Planning Department.

Please note that while the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Freedom of Information Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. Nonetheless, with regard to your unanswered requests, we offer the following comments.

First, we note by way of background that §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In short, we believe that the Town Board has the overall responsibility of ensuring compliance with the Freedom of Information Law and that the records access officer for the Town has the duty of coordinating responses to all 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, we believe that when an official or the Planning Department receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Per your request, a copy of this opinion will be forwarded to officials of the Town of Yorktown.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: Planning Board
Mr. Sweeney, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15640

41 State Street, Albany, New York 12231
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November 16, 2005

Mr. Rey Olsen
WSGNY, Inc.
P.O. Box 7022
New York, NY 10150

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Olsen:

We are in receipt of your November 10, 2005 follow-up e-mail.

To reiterate, there is only one instance, in our opinion, in which records reflecting opinion and advice must be released. As indicated by the court in Miller v. Hewlett-Woodmere Union Free School District, Supreme Court, Nassau County, NYLJ, May 16, 1990, when the decision maker clearly indicates that a certain opinion or recommendation was adopted as the decision, disclosure would be required. Absent that kind of endorsement, the opinions, advice or recommendations contained within inter-agency or intra-agency materials may be withheld [see McAuley v. Board of Education, City of New York, 61 AD2d 1048 (1978), aff'd 48 NY2d 659].

As you relate, the Commissioner "issued a press release stating that her agency was implementing Bluebelts in Staten Island as they were less expensive than conventional storm water sewer systems pursuant to studies and recommendation of her agency." In our opinion, referencing studies and recommendations, and in fact relying on studies and recommendations does not rise to the level of adopting a particular opinion or recommendation as the Commissioner's decision. We do not believe that the Commissioner's statement indicates her endorsement of the particular cost-benefit analysis report you seek.

Accordingly, we maintain our opinion that although the Commissioner is not required to disclose the report, the law is permissive, and it may be disclosed without penalty.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt
cc: Robin M. Levine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15641

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 16, 2005

Hon. David J. Sheen
Supervisor
Town of Southport
1139 Pennsylvania Avenue
Elmira, NY

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sheen:

We are in receipt of your September 27, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to records maintained by the Town of Southport. As you relate, fulfilling the request would take numerous hours, require a search through three years worth of documents, and would require review of each document to determine whether any information may merit redaction prior to its release.

From our 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. We 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 our 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 we are unfamiliar with the record keeping systems of the Town, to extent that the records sought can be located with reasonable effort, we 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 our opinion meet the standard of reasonably describing the records. In the context of this request, if the Town maintains all records of arrests and tickets issued by a particular officer, based on the officer's name, it would be a simple task to locate the requested records. If records are not maintained by officer name, but rather are kept chronologically, and there are only a few officers employed by the Town, locating the records might involve only one or two additional steps. To the extent that it might involve a search of many officers' records and thousands of documents, based on the holding by the State's highest court, it is our opinion that an agency is not required to engage in that kind of effort.

As you note, several grounds for denial may be relevant, and it is emphasized that many of them are based upon potentially harmful effects of disclosure. 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 our view, be considered "confidential". For instance, an incident report or 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 our opinion, detailed reports, 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.

Further, 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 our opinion, even though reference to those records is not made in the current statute, we believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it was held by the state's highest court, the Court of Appeals, some ten 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)].

Finally, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the

> acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Insofar as the request involves records reasonably described, the complexity of the analysis which may have to be performed relative to each document may slow the agency's response time. In addition, an agency may require payment in advance when copies of records have been requested, and an agency may "estimate" the number of pages to be copied. If, for instance, an agency charges $.25 per photocopy and it is clear that the number of pages requested is more than one hundred, it would be reasonable, in our view, to require a payment in escrow in the amount of $25.00.

We hope this help clarify the issues.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15642

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November 16, 2005

Mr. Kenneth A. Blanchard
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Blanchard:

We are in receipt of your October 3, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to requests and appeals you have made regarding certain records and information of the Village of Lindenhurst. To the extent that portions of your request were previously addressed in correspondence to you dated November 3, 2005, we will not duplicate that response herein.

With regard to unanswered requests and appeals made, we 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state,

> in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If, as you allege, neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

We note that you have correctly directed all your requests to the records access officer. For your information, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In short, we believe that the Village Board has the overall responsibility of ensuring compliance with the Freedom of Information Law and that the records access officer has the duty of coordinating responses to all 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, we believe that when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

With regard to the substance of your underlying requests, from our 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. We 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 our 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 we are unfamiliar with the record keeping systems of the Village, to extent that the records sought can be located with reasonable effort, we 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 our opinion meet the standard of reasonably describing the records. If the Village maintains all of its records regarding a particular topic or address, 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, depending on the record keeping system of the Village and the various offices which would maintain the requested records, access to individual records could be granted or denied.

We hope this is helpful to your understanding of the Freedom of Information Law. Per your request, and in an effort to enhance understanding of and compliance with the Freedom of Information Law, a copy of this opinion and the opinion previously issued will be forwarded to Village officials.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc Mayor and Shawn Cullinane

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 16, 2005

Mr. Neil P. Buffett
Department of History
SUNY Stony Brook
Stony Brook, NY 11794-4348

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Buffett:

As you are aware, I have received your letter in which you wrote that an educational agency indicated that you "would have to pay an employee in the school district to sit with [you] while you look through their files." You added that the records sought are "non-personal high school records" and that you understand that records pertaining to particular students are confidential.

In this regard, first, the Freedom of Information Law includes all records of an agency, such as a school district, within its coverage, for §86(4) defines the term "record" to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Third, from my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, i.e., for "sitting" with you while you inspect records, searching for records or charging more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed. In this instance, I know of no statute that would authorize a school district to do so.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

"Except when a different fee is otherwise prescribed by statute:

(a) There shall be no fee charged for the following:
(1) inspection of records;

(2) search for records; or
(3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

From: Robert Freeman
To: [redacted]
Date: 11/17/2005 1:02:46 PM
Subject: Dear Michele:

Dear Michele:

You have asked whether you may "apply for records on line."

You may do so, but only if an agency chooses to permit you do so. Section 305(1) of the State Technology Law states in relevant part that "government entities are authorized and empowered, but not required, to produce, receive, accept, acquire, record, file, transmit, forward and store information by use of electronic means."

I note that the Committee on Open Government has and will continue to recommend legislation requiring agencies to accept and respond to requests on line when they have the ability to do so.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
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(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 17, 2005

Hon. Steve Fiore-Rosenfeld
Town of Brookhaven
One Independence Hill
Farmingville, NY 11738

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Fiore-Rosenfeld:

We are in receipt of your October 5, 2005 request for an advisory opinion concerning application of the Freedom of Information Law to videotape recordings of meetings of the Town of Brookhaven.

You pose three questions:

> "1. Does the Town's video tape recording of a Work Session or Town board meeting have to be given to the Town Clerk for inclusion in the archives?
>
> 2. If a private citizen tapes a Work Session or Town Board meeting (using Cablevision equipment) and the meeting is aired on the government access channel (as proscribed [sic] by NYS PSC guidelines), does that tape recording need to be given to the Town Clerk for inclusion in the archives?
>
> 3. Are there any guidelines for how these recordings should be made available to the public? Are they to be viewed only at Town Hall? If it is made available for viewing outside Town Hall, can a charge be imposed to cover the cost of the copying the tape? What, if any, guidelines exist for the approximate cost to the public for a copy of these videotapes?"

Initially, as background, we point out that the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when a municipal board maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law, irrespective of the reason for which the recording was prepared.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, case law indicates that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

In response to your first question, from our perspective, videotape recordings of meetings of the Town, prepared by or on behalf of the Town or Town Board members, would fall within the coverage of the Freedom of Information Law. That being so, the tape recording could be destroyed or erased only in conjunction with provisions of the Arts and Cultural Affairs Law dealing with the retention and disposal of records.

We direct your attention to Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records

> management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

Based on the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials must "have custody" and "adequately protect" records until the minimum period for the retention of the records has been reached. While we cannot comment on whether or not such videotapes should be included in the Town archives, it is suggested that you or the Town's records management officer review the applicable retention schedule to ascertain the minimum period of retention, which we believe is four months from the date of the meeting.

In response to your second question, we would like to differentiate between videotapes made by private citizens and those made by entities that may be contractually obligated to record meetings of the Town.

There are no provisions in the law which permit an agency to collect and/or maintain recordings of public meetings made by private citizens. As we noted above, while we believe that a recording made by or on behalf of the Town or a Town Board member would be a record of the Town, the Town has no legal responsibility to collect or acquire such recordings from private citizens who attend and record Town meetings.

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, however, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. The Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

More recently, the Court of Appeals found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. We point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the

physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY2d 410, 417 (1995)]. Therefore, if recordings are created or produced for an agency, as in the case of recordings and/or transcripts which would otherwise be produced by the Town, they constitute agency records, even if they are not in the physical possession of the agency.

From our perspective, insofar as Town records may be in the physical possession of a local television company, in response to a request for any such records, we believe that the records access officer, in carrying out his or her duty to "coordinate" the Town's response to requests, must either direct the company to make the records available in a manner consistent with law, or acquire the records in order that they may be disclosed in accordance with law.

Lastly, in response to your third question, §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. In addition to §87(1)(b) of the Law, the regulations state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR 1401.8)."

Further, §1401.8(c)(3) states in relevant part that "the actual reproduction cost...is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries."

Based upon the foregoing, we believe that a fee for reproducing a videotape would include the cost of time spent using the VCR, plus the cost of the videotape or disc to which the video is copied. In the alternative, if the Town were to procure extra copies of the tape from an outside entity, the actual cost paid could be charged to the applicant.

Although allusion has been made to personnel costs in some judicial decisions, none specifies that those costs may clearly be assessed. Moreover, unless and until a court finds to the contrary, the regulations promulgated by the Committee have the force and effect of law. That being so, we do not believe that an agency may charge for its personnel or administrative costs in determining the amount of a fee based on the actual cost of reproduction when responding to a request made under the Freedom of Information Law.

We hope this helps clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15646

41 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 17, 2005

Ms. Frances J. 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 information presented in your correspondence.

Dear Ms. Thompson:

We are in receipt of your September 5, 2005 request for an advisory opinion concerning postage charged for copies requested from the New York City Police Pension Fund.

As a general matter, the Freedom of Information Law requires that accessible records be made available for inspection and copying. No fee may be assessed for the inspection of accessible records when inspection occurs at the offices of an agency. When copies of records are requested, §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, unless a statute other than the Freedom of Information Law permits an agency to charge a higher fee.

When an applicant requests copies of records, the records may be reproduced in the presence of an applicant, the applicant can physically present himself or herself at an agency's offices to obtain copies, or copies can be mailed to the applicant.

While nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) deals with the cost of or the assessment of charges for postage when copies are mailed to an applicant, we do not believe that either would prohibit an agency from charging for postage. In our view, mailing copies of records to an applicant represents an additional service provided by an agency that is separate from the duties imposed by the Freedom of Information Law. An agency must, in our opinion, mail copies of records to an applicant upon payment of the appropriate fees for copying and postage; alternatively, if it informs the applicant of the cost of postage, we believe that an agency could require that an applicant provide a stamped self-addressed envelope.

We hope this helps to clarify the issue.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1564?

41 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 18, 2005

Mr. Norman B. Viti, Jr.
Gibson, McAskill & Crosby, LLP
69 Delaware Avenue, Suite 900
Buffalo, NY 14202-3866

Dear Mr. Viti:

This is to reiterate information left for you in a telephone message regarding your request made under the Freedom of Information Law to the Committee on Open Government. In short, the Committee is authorized to provide advice and opinions concerning that statute. The Committee does not maintain possession or control of records generally, nor does it process, grant or deny requests for records maintained by other agencies.

When seeking records, requests 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 (see 21 NYCRR Part 1401).

On the basis of your request, it appears that the Department of Motor Vehicles is the likely source of the records of your interest. If that is so, it is suggested that you direct a request to Mr. Brad Hanscom, Records Access Officer, NYS Department of Motor Vehicles, Swan Street Building, Empire State Plaza, Albany, NY 12228.

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

From: Robert Freeman
To: Krisel, Martha
Date: 11/21/2005 2:29:00 PM
Subject: Re: FOIL FEES and NYSDMV

Hi - -

You may recall that §87(1)(b)(iii) of FOIL says that an agency may charge up to 25 cents per photocopy, unless a different fee is prescribed by statute. One such statute is §202 of the Vehicle and Traffic Law, which specifies that DMV can assess fees that far exceed those ordinarily permissible under FOIL. Often the results are anomalous: DMV can charge $15 for a copy of an accident report, but the fee for the same record maintained by a municipality cannot exceed 25 cents per photocopy.

Hope all is well and that you and yours will have a terrific holiday!

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

>>> "Krisel, Martha" <MKrisel@RVCNY.US> 11/21/2005 2:05:28 PM >>>
Would there be any reason for NYS DMV to be allowed to charge $1.00/page for a FOIL request? We have requested @700 pages, and the fee is $700.00. Not an emergency but please advise. Happy holidays to all.

Martha Krisel, Village Attorney

Village of Rockville Centre

PO Box 950

Rockville Centre, NY 11571-0950

516-678-9206

516-678-9225

mkrisel@rvcny.us

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15649

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 21, 2005

E-MAIL

TO: Denise Filaski

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. Filaski:

As you are aware, I have received your letter concerning your right to gain access to records pertaining to your son, who is enrolled in the Northport-East Northport Union Free School District.

It is noted that you referred to several provisions of federal law and raised a variety of questions. In this regard, I have neither the expertise nor the jurisdiction to respond to each of your inquiries involving federal law. However, I offer the following general comments concerning your rights of access to records.

First, since you referred specifically to notebooks prepared by your son's teacher, based on the language of the Freedom of Information Law and its judicial interpretation, the notebooks would, in my opinion, clearly fall within its scope. That statute pertains to agency records and defines the term "record" expansively to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a

"governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Further, in a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Second, perhaps 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. 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. In short, insofar as records of your interest pertain to your child and have been shared with or disclosed, even verbally, to others, I believe that you would have a right to gain access to them pursuant to FERPA.

I point out that the federal regulations exclude from the definition of "education records" :

> "Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record..." [34 CFR 99.3(b)(1)].

Therefore, if, for example, an administrator or teacher prepares notes 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.

When the Freedom of Information Law governs rights of access rather than FERPA, two of the grounds for denial would likely be pertinent to an analysis of rights of access to notes or similar records. Section 87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." If, for instance, a parent requests notes and the notes include reference to several students, I believe that a school district could withhold those portions pertaining to the students other than the child or children of the person making the request in order to protect privacy.

The other provision of significance is §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

If notes taken consist of a factual information, they would be available under §87(2)(g)(i), except to the extent that a different ground for denial could be asserted [i.e., §87(2)(b) concerning the protection of privacy]. Insofar as notes might include expressions of opinion, or conjecture on the part of the author, they would fall within the scope of the exception.

Third, the Freedom of Information Law does not deal with the maintenance of records. More relevant in my view is the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

In view of the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. I note that the provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives and Records Administration.

I hope that I have been of assistance.

RJF:tt

cc: John Lynch
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15650

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 21, 2005

Ms. Lucille Held
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Held:

As you are aware, I have received a variety of materials from you relating to your requests made under the Freedom of Information Law to the Town of Harrison. To better enable you to understand the law and my comments, I have numbered my comments to correspond to issues considered in your correspondence that are identified by number.

1. I cannot ascertain what your request is intended to mean. Do you want the salary of a custodian who works for the Town? Do you want to know the names and salaries of all Town employees? If the latter is so, you should request "the record required to be maintained pursuant to §87(3)(b) of the Freedom of Information Law. That provision requires that each agency, such as a town, "shall maintain....a record setting forth the name, public office address, title and salary of every officer or employee of the agency." If you want to know employees' gross wages (i.e., salary plus overtime), you should request records indicating the employee's/employees' gross wages during a certain period.

In general, a request should involve records; the FOIL ordinarily does not require that an agency create a new record in response to a request or that staff provide information in response to questions. When you ask: "How much was spent", for example, that is not a request for a record. I note that the provision referenced above, §87(3)(b), represents one of the few instances in the law in which an agency is required to "maintain" a particular record. Again, ordinarily, an agency is not required to create records to satisfy an applicant.

2. The Town's form refers to "Public Officers Law §96". That provision is part of the Personal Privacy Protection Law, which applies only to state agencies. It does not apply to towns or any other unit of local government.

3. The notice concerning the right to appeal is erroneous. Section 89(4)(a) of the Freedom of Information Law states that a person denied access has thirty days to appeal the denial, and that the appeals officer has ten business days, not seven business days, to determine the appeal by granting access to the records, or fully explaining in writing the reasons for further denial.

4. You asked that the Town "please list every town owned building and name of custodian for every bldg." Again, since the Freedom of Information Law pertains to existing records, it has been advised that a "list" should not be requested unless the applicant is certain that a list exists. Rather than asking that the Town list buildings that it owns, you might request "a record or records identifying buildings owned by the Town, including the addresses of any such buildings, as well as records identifying employees responsible for the maintenance of those buildings", or something similar.

5. You raised a question and did not seek records. You should request a copy of the survey or surveys relating to particular parcels, as well as a record identifying the name of the surveyor or the company that prepared the survey.

6. Your request for a copy of "Fitzsimmons letters to Zoning Bd concerning Voetsch violations" and several others were denied pursuant to §87(2)(g), which deals with "inter-agency or intra-agency materials". That provision pertains to written communications between or among government officers or employees or those prepared by consultants retained by agencies. While it potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure of portions of records. Specifically, §87(2)(g) authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

7. By asking "what law?", you were asking a question rather than requesting a record. You might request "copies of laws referenced by Mr. ____ at the meeting of __Date of meeting__ pertaining to elevators, bathrooms, conference rooms, staircases."

8. At the top of the form used by the Town, it states that "The documents will be available to you within 30 days or on approximately _____". That statement, due to the passage of amendments effective in May, is now inconsistent with law.

When an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgement must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part. That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). A failure to comply with any of the time period would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. A failure to determine the appeal within ten business days constitutes a denial of the appeal, and the person denied access could then initiate a judicial proceeding to challenge the denial of access.

9. For the reasons expressed in item 8, a response cannot merely indicate that a response will be given at some indefinite time in the future. An approximate date for granting a request in whole or part must be given if that will occur within 20 business days. If more time than that is needed by the agency to respond, it must provide a written explanation and a specific date, a self-imposed deadline, within which it will grant the request in whole or in part. Also, any delay must be reasonable in consideration of the circumstances relating to the request.

10. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." When you consider it worthwhile to do so, you could seek such a certification.

11. The Freedom of Information Law does not require that a person seeking records "specify" exactly which records he or she wants. Rather, it says that an applicant must "reasonably describe" the records sought. Therefore, if a request includes sufficient information to enable agency staff to locate the records of interest with reasonable effort, the request would reasonably describe the records. On the other hand, if attempting to locate records involves the search through the haystack for the needle, the request would not meet that standard.

12. The Freedom of Information Law specifies that an unwarranted invasion of personal privacy includes "information of a personal nature contained in a workers' compensation record..." That being so, a request for that kind of record may be denied.

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

FOIL-AO-15651

From: Robert Freeman
To: mrainbow@oath.nyc.gov
Date: 11/21/2005 3:54:05 PM
Subject: Dear Mr. Rainbow:

Dear Mr. Rainbow:

With respect to your question concerning the backup tape, in my view, rights of access or, conversely, the ability to deny access, would be dependent on the content of the tape. I believe that tape recording itself would constitute a "record" that falls within the coverage of the FOIL. From there, the issue involves the extent, if any, to which one or more of the grounds for denying access would apply.

If indeed the tape recorder captures attorney-client communications, those portions of the tape could be withheld in my opinion under §87(2)(a) of the FOIL pertaining to records that "are specifically exempted from disclosure by state or federal statute", the statute being §4503 of the CPLR concerning the attorney client privilege. There may be elements of the tape which if disclosed would constitute an unwarranted invasion of personal privacy that may be withheld under §§87(2)(b) and 89(2)(b). On the other hand, in some instances the tape recorder might capture innocuous remarks that do not fall within any of the grounds for denial.

In short, as in other instances, the content of the records at issue and the effects of disclosure would be the key factors in determining the ability to withhold or the obligation to disclose.

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-15052

41 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 22, 2005

E-MAIL

TO: Sara Stein

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. Stein:

As you are aware, I have received your letter in which you questioned the propriety of a denial of your request to the office of a district attorney for records of any arrest or "criminal instrument" filed against you.

In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant in this instance is §87(2)(a), the first ground for denial, which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §160.50 of the Criminal Procedure Law. In brief, in situations in which charges against a person are dismissed in his or her favor, the records become sealed pursuant to §160.50 and, therefore, exempt from disclosure under the Freedom of Information Law.

I note that the primary custodian of criminal history records in New York is the Division of Criminal Justice Services. If you can provide that agency with the personally identifying information pertaining to yourself that it requires to search its records, it will provide a criminal history to you that includes any arrests or convictions in this state, or a certification that there have been no arrests or convictions. It is suggested that you contact Ms. Valerie Friedlander at the Division to obtain information concerning the requirements that must be met to conduct a criminal history search. She can be reached at (518)457-6699 or by writing to her as follows:

Valerie Friedlander, Records Access Officer,
NYS Division of Criminal Justice Services,
Stuyvesant Plaza, Albany, NY 12203

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15653

41 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 22, 2005

E-MAIL

TO: Eduardo Gonzalez Ovadiah

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. Ovadiah:

As you are aware, I have received your letter in which you questioned the propriety of a denial of your request to the office of a district attorney for records of any arrest or criminal instrument filed against you.

In this regard, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant in this instance is §87(2)(a), the first ground for denial, which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §160.50 of the Criminal Procedure Law. In brief, in situations in which charges against a person are dismissed in his or her favor, the records become sealed pursuant to §160.50 and, therefore, exempt from disclosure under the Freedom of Information Law.

I note that the primary custodian of criminal history records in New York is the Division of Criminal Justice Services. If you can provide that agency with the personally identifying information pertaining to yourself that it requires to search its records, it will provide a criminal history to you that includes any arrests or convictions in this state, or a certification that there have been no arrests or convictions. It is suggested that you contact Ms. Valerie Friedlander at the Division to obtain information concerning the requirements that must be met to conduct a criminal history search. She can be reached at (518)457-6699 or by writing to her as follows:

Valerie Friedlander, Records Access Officer
NYS Division of Criminal Justice Services
Stuyvesant Plaza, Albany, NY 12203

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15654

41 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 22, 2005

E-MAIL

TO: Matthew Jacoby

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Jacoby:

We are in receipt of your October 7, 2005 e-mail request for an advisory opinion concerning the application of the Freedom of Information Law to a document that you requested from your local school district.

Based on your e-mail, you have been informed that a copy of the 1200 page document requested will be made available to you upon payment of $300, that you cannot narrow your request to (a) review the document first, in order to determine which portions are relevant, or (b) to receive only a particular chapter of the document.

In this regard, first, when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. 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, we 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, we believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record.

For example, we do not believe that you would have the right to inspect W-2 forms, for they include information that you have no right to see. Based upon the direction provided by the Freedom of Information Law and the courts, insofar as W-2 forms pertaining to public employees indicate gross wages, they must be disclosed. Pursuant to §87 (2)(b) of the Freedom of Information Law concerning the ability to protect against unwarranted invasions of personal privacy, however, we believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

In short, while portions of payroll records containing names and gross wages must be disclosed, an agency could seek advance 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). From your description, it seems likely that the "curriculum document" which you have requested from the District does not contain information which would be protected from disclosure and thus require redaction. Again, if a record is available in its entirety, we believe that you would have the right to inspect it free of charge.

Second, in our view, every law must be implemented in a manner that gives reasonable effect to its intent, and we 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 or a limitation on the records inspected. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In sum, unless there is a reasonable basis for limiting the public's ability to inspect the record, the policy that you described would, in our opinion, be inconsistent with the language of the Freedom of Information Law and its judicial interpretation.

Third, there is nothing in the law that requires that a person seeking records must obtain copies of the entirety of their contents. If, after inspecting a 1200 page document, you conclude that you only want copies of pages 48 through 50, three photocopies, the District, in our opinion, must honor that request, prepare the three photocopies, and charge a maximum of twenty-five cents per photocopy [see Freedom of Information Law, §87(1)(b)(iii)].

Further, it is noted that §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be

> promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the District, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

In a case in which the court invalidated a rule established by a village, the matter involved the validity of a limitation regarding the time permitted to inspect records established pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

In short, while a unit of government has the ability to adopt rules and procedures, they must be reasonable and consistent with law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the District has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests.

With regard to your contention that the Superintendent serves as the Records Access Officer and the Appeals Officer, as stated in the Committee's regulations, "[T]he records access officer shall not be the appeals officer" [§1401.7(b)]. The intent of this provision is to ensure that the records access and appeals officers are not the same person, and to ensure that an appeal is reviewed anew.

Therefore, if your information is correct, we believe there is a legal impediment to the Superintendent serving as the records access officer and appeals officer.

We hope that this helps to clarify the issues.

CSJ:tt

cc: James Christmann, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15655

41 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 22, 2005

Hon. James Atkinson
Supervisor
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.

Dear Supervisor Atkinson:

As you are aware, I have received your letter. You asked whether the Town Clerk "has the right to give to a private citizen...Town records such as Supervisor's reports, the monthly warrant of bills, zoning reports and other departmental reports before the Town Board sees them or acts upon them to make them official records."

In this regard, I offer the following comments.

First, the Freedom of Information Law does not distinguish between records characterized as "official" and others. That statute is applicable to all records of an agency, such as a town, and defines the term "record" in §86(4) 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 soon as Town records exist or come into the possession of the Town, they fall within the coverage of the Freedom of Information Law and are subject to rights of access conferred by that law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, unless there is a basis for denying access, records, whether characterized as "official" or otherwise, would be accessible to the public.

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 the foregoing, the records access officer must "coordinate" an agency's response to requests. In the majority of towns, the town clerk is designated as records access officer, for he or she, by law, is also the records management officer and the custodian of town records.

When an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief

> executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

In consideration of the foregoing, it is clear that a town board, for example, is authorized to determine appeals, or that a town board may designate a person or body to carry out that function on its behalf. When one person is designated to determine appeals, he or she is often characterized as the "appeals officer" or "records access appeals officer." I know of no provision of law that makes reference to a "Records Management Appeals Officer."

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-15656

41 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 22, 2005

Mr. Gary T. Lear
03-B-1811
Five Points Correctional Facility
State Route 96, P.O. Box 119
Romulus, NY 14541

Dear Mr. Lear:

I have received your letter in which you wrote that the company that employed you has failed to respond to your requests made under the Freedom of Information Law.

In this regard, please be advised that the Freedom of Information Law pertains to government agencies. Section 86(3) of that statute defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, as a general matter, the Freedom of Information Law is applicable to entities of state and local government; it does not apply to private companies. While a private company may choose to disclose its records, it not required to do so pursuant to the Freedom of Information Law.

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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41 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 23, 2005

Ms. Jeanne Polisoto
[redacted]

The staff of the Committee on 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. Polisoto:

We are in receipt of your August 31, 2005 and September 27, 2005 requests for advisory opinions concerning the application of the Freedom of Information Law to certain records which you have requested from the Chatauqua County Department of Social Services.

In brief, having attempted to obtain records including notes taken by a County employee, Ms. Gates, during a telephone conversation you had with her, the County denied your request citing confidentiality provisions set forth in Social Services Law §§473-e.

In this regard, we 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, of relevance to the issue 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 §473-e of the Social Services Law, which prohibits the release of reports and information obtained in conjunction with such reports from disclosure except to certain persons. Subdivision (2) states in relevant part:

> Such reports and information may be made available to: (a) any person who is the subject of the report or such person's authorized representative.

Subdivision (1)(b) defines an "authorized representative" to mean:

> (i) a person named in writing by a subject to be a subject's representative for purposes of requesting and receiving records under this article; provided, however, that the subject has contract capacity at the time of the writing or had executed a durable power of attorney at a time when the subject had such capacity, naming the authorized representative as attorney-in-fact, and such document has not been revoked in accordance with applicable law;
>
> (ii) a person appointed by a court, or otherwise authorized in accordance with law to represent or act in the interests of the subject; or
>
> (iii) legal counsel for the subject.

Accordingly, unless you meet the qualifications for an authorized representative under either of these three exceptions, it is our opinion that the County properly denied access to the requested records.

We hope that this helps to clarify the matter.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Mark Thomas

FOIL-AO-15658

From: Robert Freeman
To: Oksana
Date: 11/28/2005 8:21:53 AM
Subject: Re: Foil requests for private email

I am not sure what you mean by "private emails." However, I point out that the Freedom of Information Law includes all records within its coverage and that §86(4) defines the term "record" to mean "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Therefore, if, for example, an elected official receives email from a private citizen in the government representative's capacity as an elected official, the email would constitute a "record" that falls within the coverage of the Freedom of Information Law.

The foregoing is not intended to suggest that email correspondence with private citizens is necessarily accessible in every instance or in its entirety. Often disclosure of a name or other details may be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy", and I believe that a person's email address may be withheld on the same basis. In short, email is merely a means by which is communicated. As in the case of every other record, its content is the primary factor in considering the extent to which it must be disclosed, or conversely, may be withheld.

I hope that the foregoing serves to clarify your understanding.
>>> Oksana [redacted]> 11/28/2005 8:12:26 AM >>>
Mr. Freeman,

I guess I asked the wrong question...
Could an individual request, via FOIL, to see private emails
of elected officials?

Oksana Fuller

----- Original Message -----
From: "Robert Freeman" <RFreeman@dos.state.ny.us>
To: [redacted]
Sent: Monday, November 28, 2005 8:05 AM
Subject: Re: Foil requests for private email

> Under §305 of the State Technology Law, an agency may, but is not required to accept requests made under the Freedom of Information Law via email. It is suggested that you ask, by email, whether the agency of your interest will accept a request made by email.
>
> 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
>
> >>> Oksana <lffemc@rit.edu> 11/28/2005 8:05:24 AM >>>
> November 28, 2005
>
> Oksana Fuller
> 3971 West Lake Road

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15659

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 28, 2005

Mr. Ralph Brill
[redacted]

Dear Mr. Brill:

I have received your letter and the materials attached to it. Irrespective of whether I concur with the responses to your previous requests, I do not believe that legal remedies are available to you at this juncture.

As I understand the matter, you have requested records on several occasions from the New York City Police Department and followed its denials by initiating judicial proceedings to challenge its determinations. In this regard, it has been held on several occasions that "Belated judicial review...cannot be based on petitioner's second request for the same information" [see e.g., McGriff v. Bratton, 293 AD2d 401 (2001)]. It appears, too, that requests to investigate the judge in question have been made to the Commission on Judicial Conduct. By statute, however, §45 of the Judiciary Law, the Commission is prohibited from disclosing unless and until a judge has been found to have engaged in misconduct. The only additional route that might be of value would involve an attempt to encourage the Department of Investigation to conduct an inquiry concerning the actions of the Police Department in relation to its role in the matter.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15660

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 28, 2005

Mr. Willie Ivy
93-B-2469
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

Dear Mr. Ivy:

I have received your letter in which you appealed a denial of access to records involving the racial composition of several juries.

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, states in relevant part that:

> "...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."

I note, too, that the information that you have requested is likely contained within questionnaires completed by jurors, and that those records are confidential under §509-a of the Judiciary Law. That being so, the records would be exempt from disclosure pursuant to §87(2)(a) of 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15661

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 29, 2005

Mr. John J. Sheehan
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sheehan:

We are in receipt of your September 26, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to your request for a copy of a motor vehicle accident report (MVA-104A) from the Tompkins County Sheriff's Department.

We believe the document should be made available to you in its entirety. In this regard, we offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, written materials comprising an accident report, as well as other documentation, including photographs taken at the scene by County employees, would in our opinion clearly constitute "records" subject to rights conferred by the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. We note that §89(6) states that if records are available under some other provision of law or by means of judicial interpretation, the grounds for denial appearing in §87(2) cannot be asserted.

Third, except in unusual circumstances, accident reports prepared by police agencies are in our opinion available under both the Freedom of Information Law and §66-a of the Public Officers Law. Section 66-a states that:

> "Notwithstanding any inconsistent provisions of law, general, special or local or any limitation contained in the provision of any city charter, all reports and records of any accident, kept or maintained by the state police or by the police department or force of any county, city, town, village or other district of the state, shall be open to the inspection of any person having an interest therein, or of such person's attorney or agent, even though the state or a municipal corporation or other subdivision thereof may have been involved in the accident; except that the authorities having custody of such reports or records may prescribe reasonable rules and regulations in regard to the time and manner of such inspection, and may withhold from inspection any reports or records the disclosure of which would interfere with the investigation involved in or connected with the accident."

The Freedom of Information Law is consistent with the language quoted above, for while accident reports are generally available, §87(2)(e)(i) of the Freedom of Information Law states in relevant part that records compiled for law enforcement purposes may be withheld to the extent that disclosure would "interfere with law enforcement investigations or judicial proceedings." Further, the state's highest court, the Court of Appeals, has held that a right of access to accident reports "is not contingent upon the showing of some cognizable interest other than that inhering in being a member of the public" [Scott, Sardano & Pomeranz v. Records Access Officer, 65 NY 2d 294, 491 NYS 2d 289, 291 (1985)]. Therefore, unless disclosure would interfere with a criminal investigation, an accident report would be available to any person, including one who had no involvement in an accident.

As we understand §66-a, there is nothing in that statute that would authorize an agency, such as a County, to withhold the items redacted from the copy provided to you, namely details identifying the general physical and emotional state of those involved in the accident. Aside from the broad definition of the term "record" appearing in the Freedom of Information Law, we point out that it has been held that even photographs made during the course of an investigation of an accident and other records comprising a police department's investigation of an accident are part of the accident report and are therefore available under §66-a of the Public Officers Law [see Fox v. New York, 28 AD 2d (1967); Romanchuk v. County of Westchester, 42 AD 2d 783, aff'd 34 NY 2d 906 (1973)]. Again, except to the extent that disclosure would "interfere with the investigation involved in or connected with the accident", the documentation comprising the accident report must, in our view, be disclosed.

In an effort to enhance understanding of and compliance with the Freedom of Information Law, a copy of this advisory opinion will be forwarded to the County officials.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

Cc: Sheriff Peter Meskill
Jonathan Wood

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1560

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 29, 2005

Ms. Karen A. Ottati
[redacted]

The staff of the Committee on 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. Ottati:

We are in receipt of your September 15, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to a request for records which you have made to the City of Amsterdam.

Because you note that you are a City employee and have filed a complaint against your employer with the Division of Human Rights, we point out, as stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)].

In short, we 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.

Notwithstanding the foregoing, having reviewed your request, it may be that your request does not reasonably describe records maintained by the City, and/or that the City does not continue to maintain such records.

With respect to the breadth of the requests, we note that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an

agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v. Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a)(3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']) (id. At 250)."

In our 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 we are unfamiliar with the recordkeeping systems of the City, to the extent that the records sought can be located with reasonable effort, we believe that the requests would have met the requirement of reasonably describing the records. On the other hand, if emails or documents 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 our opinion meet the standard reasonably describing the records.

Second, while some types of documents are clearly public, other records sought might be withheld. Assuming that a request has reasonably described the records and that the records have been found, pertinent, particularly with respect to correspondence, is §87(2)(g). That provision authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld.

If, for instance, a member of the City Council in an item of correspondence transmitted to another city official offered an opinion regarding a controversy, that portion of the correspondence could in our view be withheld.

In regards to the time frame within which the City has to respond to your request, we 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that

circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the

approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

We hope this helps clarify your understanding of the Freedom of Information Law. Pursuant to your request for assistance, a copy of this opinion will be forwarded to City officials.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

Cc: Hon. Emanuele
Bob Going
Carol DeJohn
Kathy Garrison

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15663

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November 30, 2005

E-MAIL

TO: William Cameron

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Cameron:

We are in receipt of your October 4, 2005 e-mail request for an advisory opinion concerning application of the Freedom of Information Law to various records which you have requested from the Warrensburg Central School business manager.

In response, it is emphasized that the Freedom of Information Law pertains to existing records and §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. As we understand your correspondence, you may have sought records or information which do not exist. For instance, you requested "information on graduates and their degrees" and "the number of students that dropped out over a period of time". If the information you seek does not exist in the manner of form in which you requested it, the District would not be obliged to prepare such documents on your behalf.

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 our view be withheld from the public in order to comply with federal law. Concurrently, if a parent of a student requests records pertaining to his or her child, the parent ordinarily will have rights of access to those portions of records that are personally identifiable to that child.

While it would not be appropriate for us to comment on whether you are being "jerked around" we note that there are statutory response time frames within which the District must respond to requests made pursuant to Freedom of Information Law. To that extent, we offer the following comments and recommend that you direct your requests to the District's records access officer.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an

acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

We hope this helps clarify your understanding of the Freedom of Information Law.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 30, 2005

E-MAIL

TO: Ronald McLain

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. McLain:

We are in receipt of your October 9, 2005 e-mail request for an advisory opinion concerning the application of the Freedom of Information Law to records requested by a former employee of the Northville Central School District.

You state that your friend "has sent a foil to them as well as just a simple letter requesting the information", but that the District "refuse[s] to reply to either of his requests." In that regard, we offer the following comments.

First, the Freedom of Information Law is applicable to all 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."

Consequently, whether documents pertain to current or former employees, they would constitute "records" that fall within the requirements 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.

Further, the statute provides the right to inspect and copy, as well as an obligation upon an agency to prepare copies on request and upon payment of the requisite fee. This is not to suggest that the records contained within the former employee's personnel file must in every instance be disclosed to the public generally. Many aspects of a personnel file could in our opinion be withheld pursuant to §§87(2)(b) and 89(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." Nevertheless, §89(2)(c) states that unless there is an independent basis for withholding, disclosure "shall not be construed to constitute an unwarranted invasion of personal privacy...when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him." We note that records pertaining to an employee might include reference to others, such as students or parents that might properly be withheld as an unwarranted invasion of their personal privacy or pursuant to the Family Educational Rights and Privacy Act (20 USC 51232g). Additionally, records or portions of records might properly be withheld under §87(2)(g) concerning inter-agency or intra-agency material.

With regard to the District's alleged failure to respond, we 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency

cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges

that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Because you state that your friend requires the records for his retirement, it raises the issue of whether the District continues to maintain the 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."

Finally, please note that while the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Freedom of Information Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. At your request, we will forward a copy of this opinion to the records access officer at the Northville Central School District.

We hope this helps clarify your understanding of the Freedom of Information Law.

CSJ:tt

cc: Diane Horton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 30, 2005

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 facts presented in your correspondence.

Dear Mr. Berman:

We are in receipt of your September 22, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to records you have requested from the Valley Stream Central High School District. Please note that while the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Freedom of Information Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. As you may know, copies of previously issued opinions are available from our website.

In response to your many questions, we 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state,

> in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. Regardless of the date typed on the request, the agency is bound by law to respond within five date of receipt of a request. Accordingly, post-dating a request for records would have no effect on the agency's responsibility to respond within five days of receipt of the request.

Second, you inquire as to how many times requested records may be inspected. While it has been held that an agency must permit an applicant to review records throughout its regular business hours [see Murtha v. Leonard, 210 AD 2d 441 (1994)], we know of no provision or decision that deals with the number of times that a record may be inspected or how long a request may be considered to be active. From our perspective, the principle of reasonableness should govern. If a request involves a great number of records, we do not believe that an agency can restrict inspection to a single day; rather, it should provide an opportunity to the applicant to review all of the records, perhaps on a piecemeal basis so as not to unduly interfere with the agency's ability to perform its duties. Similarly, we know of no limitation concerning the inspection of records. And, we do not believe that an agency must make the same records available over and over, if such disclosure would unnecessarily interfere with its capacity to carry out its duties.

Finally, we point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information Law 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.

From our perspective, a request for a law that may applicable might not be viewed as a request for a record, but rather an interpretation of law that requires a judgment. Depending on the nature of the matter, any number of provisions might be applicable, and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Further, two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 10 of the Education Law", no interpretation or judgment is necessary, for sections of the law appear numerically and can readily be identified. That kind of request, in our opinion, would involve a portion of a record that must be disclosed. Again, a request for laws that might be applicable is not, in our view, a request for a record as envisioned by the Freedom of Information Law.

We hope this helps clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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November 30, 2005

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:

We are in receipt of your October 2, 2005 request for guidance concerning records that are copyrighted. Based on information you provided, the Metropolitan Transportation Authority may have claimed copyright protection relative to its maps, and denied access.

In this regard, first, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Metropolitan Transportation Authority is an agency and, therefore, is subject to the Freedom of Information Law.

Second, with respect to the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in our 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, we agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

In our opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department may properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted material

would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of Information Law, it would appear that an agency could preclude reproduction of the work. Here, as you note, because the maps are freely distributed, it would appear that reproduction of the maps would not be in contravention of the Copyright Act or the Freedom of Information Law.

We hope this helps clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Ann Cutler

STATE OF NEW YORK
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November 30, 2005

Mr. Brian Hellner
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hellner:

As you are aware, I have received material that you forwarded on behalf of Newfane C.A.R.E.S. concerning a denial of a request for the life insurance policy purchased by the Newfane Central School District for its Superintendent.

The initial denial of access by the District's records access officer indicates that the policy was provided to the Superintendent as "a benefit of employment" referenced in his employment contract and "is not on file in the District's system of records. Accordingly, the District is unable to make it available for...inspection or copying." In response to Newfane C.A.R.E.S.' appeal, it was reiterated that the "[t]he District is unable to produce a document, which it does not have now, or was ever in possession." Additionally, the Superintendent, who determined the appeal, wrote that he is "the owner of the policy", which "became his personal property", and that specific items in the policy document, such as those pertaining to his "health condition...investment options, and beneficiaries are personal in nature."

In this regard, I offer the following comments.

First, irrespective of its physical location or custody, I believe that the insurance policy is a District record that falls within the scope of the Freedom of Information Law. That statute pertains to all records of an agency, such as a school district, for §86(4) defines the term "record" expansively to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents referenced in the contract need not be in the physical possession of the District to constitute agency records; so long as they are produced, kept or filed for an agency, the law specifies and the courts have held that they constitute "agency records", even if they are maintained apart from an agency's premises.

In a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University pursuant to a contract were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Also significant is the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", in which the matter involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980)].

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there may be "considerable crossover" in the activities of the Superintendent as a District employee and a citizen. As the Superintendent himself indicated, the District paid for the insurance policy.

Also pertinent is another decision rendered by the Court of Appeals in which the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

From my perspective, *any* document produced for the District pursuant to the terms of a contract constitutes a "record" that falls within the scope of the Freedom of the Freedom of Information Law. Any "prescreening" of a document to determine whether the document falls within the coverage of that statute would, in my view, conflict with the clear direction provided by the Court of Appeals and the language of the law itself.

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The "policy document", like other records, is, in my view, presumptively accessible to the public. However, as the Superintendent suggested, insofar as it includes intimate, personal information, such as material involving his health or medical condition, the identity of beneficiaries, or "investment options" that indicate the manner in which he has chosen to spend his money or allocate his personal resources, may be deleted, in my opinion, on the ground that disclosure would constitute an unwarranted invasion of personal privacy pursuant to §§87(2)(b) and 89(2)(b) of the Freedom of Information Law.

While the standard in the law 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 relate to their 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].

The Superintendent's contract describes the terms and conditions of his employment, including the "perks" or fringe benefits. Again, the insurance policy was purchased by the District as part of the contract. Subject to the qualifications described above concerning intimate information, I believe that it must be disclosed.

Copies of this opinion will be sent to the Superintendent and the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Enc.

cc: James N. Mills
Board of Education

STATE OF NEW YORK
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November 30, 2005

Mr. Dennis Crowley
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Crowley:

We are in receipt of your October 6, 2005 request for an advisory opinion concerning the application of Freedom of Information Law to a record, namely the subject matter list, requested from the New York Convention Center Operating Corporation.

As a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception to that rule relates to the subject of your inquiry. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in our opinion, required to identify each and every record of an agency; rather we 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)]. We 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 any such schedule or its equivalent applicable to the Corporation.

The provisions of the Freedom of Information Law that require the Corporation to maintain a subject matter list have been in effect since 1974. A recent report, Needle in a Haystack, published by the Chair of the Assembly Committee on Oversight, Analysis and Investigation and the Assembly Chair of the Administrative Regulations Review Commission examined state agency compliance with this provision. The report recommended, among other things, greater oversight and accountability for those entities that do not fully comply with §87(3)(c).

We hope this is helpful. At your request, copies of this opinion will be sent to Ms. Bradford and Mr. McQueen.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Elizabeth Bradford
Gerald T. McQueen

STATE OF NEW YORK
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November 30, 2005

Mr. Edward J. Sarzynski
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Sarzynski:

We are in receipt of your September 21, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to a request made to the Hunter-Tannersville Central School District.

The request involved a portion of last year's master basketball schedule developed for the District by the International Association of Approved Basketball Officials (IAABO). It is our understanding that the District may not maintain a copy of the requested portion of the schedule, and you inquire as to the District's responsibility was for obtaining it.

Based on decisions rendered by the Court of Appeals, we believe that it is likely that the record identified above must be made available by the District. In this regard, we offer the following comments.

First, it is our understanding that the District that you represent, as well as others contracts with IAABO to produce the master schedule. While the record sought may not be in the physical custody of the District, based on the nature of the relationship between the District and IAABO, it appears that the schedule is a District record that falls within the framework of the Freedom of Information Law. That statute pertains to agency records, such as those of a school district, and §86(4) defines the term "record" expansively to mean:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

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. The Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Insofar as records maintained by IAABO are "kept, held, filed, produced or reproduced...*for* an agency", such as the District, i.e., for the purpose of providing services that would otherwise be carried out by that entity, we believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform IAABO into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it maintains are maintained for an agency, and that those records fall within the coverage of that statute.

In other circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency, as Mr. Visentin did in this instance. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation described in the correspondence, insofar as IAABO maintains records for the District, to comply with the Freedom of Information Law and the implementing regulations, the records access officer must either direct IAABO to disclose the records in a manner consistent with law, or acquire the records from IAABO in order that s/he can review the records for the purpose of determining rights of access.

Should the IAABO refuse to provide a copy to the District, we would recommend relying on the terms of the contract between IAABO and the District.

We hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
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December 1, 2005

Mr. David L. Darwin
Orange County Department of Law
255-275 Main Street
Goshen, NY 10924

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Darwin:

We are in receipt of a copy of a September 22, 2005 appeal to your office regarding a denial of access to records requested by Mr. Brendan Scott at the Times Herald-Record. To date we have no record of your response to that appeal.

As you may know, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(4)(b) of the Freedom of Information Law states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules. Further, §89(4)(a) requires an agency, such as the County, to forward a copy of its determination of an appeal to the Committee on Open Government.

Based on the information which Mr. Scott has provided, including a copy of the denial of his request, we offer the following comments.

While it is possible that some elements of the records sought might justifiably be withheld, based on judicial decisions, it is likely that a blanket denial of access to the entirety of all records sought is inconsistent with law.

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 our view, this phrase 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, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). 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 Mr. Scott's request, the County has engaged in a blanket denial of access in a manner which, in our view, is equally inappropriate. We are 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 County 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, 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. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Two of the grounds for denial are relevant to an analysis of the matter; neither, however, would in our 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 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 our view be withheld. Insofar as a request involves a final agency determination, we believe that such a determination must be disclosed, again, unless a different ground for denial could be asserted.

When allegations or charges of misconduct have not yet been determined or did not result in a finding of misconduct, the records relating to such allegations may, in our 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, we believe that they may be withheld.

With respect to records reflective of suspension of a public employee who is not a police or correction officer, such records must in our view be disclosed, in this instance.

Although a suspension in some situations might not reflect an agency's final determination of a matter, it would represent factual information that must be made available under §87(2)(g)(i).

With regard to Mr. Scott's request for suspension and termination letters issued by the Sheriff's Office, we note that §87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used "to evaluate performance toward continued employment or promotion" are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)]. The Court in an opinion rendered in 1999 reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)].

To acquire the records that fall within the coverage of §50-a, there must be a court order issued in accordance with other provisions in that statute that state that:

> "2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.
>
> 3. If, after such hearing, the judge concludes there is a sufficient basis he shall sign an order requiring that the personnel records in question be sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting."

Based on the language of §50-a of the Civil Rights Law, various aspects of a personnel file pertaining to a police officer are exempt from disclosure, such as evaluations of performance, complaints and related records pertaining to allegations of misconduct. 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. It is our opinion, therefore, that suspension letters of police and correction officers may be exempt from disclosure pursuant to §50-a.

It is emphasized that the bar to disclosure imposed by §50-a deals with personnel records that "*are used to evaluate performance toward continued employment or promotion.*" When an officer has retired or no longer serves as a police officer for the County, there is no issue involving

continued employment or promotion; s/he is no longer employed as a police officer. That being so, in our opinion, the rationale for the confidentiality accorded by §50-a is no longer present, and that statute no longer is applicable or pertinent.

We hope that this helps clarify your understanding of these matters.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15671

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December 1, 2005

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 correspondence pertaining to your request for records maintained by the Department of Transportation. It is my understanding that your requests were precipitated by an incident in which two employees of the Department took a "cigarette smoke break" on your property. Thereafter, you sought a variety of information relating to the those employees, as well as Department policies, rules and regulations that might be pertinent to the incident. While some of the information sought was made available, you wrote that the Department's response "falls far short of full satisfaction of [your] FOIL request..."

Based on a review of the materials, I offer the following comments.

First, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading. That statute pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the information sought does not exist in the form of a record or records, the Freedom of Information Law would not apply. Similarly, agencies are not required to supply information in response to questions. While they may choose to do so, there is no obligation to do so, again, because that law encompasses existing records within its coverage.

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.

Although certain items relating to the two employees who are the subjects of your requests were disclosed, the Department withheld their names, education and training. From my perspective, based on judicial decisions, those kinds of materials should be disclosed.

Most relevant to an analysis of rights of access are §§87(2)(b) and 89(2)(b), which authorize an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy. Judicial decisions indicate 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)].

In my view, since the two employees in question were on the premises in relation to their work for the Department, their identities should be disclosed.

I note that it has been specifically held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

Additionally, in Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that portions of resumes of public employees 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" [262 AD2d 171 (1999)].

That decision was affirmed by the Appellate Division. In the same vein, if an employee has engaged in training programs in relation to his or her position, those portions of records reflective of the training would be accessible in my opinion, for they relate to the performance of the employees' duties.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Keith D. Martin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 1, 2005

Mr. Brian Patterson
04-A-0711
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871-2000

Dear Mr. Patterson:

I have received your letter in which you wrote that your request made under the Freedom of Information Law to the office of a district attorney was denied initially, and that your appeal was denied as well. That being so, you requested the records from this office.

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 compel an agency, such as an office of a district attorney, to grant or deny access to records. Further, this office does not have custody or control of records. In short, I cannot make the records of your interest available, because this office does not possess them.

I point out that when an appeal is denied, §89(4)(b) of the Freedom of Information Law states that a person denied access may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. Stated differently, under the circumstances that you described, only a court would have the authority to require that the office of the district attorney grant access to the records sought.

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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December 1, 2005

Mr. Terrence J. Skinner
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Skinner:

We are in receipt of your October 4, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to certain records requested from the New York State Police. Please note that while the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Freedom of Information Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions.

Based on the information you provided, you requested documents reflecting results of an investigation of complaints filed against state troopers. Access to such records was denied pursuant to Civil Rights Law §50-a. In this regard, we offer the following comments.

The Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used "to evaluate performance toward continued employment or promotion" are confidential. The Court of Appeals, the State's highest court, in reviewing the legislative history leading to its enactment, has held that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY2d 562, 568 (1986)]. In another decision which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

The Court in an opinion rendered in 1999 reiterated its view of §50-a, citing that decision and stating that:

> "...we recognized that the decisive factor in determining whether an officer's personnel record was exempted from FOIL disclosure under Civil Rights Law § 50-a was the potential use of the information contained therein, not the specific purpose of the particular individual requesting access, nor whether the request was actually made in contemplation of litigation.
>
> > 'Documents pertaining to misconduct or rules violations by corrections officers – which could well be used in various ways against the officers – are the very sort of record which *** was intended to be kept confidential. *** The legislative purpose underlying section 50-a *** was *** to protect the officers from the use of records *** as a means for harassment and reprisals and for the purpose of cross-examination' (73 NY2d, at 31 [emphasis supplied])" (Daily Gazette v. City of Schenectady, 93 NY2d 145, 156- 157 (1999)].

To acquire the records that fall within the coverage of §50-a, there must be a court order issued in accordance with other provisions in that statute that state that:

> "2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.
>
> 3. If, after such hearing, the judge concludes there is a sufficient basis he shall sign an order requiring that the personnel records in question be sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting."

Based on the language of §50-a of the Civil Rights Law, various aspects of a personnel file pertaining to a police officer are exempt from disclosure, such as evaluations of performance, complaints and related records pertaining to allegations of misconduct. 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. While we appreciate your position that these records are not, in your opinion, "personnel" records but rather are the Lieutenant's conclusions and

recommendations regarding your complaints, the courts have determined that records of that nature are afforded the protection of §50-a.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 2, 2005

Mr. Lewis B. Oliver, Jr., Esq.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Oliver:

We are in receipt of your October 10, 2005 request for an advisory opinion concerning application of the Freedom of Information Law to various records which you have requested from the County of Herkimer.

Based on the records which you attached, the County has denied access to property maps with preliminary draft drawings of proposed correctional facilities on them based on §87(2)(g), and rough cost estimates for construction of the proposed correctional facility on the ground that the cost estimates are not "statistical or factual tabulations or data" that must be disclosed, but "estimates and advice regarding advisability of various potential sites, the disclosure of which could impair the ability of the County to acquire such sites."

In this regard, we offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision upon which the County relied, §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.

Based on the description in the agency's August 26, 2005 denial, however, more pertinent is §87(2)(c), which permits an agency to deny access to records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." (See above, "disclosure . . . could impair the ability of the County to acquire such sites.") The key word in §87(2)(c) in our opinion is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" a contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That a County committee may no longer have jurisdiction over the property acquisition, in our view, is not determinative of rights of access or, conversely, an agency's ability to deny access to records. Rather, we believe that consideration of the effects of disclosure is the primary factor in determining the extent to which §87(2)(c) may justifiably be asserted.

As we understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. After the deadline for submission of bids or proposals, and after a contract has been awarded, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Similarly, if an agency is involved in collective bargaining negotiations with a public employee union, and the union requests records reflective of the agency's strategy, the items that it considers to be important or otherwise, its estimates and projections, it is likely that disclosure to the union would place the agency at an unfair disadvantage at the bargaining table and, therefore, that disclosure would "impair" negotiating the process.

The Court of Appeals has sustained the assertion of §87(2)(c) in a case that did not clearly involve "contract awards" or collective bargaining negotiations. In Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], the issue pertained to real property transactions where appraisals in

possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In each of the kinds of situations described above, there is an inequality of knowledge. In the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the context of collective bargaining, the union would not have all of the agency's records relevant to the negotiations; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of records regarding collective bargaining strategy or appraisals would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

In a case involving negotiations between a New York City agency and the Trump organization, the court referred to an opinion prepared by this office, and adopted the reasoning offered therein, stating that:

> "Section 87(2)(c) relates to withholding records whose release could impair contract awards. However, here this was not relevant because there is no bidding process involved where an edge could be unfairly given to one company. Neither is this a situation where the release of confidential information as to the value or appraisals of property could lead to the City receiving less favorable price.
>
> "In other words, since the Trump organization is the only party involved in these negotiations, there is no inequality of knowledge between other entities doing business with the City" [Community Board 7 v. Schaffer, 570 NYS 2d 769, 771 (1991); Aff'd 83 AD 2d 422; reversed on other grounds 84 NY 2d 148 (1994)].

Based on the foregoing, if the County's explanation of its rationale for non-disclosure is accurate, and if disclosure to your client would impair the County's ability to reach an agreement optimal to the taxpayer, the judicial decisions rendered to date suggest that §87(2)(c) could justifiably have been asserted to withhold the records.

With respect to what constitutes "statistical or factual information," one of the grounds for withholding records clearly relates to the kind of documents at issue. 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 our 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, we 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 our view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible, unless §87(2)(c) can be asserted as a basis for denial.

Another decision highlighted that the contents of materials falling within the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][I], or other

> material subject to production, they should be redacted and made available to the appellant" (id. at 133).

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

More recently, a decision involved ratings relating to requests for proposals (RFP's). The ratings were prepared by staff for the purpose of evaluating criteria used in analyzing the RFP's. Even though the ratings consisted essentially of numerical figures assigned to opinions, it was held that they must be disclosed. The Court was careful to point out, however, that "the subjective comments, opinions and recommendations" prepared by staff need not be disclosed [Professional Standards Review Council of America, Inc. v. NYS Department of Health, 193 AD 2d 937, 930-940 (1993)].

We hope this helps to clarify your understanding of the Freedom of Information Law. Please contact me directly if you have further questions.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Charles E. Crandall, III, Esq.
James W. Wallace, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 8, 2005

Mr. John Hynes
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Hynes:

We are in receipt of your October 10, 2005 request for an advisory opinion concerning application of the Freedom of Information Law to records reflecting the names of deceased persons in whose names claims have been filed for workers' compensation benefits.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute."

From our perspective, Workers' Compensation Law §110-a precludes the release of the names you have requested. Unlike access to the records described in our correspondence to you in July of this year, this statute prohibits the Workers' Compensation Board from disclosing "records", except pursuant to court order, and §110-a(1)(b)(i) defines "records" as follows:

> "a claim file, a file regarding an injury or complaint for which no claim has been made, and/or any records maintained by the board in electronic databases in which individual claimants or workers are identifiable, or any other information relating to any person who has heretofore or hereafter reported an injury or filed a claim for workers' compensation benefits, including a copy or oral description of a record which is or was in the possession or custody of the board, its officers, members, employees or agents."

In short, the Workers' Compensation Board is prohibited from providing any records to you in which individual claimants are identifiable.

We hope this helps to clarify your understanding of the matter.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Jon Sullivan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 8, 2005

Mr. Allan D. Riga
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Riga:

We are in receipt of your October 10, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to various requests for records you have made to the City of Albany. Please note that while the Committee on Open Government is authorized to issue advisory opinions, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions.

You wrote that previous requests were not answered in their entirety, that you have submitted additional requests, and that you desire assistance in securing records in a timely fashion. In this regard, we offer the following comments.

First, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. We 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 our 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 we are unfamiliar with the record keeping systems of the City, to the extent that the records sought can be located with reasonable effort, we believe that the request would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the City can locate the records sought with a reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that the departments maintain their records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Based on our experience, it would be unlikely that the City could not locate the records on the basis of either the names of owners, and a street address or section, or the date of the complaint. We would conjecture as well that the records sought, as you have specified, are likely maintained by more than one department of the City.

Second, with respect to the delay in disclosure of the records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

In light of the volume of offices which the Clerk must contact and the extensive nature of your requests, it would not be unreasonable for City officials to take more than five days to respond

with records, or to assume that any delay would be reasonable in light of the nature of the totality of circumstances.

We hope this helps to clarify your understanding of the Freedom of Information Law. A copy of this opinion will be sent to Mr. Marsolais at your request.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: John Marsolais

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15677

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December 8, 2005

Mr. Adam Gorman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Gorman:

We are in receipt of your October 9, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to a request for records you have made to the Brighton Central School District that had not been answered.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

As per the above, any appeal of a constructive denial should be directed to the Superintendent.

We hope this helps to clarify your understanding of the Freedom of Information Law. In an effort to enhance understanding of and compliance with the Freedom of Information Law, a copy of this advisory opinion will be forwarded to Mr. Valenti.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Gary Valenti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15678

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December 8, 2005

E-MAIL

TO: Mr. Frank J. Russo, Jr.

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Russo:

We are in receipt of your October 19, 2005 request for an advisory opinion concerning the ability of a school district to refuse to receive requests for records made pursuant to the Freedom of Information Law via fax and/or e-mail. If your contentions are accurate, your local school district has recently changed its policy of accepting requests by fax and e-mail and now requires their submission in person or by US Mail.

In this regard, we believe that our response must be based on a provision within the State Technology Law, which consists of a series of relatively recently enacted statutes. Specifically, §305(1) states in relevant part that:

> "In accordance with rules and regulations promulgated by the electronic facilitator, government entities are authorized and empowered, *but not required*, to produce, receive, accept, acquire, record, file, transmit, forward, and store information by use of electronic means" (emphasis added).

Based on the foregoing, an agency such as a school district may choose to accept a request under the Freedom of Information Law made by means of fax and/or e-mail, but as indicated above, it is "not required" to do so. Similarly, §305(1) specifies that an agency would not be required to electronically transmit records sought under the Freedom of Information Law.

We hope this helps to clarify your understanding of the Freedom of Information Law.

CSJ:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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December 12, 2005

Luis Evangelista
[redacted]

Dear Mr. Evangelista:

Your letter addressed to Governor Pataki has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning public access to records, primarily in relation to the state's Freedom of Information Law.

The issue that you raised, in brief, involves the fee charged by a pharmacy for copies of records pertaining to a customer.

In this regard, the Freedom of Information Law is applicable to records maintained by governmental entities and generally authorizes those entities to charge a maximum of twenty-five cents per photocopy. However, that statute does not apply to pharmacies or other private entities. A different statute, §18 of the Public Health Law, pertains to medical records and authorizes providers of medical services, such as physicians or hospitals, to charge up to seventy-five cents per photocopy. I have contacted the Office of the Professions at the State Education Department, the agency that licenses pharmacists, and confirmed that pharmacists are not providers of medical services and that the limitation concerning fees in the Public Health Law does not apply to pharmacists or pharmacies.

As you suggested in your letter, there is no law that either pertains to or limits the fee that may be charged by a pharmacy or pharmacist for making copies of records available to customers. While the fee to which you referred may be excessive or perhaps unreasonable, there is no law of which I am aware that addresses the matter or that precludes the pharmacy from charging that fee.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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December 12, 2005

E-MAIL

TO: Stephen A. Melnyk

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Melnyk:

We are in receipt of your October 17, 2005 e-mail request for an advisory opinion concerning the release of certain work-related information about you contained in an e-mail from you to the Village Building Inspector.

According to your description, in your capacity as Chair of a Village Board, you wrote to the Building Inspector requesting information and making comments about an application. Your e-mail contained the name and address of your private employer, your work phone and fax number, and your work e-mail address. You inquire whether the information relative to your employment with the private employer is accessible pursuant to Freedom of Information Law. In this regard, we 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, in our view, only one of the grounds for denial is pertinent to disclosure of information related to your private employment. Specifically, §87(2)(b) states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a

permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

From our perspective, the private employer address, telephone number and e-mail address of a public officer or employee is largely irrelevant to the performance of one's official duties. When a person or firm seeks to contact members of municipal boards they typically address their correspondence to the appropriate government office, and those persons are typically contacted by phone either at or through their government offices. While contacting a village board member through the village offices may not be the most direct method of reaching that person, a message or notification can be given easily to the member. In short, we agree with your inference that the name and address of your employer, your work telephone number and e-mail address could have been withheld.

Third, in our view, the examination questions or answers provision is inapplicable to the content of the e-mail. Section 87(2)(h) 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, a licensing 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, if examination questions will be used in the future, the law permits an agency to deny access to both the questions and the answers.

Questions raised by you to the Building Inspector, and answers provided in response, in our opinion, are quite different from the administration of examinations in an academic or similar exam, or an exam relating to employment or licensing. Your characterization of the questions and answers which you exchanged as "about a permit application", " to try to gather information before the applicant came before our board" indicate that they were not used to evaluate a candidate for public employment, and therefore, it is our opinion that they are not exempt from disclosure.

Also relevant to an analysis of rights of access to the questions and answers is §87(2)(g). That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld. Factual information regarding the pending application and/or the applicant, therefore, would be available under §87(2)(g)(iii), however, to the extent that the e-mail contains opinions pertaining to the applicant and/or the application, in our view, those materials could be withheld.

We hope this helps to clarify your understanding of the Freedom of Information Law.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO- 15681

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December 12, 2005

Ms. Eileen Haworth Weil
[redacted]

The staff of the Committee on 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. Weil:

We are in receipt of your October 6, 2005 request for an advisory opinion concerning various requests for records made to the Town of Mamakating.

If your contention is accurate, that the Town has failed to respond to your specific requests for access to minutes and a draft Findings Statement from a recent Zoning Board of Appeals meeting, it has constructively denied your request. In addition, the Town has denied access to a letter from the Chair of the ZBA to the Attorney for the ZBA, citing "personnel matters."

In this regard, we offer the following comments.

First, when records are accessible under the Freedom of Information Law, they must be made available for inspection and copying. Further, §89(3) of that statute requires that an agency prepare copies of accessible records on request upon payment of the appropriate fee.

Second, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in our opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

There is nothing in the Open Meetings Law or any other statute of which we are aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, we believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Viewing the issue from a different vantage point, the Freedom of Information Law makes no distinction between drafts as opposed to "final" documents. The Law 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."

Due to the breadth of the language quoted above, once a document exists, it constitutes a "record" subject to rights of access, even if the record is characterized as "draft" or is unapproved. Further, as a general matter, minutes consist of a factual rendition of what transpired at an open meeting. On that basis, we believe that they are accessible [see Freedom of Information Law, section 87(2)(g)(i)]. Further, minutes often reflect final agency determinations, which are available under section 87(2)(g)(iii), irrespective of whether minutes are "approved". Additionally, in the case of an open meeting, during which the public may be present and, in fact, may tape record the meeting [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], there would appear to be no valid basis for withholding minutes, whether or not they have been approved.

Based on our understanding of the nature of a Findings Statement, it too, whether in "draft" or "final" form, constitutes a record which reflects factual matters upon which the ZBA makes its

legal findings and conclusions. Because Findings Statements are not required to be maintained separately from the meeting minutes, it is not uncommon for a zoning board to adopt minutes as their Findings Statements. It is our opinion, therefore, that Findings Statements, similar in most respects to minutes, are subject to rights of access under the Freedom of Information Law.

To the extent that you still may not have received a response from the Town regarding portions of your request, we 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless

it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Finally, with regard to the denial of your request for a copy of a letter between the ZBA Chair and the ZBA Attorney, while we are unaware of the contents of the letter, the Town's description indicates "this is a personnel matter", and your description indicates "it was discussed at length at the September 8, 2005 meeting."

By way of background, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of the documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. It may be that there are one or more grounds for denial which could justify a denial of access, however, without further information, we are unable to issue an opinion on this matter.

Perhaps of greatest significance is the provision cited earlier, §87(2)(b), concerning unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of 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 our view be withheld. Insofar as a request involves a final agency determination, we believe that such a determination must be disclosed, again, unless a different ground for denial could be asserted.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Linda Franck

From: Robert Freeman
To: LocalNet Email
Date: 12/13/2005 12:24:57 PM
Subject: Re: FIOL

Hi —

Whatever is filed with a court is public, unless a statute provides direction to the contrary. In the situation that you described, the records remain public unless and until charges are dismissed in favor of the accused, in which case the records are supposed to be sealed pursuant to §160.50 of the Criminal Procedure Law.

If you are referring to a justice court, the applicable provision is §2019-a of the Uniform Justice Court Act. In brief, that statute requires that records maintained by a justice court be made available to the public, again, unless a statute provides to the contrary.

If you need more or different information, I'll be happy to accommodate.

If not, have a wonderful holiday season!
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

>>> "LocalNet Email" [redacted]> 12/13/2005 12:03:22 PM >>>
Bob,
In dealing with court records, what can be withheld? If someone has been charged and arrested, can someone obtain the deposition of the written complaint? I would imagine the complaintant's name would be blacked out?

Rebecca A. Connolly, MMC
Somerset Town Clerk PO Box 368
Barker, NY 14012
716-795-3575 FAX 716-795-9041

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15683

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December 13, 2005

E-MAIL

TO: Anthony Johnston

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. Johnston:

I have received your letter concerning a denial of access to records maintained by a court in Erie County.

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."

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, it is clear that the courts are not subject to the Freedom of Information Law. Additionally, I know of no general requirement that a judge explain the basis for his or her decision.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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December 13, 2005

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 facts presented in your correspondence.

Dear Mr. Berman:

I have received your letter concerning your request made to the Valley Stream Central High School District for applications for the position of assistant superintendent and records related to the process of selection.

In this regard, first, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) 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)], other than that of the person selected, 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, applications for employment 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)].

Second, with respect to the evaluation of candidates for the position, of likely significance is §87(2)(g), which pertains to communications between and among government officers and employees. Specifically, the cited provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> I. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 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 the foregoing serves to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Frank J. Chiachiere

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 13, 2005

Ms. Valerie Seeley
03-G-0446
Bedford Hills Correctional Facility
P.O. Box 1000
Bedford Hills, NY 10507

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Seeley:

I have received your letters concerning your efforts in gaining access to records relating to the criminal proceeding that resulted in your conviction. In consideration of the situation that you described, I offer the following comments.

First, the Freedom of Information Law applies to agency records, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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, a police department or office of a district attorney would constitute an agency required to comply with the Freedom of Information Law, but a court falls beyond the coverage of that statute. This is not intended to suggest that court records need not be disclosed; on the contrary, other provisions of law often provide broad rights of access to court records (see e.g., Judiciary Law, §255). When seeking court records, it is suggested a request be made to the clerk of the court, citing an applicable provision of law as the basis for the request.

Second, when seeking records pursuant to the Freedom of Information Law from an agency, a request should be made to the agency's "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records (see 21 NYCRR §1401.2).

Third, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Based on the foregoing, it is suggested that you contact your attorney to determine the extent to which he or she continues to possess the records of your interest. If the attorney no longer maintains the records, he or she should prepare an affidavit so stating that can be submitted to the agency that maintains the records sought, and you should prepare similar affidavit.

I note that in Moore, it was also held that agency records ordinarily beyond rights of access conferred by the Freedom of Information Law are accessible if the records have been used as evidence or introduced in a public judicial proceeding. In other words, if the records could be obtained from a court clerk because they were used or introduced in a judicial proceeding, the same records would be available from an agency.

Next, insofar as the records sought were not made public through a judicial proceeding, they would be accessible or deniable, in whole or in part, depending on their content, under the Freedom of Information Law. With respect to those records, as a general matter that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In considering the kinds of records to which you referred, relevant is a decision by the Court of Appeals, the state's highest court, concerning records prepared by police officers in which it was held that a denial of access based on their characterization as intra-agency materials would be

inappropriate. The provision at issue, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In its analysis of the matter, it was determined that the agency could not claim that the records can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

For instance, of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness, or others interviewed in an investigation.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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December 13, 2005

Ms. Amber Suriani
[redacted]

The staff of the Committee 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. Suriani:

I have received your letter concerning your request made to the Central New York Regional Emergency Medical Services Council ("the Council"). Based on our recent conversation, the primary issue involves your ability to obtain the names of emergency care providers ("ECP's") for the Public Access Defibrillation ("PAD") programs in Onondaga County.

In this regard, first, I believe that the Council is required to comply with the Freedom of Information Law, for it carries out its functions pursuant to Article 30 of the Public Health Law under the aegis of the State Department of Health. Section 3011 pertains to the powers and duties of the Department and the Commissioner in relation to the operation of ambulance and advanced life support first response services and states in subdivision (3) that the Commissioner, "with the advice and consent" of the of the State Emergency Medical Services Council created by §3002 of the Public Health Law, "shall designate not more than eighteen geographic areas within the state wherein a regional emergency medical services council shall be established." The Council is one among several to have been established.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant, particularly in consideration of the concerns expressed by the Council's attorney, is §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In addition, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, and the third involves the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." Based

on the remarks in your correspondence, the use of the names and addresses of ECP's would not involve either a commercial or a fund-raising purpose.

More importantly, I point out that there are several judicial decisions, rendered under both New York and federal statutes, that pertain to records about individuals in their business or professional capacities which indicate that the records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural

> Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of the identities of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such as unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

In short, in my opinion and as suggested in the decisions cited above, the exception concerning privacy, including §89(2)(b)(iii), does not apply in the context of your request. In my view, if a list of ECP's and their addresses exists, it must be disclosed. Alternatively, if there is no such list, I believe that portions of records that reflect ECP's names and addresses must be made available to comply with the Freedom of Information Law.

A copy of this response will be sent to the Council's attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Bradley M. Pinsky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 14, 2005

E-Mail

TO: Tom McGinty

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. McGinty:

I have received your letter concerning Newsday's request under the Freedom of Information Law for the names, titles, hire and retire dates and monthly pension annuities pertaining to retirees of the New York City Transit Authority who are currently receiving pension benefits.

The Transit Authority responded by transmitting the items sought, except for the names of the retirees. Its response did not indicate that the Transit Authority was withholding the names. Upon questioning the reason for the denial of access to the names of retirees, the Deputy FOIL Officer referred to §89(7), which provides in relevant part that the Freedom of Information Law does not require the disclosure of "the name or home address of a beneficiary of a public employees' retirement system." The Transit Authority has contended that the term "beneficiary" refers to a retired employee receiving benefits.

From my perspective, the denial of access to the identity of a retiree is contrary to both common practice and law. The identities of former public employees receiving pension benefits, including the amounts, are routinely disclosed, and in my view those persons may not be characterized as "beneficiaries." To bolster my contention, I have reviewed Black's Law Dictionary (Revised Fourth Edition) which defines "beneficiary" to mean "[O]ne for whose benefit trust is created...A person having the enjoyment of property of which a trustee, executor, etc., has the legal possession. The person to whom a policy of insurance is payable." Similarly, Webster's New Collegiate Dictionary defines "beneficiary" to mean "the person designated to receive the insurance of a trust estate."

In short, I believe that the term "beneficiary" as it is used commonly and for the purposes of the Freedom of Information Law is intended to pertain to a person designated by a public employee to receive pension benefits upon the employee's death.

It is also noted that when any aspect of a request is denied, both the Freedom of Information Law, §89(3), and the regulations promulgated by the Committee on Open Government, 21 NYCRR §1401.2, require that the applicant be informed of the denial of access. In addition, §1401.7 of the regulations requires that the applicant be informed of the right to appeal and the identity of the person designated to determine appeals. Based upon your comments, the Transit Authority failed to comply with those requirements.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be sent to officials at the Transit Authority.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Denise Fraser
Juliet Williams

From: Robert Freeman
To: [redacted]
Date: 12/14/2005 4:37:24 PM
Subject: Re: LETTERS THAT DIDN'T GET INTO THE PUBLIC RECORD

In my view, email is merely a means of transmitting a record, and it should be treated for purposes of the Freedom of Information Law in the same manner as a traditional paper record. I note that there is no requirement that email communications be printed or kept in paper form. Also, I am not sure what you mean by not "making it into the Village of Millbrook public record." There is no obligation that a municipal board refer at its meetings to each item of correspondence that it receives.

If you can offer clarification, perhaps I may be able to provide better guidance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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>>> [redacted] > 12/14/2005 3:41:28 PM >>>
DEAR MR. FREEMAN,
IT HAS JUST COME TO OUR ATTENTION THAT TWO LETTERS FROM THE SAME PERSON NEVER MADE IT INTO THE VILLAGE OF MILLBROOK PUBLIC RECORD. WE KNEW THE LETTERS HAD BEEN WRITTEN, HAD FOILED THEM, AND BEEN TOLD THEY WERE NOT IN THE FILE.
BUT NOW THE WRITER OF THE LETTERS HAS TURNED THEM OVER TO LISA BARAVALLE. THEY WERE ORIGINALLY EMAILS, AND I'M ASSUMING SHOULD HAVE BEEN PRINTED OUT
AND PUT IN THE FILE. OR AREN'T PUBLIC OFFICIALS REQUIRED TO TREAT EMAILS AS THEY WOULD OTHER CORRESPONDENCE?
WE WOULD VERY MUCH APPRECIATE YOUR ADVICE ON OUR SITUATION.

THANK YOU,
JULIA WIDDOWSON

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 14, 2005

Ms. Ruth S. Szalasny
[redacted]

The staff of the Committee on 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. Szalasny:

We are in receipt of your October 26, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to copies of requests for records made to the Town of Eden pursuant to the Freedom of Information Law. As you relate, a Town Board member has requested the names and addresses of persons who have made requests to the Town, in addition to the subject matter of those requests. In that regard, we offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. It may be that the Town Board member has sought records or information that may not exist. To clarify, he requested "names of who filed" requests for copies. If no list of names exist, the Town would not be obliged to prepare a list on his behalf.

Second, and more importantly, 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. From our perspective, with the exception of portions of certain kinds of requests, copies of the records in question, the request themselves would be accessible to the public under the law.

In our 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, we 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).

It is also noted that the Freedom of Information Law is permissive; even in situations in which an agency *may* withhold records or portions of records, it is not obliged to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. Therefore, even if the Town could withhold the records on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see §87(2)(b)], it would not be required to do so.

Lastly, you indicated that the member made repeated requests for these particular records. While it has been held that an agency must permit an applicant to review records throughout its regular business hours [see Murtha v. Leonard, 210 AD 2d 441 (1994)], we know of no provision or decision that deals with the number of times that a record may be inspected or how long a request may be considered to be active. From our perspective, the principle of reasonableness should govern. If a request involves a great number of records, we do not believe that an agency can restrict inspection to a single day; rather, it should provide an opportunity to the applicant to review all of the records, perhaps on a piecemeal basis so as not to unduly interfere with the agency's ability to perform its duties. Similarly, we know of no limitation concerning the inspection of records. We do not believe that an agency must make the same records available over and over, however, if such disclosure would unnecessarily interfere with its capacity to carry out its duties.

Thank you for your kind words about our Executive Director. We hope this helps clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Hon. Mary Jo Hultquist

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 16, 2005

Ms. Karen A. Hoffman
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Hoffman:

We are in receipt of your October 24, 2005 e-mail request for an advisory opinion concerning actions taken by the Board of Education of the Greece Central School District on October 15, 2005. Based on your description, the Board President closed a meeting to the public, indicating that it was a "closed study session" for the Board only. Notice of the meeting had not been posted, but two consultants were present and presumably discussed their recently completed report, an "Educational Audit of the District and the Board of Education."

First, as you correctly point out, there is no such gathering characterized in law as a "closed study session". In this regard, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal

> acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, if a majority of the Board gathers to discuss District business, collectively as a body and in their capacities as Board members, any such gathering, in our opinion, would constitute a "meeting" subject to the Open Meetings Law.

With respect to 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, we do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body. Further, if less than a quorum is present, the Open Meetings Law would not, in our opinion, be applicable.

Second, we point out that there are two methods 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.

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

Relevant to your inquiry may be §108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law."

While 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 may be applicable, it is unlikely that they apply in this case.

Accordingly, a meeting at which the report was discussed, in our opinion, would be subject to the Open Meetings Law, and should have been properly noticed. This is especially true in light of the accessibility of audit reports pursuant 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.

Although §87(2)(g) potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

While opinions, advice and recommendations may be withheld in many instances when found within inter-agency or intra-agency materials, that is not so in the case of an external audit. As indicated by subparagraph (iv) of §87(2)(g), the State Legislature specified that external audits must be disclosed, even though they typically consist of statistical or factual information, as well as opinions or recommendations.

In short, in consideration of the clear direction provided by §87(2)(g)(iv), we believe that the record at issue must be disclosed. We note, too, that §87(2)(g)(iv) was enacted initially as part of the "Governmental Accountability, audit and Internal Control Act of 1987." The provisions of that act "sunset" periodically but have been renewed several times to ensure, in part, that external audits remain accessible to the public.

In an effort to enhance their understanding of the Open Meetings and the Freedom of Information Laws, copies of this opinion will be forwarded to the Board.

I hope that I have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Ken Walsh, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 19, 2005

Mr. Andrew Brown
95-A-3248
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Brown:

I have received copies of your letters addressed to various courts in which you requested access to records under the Freedom of Information Law.

In this regard, I point out that the Freedom of Information is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

I note, too, that one of your requests was made to the Jamaica Information Service. Because that entity is not an "agency" as that term is defined in §86(3), it would not be required to comply with the New York 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

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December 16, 2005

Mr. Brook Chambery
Beechwood Restorative Care Center
975 Ebner Drive
Webster, NY 14580

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Chambery:

We are in receipt of your November 9, 2005 e-mail request for an advisory opinion concerning a request for records to the Office of the Attorney General. Based on the documents referenced in your request, the Attorney General has denied your appeal for a copy of a closing memorandum, and perhaps portions of a writer's report, citing provisions of the Civil Procedure Law and Rules (CPLR) and Criminal Procedure Law (CPL).

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant under the circumstances, as cited by the Attorney General, is the first ground for denial, §87(2)(a), which pertains to the ability to withhold records that "are specifically exempted from disclosure by state or federal statute." Because the records were prepared following the investigation of you and Beechwood Restorative Care Center, in anticipation of grand jury proceedings, it appears that the records would be exempt from disclosure within the scope of subdivisions (c) and/or (d) of §3101 of the CPLR, and subdivision 4(a) of §190.25 of the CPL.

Section §3101 pertains to disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe limitations on disclosure.

One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable", and §3101(d)(2) dealing with material prepared in anticipation of litigation states in relevant part that:

> "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

The thrust of case law concerning material prepared for litigation is consistent with the preceding analysis, in that §3101(d) may properly be asserted as a means of shielding such material from an adversary.

The records you have requested are further protected from disclosure pursuant to the provisions of §190 of the CPL which states in relevant part:

> 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.... Such evidence may not be disclosed to other persons without a court order.

In an effort to clarify the nature of a "closing memorandum", we telephoned the Assistant Solicitor General to determine the nature of closing memoranda generated in cases such as this. In sum, such memoranda are prepared by attorneys working on investigative files, setting out among other things conclusions reached from any investigation and the attorneys' recommendations. Because of the statutory exemptions applied to this type of document, in our opinion, it is likely that the denial of your request was proper. Whether grand jury proceedings ensued is not relevant to this determination.

Based on the Assistant Solicitor General's correspondence of October 24, 2005, page 8, the "writer's report", was provided for your inspection with redacted copies of interviews. If you did not receive a copy of the writer's report, we would suggest that you call to clarify with the Assistant Solicitor General. It is our opinion that portions of the writer's report and the interview transcripts could have been properly be redacted as attorney work-product prepared in anticipation of grand jury proceedings, pursuant to the same analysis set forth above.

We hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

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December 16, 2005

Mr. Brook Chambery
Beechwood Restorative Care Center
975 Ebner Drive
Webster, NY 14580

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Chambery:

We are in receipt of your November 14, 2005 request for an advisory opinion concerning the application of the Freedom of Information Law to certain requests made to the Department of Health.

As you indicate, the Department has not communicated with you since the denial of your appeals earlier this year. In that regard, we point out that if an agency has failed to respond to a proper appeal as required by §89(4)(a) of the Freedom of Information Law, the person seeking the records may consider such failure as a denial of the appeal and to have exhausted his or her administrative remedies. That being so, it has been held that he or she may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD2d 388 (1982)]. Further, the Freedom of Information Law was recently amended to specify that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal [see §89(4)(b)].

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)].

While the Judge may have ordered DOH, in the context of litigation, to "produce . . . a detailed description of each of the documents that are being withheld pursuant to a statutory exemption, articulating the reasons why such documents fall squarely within such statutory exemption," there is no statutory requirement for such description relative to a denial of a request or appeal.

With respect to any documents which you believe have been inadvertently omitted, 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, we note that the Committee on Open Government has recommended legislation that would require a court to award attorney's fees in situations in which agencies clearly fail to comply with the Freedom of Information Law. Enclosed is a copy of the Committee's annual report. I would be interested in your reaction to our proposals.

We hope that this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm
Enc.

STATE OF NEW YORK
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December 19, 2005

Ms. Patti Greenberg
[redacted]

The staff of the Committee 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. Greenberg:

As you are aware, I have received a variety of material from you concerning your requests for records of the Jericho Union Free School District. The District has also sent materials relating to your requests to this office.

In the commentary that follows, an effort will be made to provide guidance and educate both you and District officials concerning the Freedom of Information Law and the direction provided by the courts concerning the implementation of that statute. Copies of this response will be sent to District officials.

First, there is no "formal" complaint procedure. This is a small office; it has only four employees. In short, when people contact the Committee on Open Government in writing and seek advice or opinions relating to the Freedom of Information Law, we respond by preparing an advisory opinion. Written opinions are prepared in response to inquiries by government officers and employees, as well as members of the public. Although the opinions rendered by this office are not binding, it our hope that they are educational and persuasive, and that they serve to encourage compliance with law.

Second, I point out that the title of the Freedom of Information Law may be somewhat misleading. That statute pertains to existing records, and §89(3) provides in relevant part that an agency, such as a school district, is not required to create a new record in response to a request. Therefore, if, for example, a request is made for a "list" of certain items and no such list exists, an agency would not be required to prepare a list in order to accommodate the person making the request. Similarly, because it pertains to requests for existing records, the Freedom of Information Law does not require that agency staff provide information in response to questions. Many of your requests seek to elicit information through questions. For instance, in your letter of October 22 addressed to the Superintendent, you raised a variety of questions, e.g., "6/17 dinner who was with Superintendent in Huntington?"; "9/27 why was Superintendent buying supplies?". On October 8, you asked questions concerning vehicles, such as "where is the Buick now?" Those are examples

of numerous instances in which you sought information by raising questions. In my view, it is the obligation of an agency to respond to requests for existing records; an agency is not obliged to furnish answers to questions to comply with the Freedom of Information Law.

Third, since you referred to the Personal Privacy Protection Law, I point out that that law applies only to state agencies; it does not apply to local governments, such as school districts. Further, in the context of your reference to that law when it is applicable, it deals with personal information pertaining to a "data subject", a natural person. In brief, the Personal Privacy Protection Law generally provides data subjects with rights of access to records pertaining to them that are maintained by state agencies; concurrently, it forbids state agencies from disclosing personal information about a data subject, unless a disclosure is permitted by §96(1) of that law. Again, because your requests involve a school district, a unit of local government, the Personal Privacy Protection Law is inapplicable.

Fourth, several of your requests involve records prepared over the course of several years, and you were informed that many of the records are kept in storage. In another aspect of your requests, a key issue involves the extent to which your requests "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 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 District, to the extent that records sought can be located with reasonable effort, I believe that you 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 of reasonably describing the records.

It is important to point out that referring to a specific document or documents would not necessarily result in a request that reasonably describes the documents. By indicating 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 of Appeals 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 illustration, assuming that the Nassau County telephone directory is a District record and that you request portions of the directory identifying those persons whose last name is "Greenberg", 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 Greenberg'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 "Patricia." 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 Patricia would require a line by line 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. I would conjecture that some aspects of your requests involve the equivalent of the search for the needle in the haystack. In those instances, your requests in my opinion would not reasonably describe the records.

In a somewhat related vein, it has been suggested that elements of your requests are repetitive. If that is so, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you, there must be a demonstration that you no longer 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).

Based on the foregoing, if you request records previously made available to you, you can be asked to prepare an affidavit stating that you no longer have possession of the records before an agency is required to honor a second request for the same record.

You complained that the District failed to respond to your requests in a timely manner. As you may know, the Freedom of Information Law was amended in May in a manner that clarifies agencies duties to respond to requests in a timely manner. Specifically, the Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Lastly, 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.

I hope that I have been of assistance and that the foregoing will be of value to you and District officials.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Henry L. Grishman
John Gross

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15695

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December 19, 2005

Ms. Ruth Markovitz, Chief
Legal Counsel Bureau
County of Nassau
Office of the County Attorney
One West Street
Mineola, NY 11501-4820

The staff of the Committee on 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. Markovitz:

We are in receipt of the copy of your October 26, 2005 response to Ms. Carolyn Foley's appeal of a denial of her request for GIS data that is reflected on the Nassau County website. Although it was not requested, we offer the following opinion regarding a government claim that GIS material may be protected by copyright.

While we are not experts on the subject of copyright, based on the only judicial decision of which we are aware, Nassau County GIS data may not be subject to a copyright claim. In that case, County of Suffolk v. Experian Information Solutions, Inc., it was initially determined that the County could properly claim copyright protection for the tax maps that it prepared (U.S. District Court, SDNY, 99 Civ.8735, May 15, 2000). On reargument, the District Court reversed its prior holding and found that such a claim could not be made (U.S. District Court, SDNY, July 21, 2000).

On appeal, the Second Circuit Court of Appeals held that in general, New York State, local government, and Suffolk County may claim a copyright protection under the Copyright Act. In contrast to the Federal Government, which is prohibited from obtaining copyright protection for its works (17 USC §105), the Second Circuit found that "the Copyright Act is silent as to the rights of states or their subdivisions" and that "[b]y specifying a limitation on ownership solely against the federal government, the Copyright Act implies that states and their subdivisions are not excluded from protection under the Act." County of Suffolk v. First American Real Estate, 261 F.3d 179, 187 (2nd Cir. 2001).*

* First American Real Estate purchased the business of Experian Information Solutions, Inc., on January 1, 1998, County of Suffolk, at 183, FN 1.

Due to insufficient evidence, however, the Second Circuit remanded the matter concerning whether the maps were sufficiently original and creative to qualify for copyright protection, or whether the content and the form of the maps were dictated by state law and regulation and thus not subject to copyright protection. Further, the Second Circuit opined, it would be for the District Court to determine whether the tax maps were in the public domain from inception, and thus outside the coverage of the Copyright Act. To make this determination, the District Court would have to consider, most importantly, whether the County needed the economic incentive of the Copyright Act to create the maps, or whether it had adequate incentives or obligations to produce their respective materials.

The Second Circuit Court then turned to the issue of whether the Freedom of Information Law continued to impose an obligation on the County to make the maps available for public inspection and copying, and confirmed that the County's responsibility to make all records available for public inspection and copying applied to maps which may be protected by copyright. The Court further opined that:

> "Suffolk County also cannot restrict the subsequent dissemination of its work completely. First, the Copyright Act 'protects only the form of expression and not the ideas expressed.' New York Times Co. v United States, 403 US 713, 726 n. *, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (Brennan, J., concurring); .... Second, the fair use doctrine, codified in section 107 of the Copyright Act, strikes a balance between the rights of a copyright holder and the interest of the public in disseminating information.... The fair use doctrine 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.' Campbell v. Acuff-Rose Music, Inc., 510 US 569, 577, 114 S.Ct. 1164, 127 L.E.2d 500 (1994) (internal quotation marks omitted)." Id., at 193.

Following remand to the District Court, litigation was settled, and the court, therefore, never determined the issue of whether the maps were sufficiently original and creative to validly claim copyright protection.

Conditioning the release of copies on contractual agreements governing future treatment of the copies, in our opinion, would thwart the very purpose and intent of the Freedom of Information Law. It is our belief that when materials are accessible under the Freedom of Information Law, upon receipt of the appropriate fee, they must be released to the applicant without restriction. Accordingly, in keeping with the Second Circuit decision in County of Suffolk, we advise that it is permissible for the County to *notify* the applicant that the materials may be subject to copyright protection, but that the County cannot condition access on a contractual obligation pertaining to redisclosure of records accessible to any member of the public.

Finally, we note that your letter advises Ms. Foley that there is a $45 cost of reproduction of the material onto a compact disc.

With respect to clerical or other costs associated with responding to a request for copies of records, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. In addition to §87(1)(b) of the Law, the regulations state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR 1401.8)."

Further, §1401.8(c)(3) states in relevant part that "the actual reproduction cost...is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries."

Based upon the foregoing, we believe that a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or disk) to which data is transferred.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

Thank you for your consideration of these issues. A copy of this opinion will be forwarded to Ms. Foley.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Carolyn K. Foley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 19, 2005

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 correspondence concerning your request for the employment contract of the Executive Director of the Lackawanna Municipal Housing Authority. In response, you were informed that the request was forwarded to the Authority's attorney "per proper procedure/disposition relative to release of same."

In my view, the response was incomplete and, for the reasons to be described in the ensuing commentary, you may consider the request to have been denied. When a request is denied, the applicant has the right to appeal.

By way of background, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the

> acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Further, as advised in an opinion addressed to you in 2003, I believe that the contract must be disclosed. To reiterate, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, contracts, bills, vouchers, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff or outside contractors must generally be disclosed, for none of the grounds for denial could appropriately be asserted to withhold those kinds of records. Likewise, in my opinion, a contract between an administrator, for example, and a public authority clearly must be disclosed under the Freedom of Information Law.

In analyzing the issue, the provision of greatest significance in my opinion is §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers

employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In a discussion of the intent of the Freedom of Information Law by the state's highest court in a case cited earlier, the Court of Appeals in Capital Newspapers, supra, found that the statute:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (67 NY 2d at 566).

In sum, I believe that a contract between the Authority and an individual, like a collective bargaining agreement between a public employer and a public employee union, must be disclosed, for it is clearly relevant to the duties, terms and conditions reflective of the responsibilities of the parties.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas J. Radich

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 19, 2005

Ms. Shauna Daly
[redacted]

Dear Ms. Daly:

As you may be aware, the Committee on Open Government was created by the enactment of the New York Freedom of Information Law, and its primary functions involve providing advice and opinions to government agencies and members of the public. In that role, I have received a copy of your request involving communications between numerous agencies and Rudolph Giuliani and George E. Pataki, the former in his capacities as a government official and a private citizen, and the latter in his governmental positions.

In consideration of the nature and scope of your requests, 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 or prepare new records in response to a request. Many elements of your request relate to the subjects of your interest and their activities occurring more than twenty years ago. Here I point out that government agencies are not required to maintain most records permanently. Pursuant to Articles 57 and 57-A of the Arts and Cultural Affairs Law, agencies must maintain records in accordance with schedules indicating minimum retention periods. Once the expiration of a retention period has been reached, records may be disposed of or destroyed. I would conjecture that in many instances, records that might have fallen within the scope of your request have been legally destroyed.

Second, §89(3) also states that an applicant must "reasonably describe" the records sought. The Court of Appeals, the state's highest court, has held that whether that standard is met often is dependent on the nature of an agency's filing or record keeping systems, and that an agency, in its attempt to locate requested records, is not required to engage in a prolonged search "where [an] agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden....'" (Konigsberg v. Coughlin, 68 NY 2d 245, 250 (1986)]. If, for example, all records involving communications between an agency and either of the two individuals named are maintained in a file or files kept by means of their names, or if certain communications falling within the scope of the request can be located with reasonable effort, the request, to that extent, would in my view, reasonably describe the records sought. On the other hand, insofar as records cannot be located with reasonable effort, i.e., because an agency's correspondence is not

retrievable by name but rather chronologically, and locating the records falling within the request would be analogous to an attempt to find a needle in the haystack, the request would not, in my opinion, meet the standard of reasonably describing the records. Based on my discussions with representatives from several agencies, while they may possess records that fall within the scope of your request, in most instances, the records cannot be found with reasonable effort due, very simply, to the manner in which they are kept or filed.

Lastly, if responding to your request would "generate a substantial number of documents", you wrote that you would "prefer to have an index of the documents..." In short, there is nothing in the Freedom of Information Law that requires an agency to produce the kind of index to which you referred.

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

From: Robert Freeman
To: Frank Coccho
Date: 12/20/2005 11:51:31 AM
Subject: Re: Appeals Officer

Hi - -

I've always believed that it's the governing body because §87(1)(a) of the FOIL say that "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation..." In your case, the City of Corning is the public corporation, and its governing body is the City Council. I know that it doesn't always happen that way in practice, but I believe that's what it's supposed to be.

Hope all is well and that you and yours have a terrific holiday season!
Bob

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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>>> "Frank Coccho" [redacted]> 12/20/2005 9:59:38 AM >>>
Hi Counselor. I have a question regarding the appointing authority of an Appeals Officer. The pocket guide (page 8) (in part) states:

"A denial of access must be in writing, stating the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to hear appeals by the head or governing body of the agency."

My question is: with the City Manager form of government, who is the "head or governing body of the agency or the person designated to hear appeals by the head or governing body of the agency."?

Our charter states that the City Manager shall be the "Chief Executive Officer and the Chief Administrative Officer of the city.." Further, there is no provision in our charter with regard to the appointment (mayor or manager) of the Appeals Officer.

Is there any provision in the law with regard to the appointing authority?
Thanks.

FOIL-AO-15099

From: Robert Freeman
To: Melissa Gold
Date: 12/20/2005 11:19:53 AM
Subject: Re: Hi - -

Hi - -

I'm back. I assume that you spoke with John Dearstyne (who I believe has a daughter who went to HS with you). I left a message with him concerning your inquiry. Let me know if you have difficulty, and I'll see what I can do.

By the way, did you actually submit a FOIL request, or was it an informal oral inquiry? For what it's worth, you should know that FOIL deals with existing records and does not require that an agency create a new record in response to a request. Also, FOIL doesn't require that agency staff answer questions. Certainly they may choose to do so and often do, but they are not required to do so to comply with FOIL. If you are submitting a written request under FOIL, you should always seek records (i.e., records or portions of records indicating the locations of hazardous intersections in the Town of Colonie), rather than asking questions.

Let me know if I can help.

Robert J. Freeman
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>>> Melissa Gold <mgold@bizjournals.com> 12/20/2005 10:43:48 AM >>>
Well, I spoke with the records officer and he said that he will look into it. His argument was that the document was created for one purpose and is being used for another, which I think is irrelevant. Specifically, this data was created by or for engineers. I am not looking for any engineering-specific data or asking anyone to create a key just for my use. All I want is a list or map of what the intersection numbers are, which I imagine must exist somewhere in order for this to be/have been usable by anyone. So, he's going to check on it and let me know.

--
Melissa F. Gold
Research Director
The Business Review
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Latham, New York 12110

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Fax: 518-640-6801
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albany.bizjournals.com

From: "Robert Freeman" <RFreeman@dos.state.ny.us>
Date: Tue, 20 Dec 2005 09:46:59 -0500
To: <mgold@bizjournals.com>
Subject: Re: Hi - -

Hi - -

Assuming that there are definitions or descriptions for the codes, yes, they must be disclosed. By the way, you're getting this stuff due to a case that went to the Court of Appeals. I wrote an opinion with which the Court agreed.

I have a 10 o'clock meeting. I'll get back to you with more after the meeting.

Robert J. Freeman
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>>> Melissa Gold <mgold@bizjournals.com> 12/20/2005 9:41:16 AM >>>
Thanks... I will check it out.

I have a question, though -- when one makes a FOIL request, is the responding agency required to provide sufficient data to "decode" the information? In other words, I made a FOIL request to the NYSDOT because I
am doing a list of the area's most dangerous intersections. I asked for the
following:

-number of accidents that occurred within specified time period,
-average number of vehicles passing through that intersection per day,
-number of vehicles that are passenger or commercial,
-number of roads/arteries intersecting and their speed limits,
-type of traffic controls at intersection (ex. lights, stop signs, etc.),
and
-number of fatalities and personal injuries that occurred within specified
time period.

They gave me as much information as they had within these parameters, however it uses all of these abbreviations and is based on intersection
numbers, rather than street names, so there is no way that I can figure out
what's what. I left a message on Friday (the day that I received the data)

for the records officer, and he hasn't called me back. If I ask for the
information, are they obligated to provide it with all of the tools that I
need to interpret it (such as a map of intersection numbers or something
like that)?

--
Melissa F. Gold
Research Director
The Business Review
40 British American Boulevard
Latham, New York 12110

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albany.bizjournals.com

From: "Robert Freeman" <RFreeman@dos.state.ny.us>
Date: Tue, 20 Dec 2005 09:34:40 -0500
To: <tgold@albanygov.com>, <mgold@bizjournals.com>
Subject: Hi - -

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15700

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December 20, 2005

E-MAIL

TO: William Brown

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Brown:

I have received your second letter concerning requests for records made to the Hoosick Falls Central School District. You wrote that the District "has ceased to respond to any of [your] requests", and you asked what process you might follow.

In this regard, I will respond to the issues raised in your initial letter within approximately a month. However, in consideration of your latest complaint, 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) states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

A copy of this response will be sent to the School District.

I hope that I have been of assistance.

RJF:tt

cc: Hoosick Falls Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15701

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December 20, 2005

Mr. Lawrence G. Malone
Couch White, LLP
P.O. Box 22222
Albany, NY 12201-2222

Dear Mr. Malone:

As you are aware, I have received your letter in which you sought an advisory opinion concerning issues that you presented in relation to the Freedom of Information Law. By way of background, you wrote that:

> "Cablevision Systems of Long Island Corporation (Cablevision) is in the process of requesting disclosure of draft franchise agreements that Verizon New York Inc. (Verizon) has filled with a number of municipal governments across Long Island, and elsewhere in New York State and related documents. Verizon has voluntarily provided the drafts to the municipalities in order to facilitate and in connection with negotiations for it to acquire franchise authority from the towns. These franchises will allow Verizon to provide cable television service in those localities.
>
> "Cablevision has existing franchises in many of the localities where Verizon is contemplating offering cable service. Cablevision does not oppose Verizon's entry into the video business. State law, however, requires that franchises granted to new providers of cable television service result in a level regulatory and economic playing field between the incumbent cable company and the new provider. 16 NYCRR 895.3. Cablevision, therefore, seeks to review the drafts that have been provided to the municipalities in order to participate meaningfully in the franchising process of each municipality (16 NYCRR 894.7) and assert its right under state law to a level playing field.
>
> "Verizon has systematically opposed each Cablevision request for disclosure of draft cable franchise agreements. In fact, it has regularly threatened municipalities with legal action if they disclose the draft

> franchises and, in some instances, has obtained injunctions against local government entities that had determined to provide disclosure. We fully expect Verizon to continue this course of action with every Town that Cablevision approaches for disclosure."

In your capacity as the attorney for Cablevision, you asked:

> "1) whether municipalities have discretion to disclose all documents in their possession, irrespective of whether the documents can be claimed to fall within exceptions to the FOIL's directive of mandatory disclosure; and
>
> 2) if so, whether Verizon has standing to challenge the exercise of that discretion by opposing the disclosure of documents by municipalities on the ground that the documents at issue allegedly fall within one or more FOIL exceptions for disclosure."

In this regard, I offer the following comments.

First, as you suggested in your letter, the Freedom of Information Law is broad in its coverage, for it pertains to all government agency records and defines the term "record" in §86(4) to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, draft franchise agreements constitute agency records subject to rights of access conferred by the Freedom of Information Law when they come into the possession of a state or municipal agency.

I note, too, that 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...."

Second, it is emphasized that the Freedom of Information Law is permissive. Although an agency may withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals has held that the agency is not obliged to do so and may choose to disclose. As stated in that unanimous decision: "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

There are numerous instances in which agencies choose to disclose records they have the ability to withhold, and their authority to do so has been confirmed judicially. In Buffalo Teachers Federation v. Buffalo Board of Education, although §89(7) of the Freedom of Information Law specifies that public employees' home addresses need not be disclosed, it was determined that the agency "may, should it choose, grant access to information which is exempt from disclosure under FOIL" [156 AD2d 1027, 1028 (1990)].

Perhaps most pertinent is Seelig v. Sielaff [200 AD2d 298 (1994)], in which the lower court enjoined a New York City agency from releasing the social security numbers of correction officers without their written consent pursuant to the Personal Privacy Protection Law, Article 6-A of the Public Officers Law. While the Appellate Division agreed that disclosure of social security numbers would result in an unwarranted invasion of correction officers' privacy, the Court unanimously reversed and vacated the judgment because the agency involved is an entity of local government and, therefore, is not subject to the Personal Privacy Protection Law or prohibited from disclosing social security numbers. Specifically, it was found that:

> "The injunctive relief granted by the IAS Court was based upon Public Officers Law §92 (1), part of this State's Personal Privacy Protection Law. That law by its own terms excepts the judiciary, the State Legislature, and 'any unit of local government' from its purview. Consequently, the relief granted against the respondents was improper" (id., 299).

In short, while a state agency that is subject to the Personal Privacy Protection Law is obliged to protect against disclosures to the public that would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §§87(2)(b) and 89(2); Personal Privacy Protection Law, §96(1), neither an entity of local government nor a court is required to do so.

Analogous under the circumstances is the operation of §89(5) of the Freedom of Information Law, under which a commercial enterprise required to submit records to a state agency may identify those portions of records considered to be deniable under §87(2)(d) at the time of their submission. Section 87(2)(d) authorizes an agency to withhold trade secrets or other records submitted by a commercial enterprise to the extent that disclosure "would cause substantial injury to the competitive position of the subject enterprise. If the agency accepts the claim made by that entity, it essentially would agree to keep the records confidential. If a request is later made under the Freedom of Information Law, or if a state agency, on its own initiative, seeks to disclose records that had been accorded protection, it would be required to inform the entity claiming the exemption from disclosure and offer the entity an opportunity to explain why disclosure would "cause substantial injury" to its competitive position. If, following the exhaustion of administrative remedies by either a person seeking the records claimed to be exempt or by the entity claiming the exemption, a judicial proceeding is commenced, it would have to be proven that the records would cause substantial injury to the entity's competitive position if disclosed. The burden would be on the agency if it has denied access based on its agreement with the entity that the records are exempt under §87(2)(d). On the other hand, if the agency believes that the record should be disclosed, the entity would have the burden of proof. The law specifies in that latter instance that a commercial entity seeking to prohibit the state agency from disclosing records has fifteen days from the issuance from the issuance of the agency's final determination to initiate a judicial proceeding to attempt to block disclosure.

As in the case of the Personal Privacy Protection Law under which a state agency may be prohibited from disclosing personal information [§96(1)] and which specifies that an aggrieved person may seek judicial review and relief (§97), §89(5) of the Freedom of Information Law offers a commercial enterprise the ability to prohibit a state agency from disclosing records that might be withheld based on §87(2)(d) by initiating a judicial proceeding. However, in this instance, since your questions involve local governments, not state agencies, neither the procedure nor the potential protection accorded by §89(5) is applicable or available to Verizon or any other commercial enterprise. Section 89(5) provides a means by which a commercial enterprise can initiate a judicial proceeding against a state agency that has chosen to disclose records; there is no provision that provides a commercial enterprise with the authority to bring suit to preclude a unit of local government from disclosing records in its possession.

I am mindful of the decision rendered last month in Verizon New York, Inc. v. Bradbury [803 NYS2d 409 (2005)] in which Verizon initiated a proceeding pursuant to Article 78 to prohibit the Village of Rye Brook from disclosing documents that the Village sought to make available to the public. The court did not explain in any detail the means by which Verizon had standing to bring suit. Further, the court cited §89(5), stating that:

> "Given the public interest in disclosure, the courts place the burden of proof on the party seeking to invoke the exemptions to prove entitlement thereto (Public Officers Law §89[5][e]..." (Id., 415).

While it is true that a commercial enterprise may have the burden of defending a denial of access at the conclusion of the procedure described in §89(5), it is reemphasized that §89(5) is applicable only with respect to records submitted to state agencies; no similar procedure exists in the Freedom of Information Law in the case of records submitted to local government agencies. In this instance, there was no denial of access. On the contrary, the Village determined to disclose the records. As I understand the matter, absent a denial of a request, there is no vehicle under which a person or firm has the ability to initiate a judicial proceeding concerning rights of access to local government records. That appears to be so in consideration of §89(4)(b), which states that:

> "Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial."

Based on the foregoing, "except as provided in subdivision five" of §89, which applies only to state agencies, or as otherwise provided by law, it is reiterated that the Freedom of Information Law is permissive, and that the Court of Appeals and other courts have so held. Even when agencies may have the ability to deny access to records, they are not required to do so and may assert their discretionary authority to disclose. That being so, and in consideration of the foregoing, I do not believe that Verizon would have standing to challenge a determination by a local government to disclose records it has received from Verizon.

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-15702

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December 21, 2005

Mr. Don Kelly
Deputy Director
Contract Administration/Research
CSEA
143 Washington Avenue
Albany, NY 12210

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kelly:

I have received your inquiry in which you asked whether an agency, a "public employer", must mail records sought under the Freedom of Information Law to an applicant for records.

In this regard, nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) specifically deals with requests made and responses given by mail. However, due to the size of the state, the inability of some people to physically travel to locations where records are kept, the reality that many people work and cannot travel to those locations, and in view of the intent of the Law, I believe that is implicit that agencies must respond to requests by mail. However, in addition to the fee for photocopying, an agency could in my view also charge for the cost of postage.

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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December 21, 2005

E-Mail

TO: Hon. Frank Coccho

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mayor-Elect Coccho:

I have received your inquiry in which you sought guidance concerning the use of the terms "agency" and "governing body" as they appear in §87(1) of the Freedom of Information Law.

In this regard, the Freedom of Information Law is applicable to agencies, and §86(3) defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

An agency may be headed by either a group of persons who carry out their functions collectively, as a body, or by an individual. In some instances, the group of persons, the governing body, serves as the primary creator of policy and possesses decision making authority. A town board, a city council, a board of education, and the boards of public authorities and industrial development agencies, to name a few, are governing bodies. In each instance, those bodies serve public corporations. As suggested to you by phone, many other agencies are headed by a single individual. The agency that houses this office, the Department of State, is headed by the Secretary of State; many state agencies are headed by commissioners. In those instances, there is no governing body.

Section 87(1) of the Freedom of Information Law distinguishes public corporations, which, again, are certain kinds of agencies, from others. Paragraph (a) refers to the obligation of the "the

governing body of each public corporation" to "promulgate uniform rules and regulations for all agencies in such public corporation..." Paragraph (b) refers to the obligations of "each agency", which includes public corporations, as well as those headed by a single individual, and provides direction concerning the nature and scope of rules and regulations.

Section 89(4)(a) pertains to the right to appeal a denial of access and states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In my view, the references to the "head, chief executive or governing body" were necessary to guarantee the right to appeal for the reason suggested above, that some agencies are headed by governing bodies, while others are headed by a single individual. Without those references, the right to appeal a denial of access to records would have been eliminated.

With respect to the issue that you raised, in a situation in which the Freedom of Information Law applies to a public corporation, such as a city, town, village, school district, etc., I believe that the direction is clear. As stated above, paragraph (a) of §87(1) refers to public corporations and states in relevant part that "the governing body of each public corporation" has the responsibility to promulgate procedural rules and regulations regarding the implementation of the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4097
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December 21, 2005

Wayne D. Esannason, Esq.
Village Attorney
Village of Scarsdale
1001 Post Road
Scarsdale, NY 10583

The staff of the Committee 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. Esannason:

I have received your letter and apologize for the delay in response. You wrote that the Village of Scarsdale has received proposals from Verizon and Cablevision in which they sought the opportunity to negotiate a cable television franchise agreement with the Village. The Village has created a Cable Commission by local law, and you asked whether the franchise renewal negotiations between the Commission and either of those entities "are subject to the Open Meetings Law and required to be open to the public." You also asked whether proposals submitted by Verizon and Cablevision are subject to the Freedom of Information Law.

In this regard, please note that the issue involving the application of the Open Meetings Law was raised recently by Dennis B. McAlpine, Chair of the entity in question, and that he referred to it as the "commission" and the "committee" and did not indicate that it is a creation of law. With that additional information that you provided, that the Commission is a creation of law, it would appear that the Commission is a "public body" required to comply with the Open Meetings Law.

Based on the assumption that the entity in question is subject to the Open Meetings Law, as suggested to Mr. McAlpine, there appears to be only one ground for entry into executive that would be pertinent. 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 the Commission's discussions involve either Verizon or Cablevision in relation to the subjects listed in §105(1)(f), e.g., consideration of a corporation's financial history, I believe that

an executive session could properly be held. However, when none of the qualifying subjects included within that provision apply, the Commission must, in my view, conduct its meetings open to the public.

With respect to proposals received by either of the companies, the Freedom of Information Law is broad in its coverage, for it pertains to all government agency records and defines the term "record" in §86(4) to include:

> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, proposals or any other materials received from Verizon or Cablevision constitute agency records subject to rights of access conferred by the Freedom of Information Law when they come into the possession of the Village.

I have been informed that in analogous situations, Verizon has requested that its submissions be kept confidential. Here I point out that 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...."

It is also emphasized that the Freedom of Information Law is permissive. 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. 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. As stated in that unanimous decision: "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

In most situations in which commercial entities are involved in negotiations leading to the award of a contract or franchise, two of the grounds for denial are most relevant.

The first, §87(2)(c), permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards..." As I understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Similarly, if an agency is involved in collective bargaining negotiations with a public employee union, and the union requests records reflective of the agency's strategy, the items that it considers to be important or otherwise, its estimates and projections, it is likely that disclosure to the union would place the agency at an unfair disadvantage at the bargaining table and, therefore, that disclosure would "impair" negotiating the process.

It is noted that the Court of Appeals sustained the assertion of §87(2)(c) in a case that did not clearly involve "contract awards" or collective bargaining negotiations. In Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In each of the kinds of the situations described earlier, there is an inequality of knowledge. In the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the context of

collective bargaining, the union would not have all of the agency's records relevant to the negotiations; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an records regarding collective bargaining strategy or appraisals would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

I point out that a situation that may be similar to that present in the Village was considered in Verizon New York, Inc. v. Bradbury [803 NYS2d 409 (2005)] in which the court found that "where more than one entity is involved in the negotiation process and an inequality of knowledge exists, thereby giving one entity an unfair advantage, impairment is likely to result and disclosure of records can justifiably be denied" (id., 420). The court concluded its consideration of §87(2)(c) by stating that:

> "The bottom line is that Rye Brook is currently negotiating with both Verizon and Cablevision to provide cable television services for the residents of Rye Brook. Premature disclosure of the Documents would enable Cablevision to obtain an unfair advantage over Verizon. Certainly, this unfair advantage may be to the ultimate detriment of Rye Brook and its cable television consumers" (id.).

I am unaware of the extent to which the facts in Scarsdale may be analogous to those considered in Verizon. However, the thrust of the decision may be useful to you.

The other provision of significance, §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..."

As in the case of §87(2)(c), the application of the provision quoted above relates to the effects of disclosure and the extent to which disclosure would, in this instance, cause substantial injury to the competitive position of either Verizon or Cablevision. In Verizon, it was determined that contentions concerning the possibility of harm were conclusory in nature and were inadequate to sustain a denial of access based on an assertion of §87(2)(d). Assuming that the submissions to the Village are analogous to those considered in the litigation, the outcome concerning that provision would likely be the same.

As you may be aware, the courts have consistently held that the Freedom of Information Law is designed to foster disclosure, and the Court of Appeals has 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Robert Freeman
To: rrybak@dot.state.ny.us
Date: 12/22/2005 4:23:16 PM
Subject: http://www.dos.state.ny.us/coog/explaination05.htm

http://www.dos.state.ny.us/coog/explaination05.htm

Dear Mr. Rybak:

Enclosed is a detailed explanation concerning the time within which agencies must respond to requests.

With respect to you other questions, first, it has been advised that an agency is not required to honor an ongoing or prospective request. Since the Freedom of Information Law pertains to existing records, and since, in a technical sense, an agency can neither grant nor deny access to records that do not yet exist, the agency, in our view is not required to agree or promise to make records available on an ongoing basis as they are created. Second, pursuant to §305 of the State Technology Law, an agency may choose to accept requests for or transmit records via fax or email, but it is not required to do so.

I hope that I have been of assistance and that you will have a happy holiday season.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

From: Robert Freeman
To: [redacted]
Date: 12/27/2005 3:27:55 PM
Subject: Dear Ms. Merlucci:

Dear Ms. Merlucci:

I have received your inquiry concerning the steps that may be taken after an appeal made under the Freedom of Information Law is denied.

In this regard, first, if an appeal is denied, the person denied access has the right to seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. An Article 78 proceeding must be initiated within four months of the agency's final determination.

Second, alternatively or additionally, anyone may write to this office and request a written advisory opinion. Although the opinions rendered by this office are not binding, it is our hope that they are educational and persuasive, and that they encourage compliance with law. I note that we do not prepare opinions after the commencement of litigation brought under the Freedom of Information Law by a person involved in the litigation.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15707

41 State Street, Albany, New York 12231
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2005

E-MAIL

TO: Bob Rybak

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. Rybak:

I have received your inquiry in which you asked whether there are limitations on rights of access conferred by the Freedom of Information Law when the records sought might be used for a commercial purpose.

In this regard, as a general matter, the reasons for which a request is made and an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 62 NYS 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Therefore, if the records are available by law, one's intended use of the records would have no effect on rights of access.

The sole exception to that general principle involves §89(2)(b)(iii), which permits an agency to withhold "lists of names and addresses if such list would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses 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].

However, §89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

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.

In the context of a request for a list of names and addresses sought for a commercial purpose, if the Freedom of Information Law solely governs rights of access, an agency could in my view seek the kind of certification referenced earlier. If a different statute requires disclosure independent of the Freedom of Information Law, I believe that an agency would be required to disclose, notwithstanding the intended use of the data. Further, it is emphasized that the provision imposing a condition on disclosure pertains only to lists of names and addresses of natural persons; no conditions may be imposed, in my opinion, with respect to requests for records other than such lists of names and addresses, irrespective of the intended use of the records.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15708

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2005

Mr. Raymond Gaston
91-A-7198
Wende Correctional Facility
Wende Road, P.O. Box 1187
Alden, NY 14004-1187

Dear Mr. Gaston:

I have received your letter in which you requested a variety of records from this office relating to your arrest.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to rights of access to government information, primarily in relation to the Freedom of Information Law. The Committee does not have possession or control of other agencies' records, 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 have them.

When seeking records, a request should be made to the agency or agencies that you believe would possess the records. Further, each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and requests should be directed to that person.

It is important to 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).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess records falling within the scope of your request. If the attorney no longer maintains the records, he or she should prepare an affidavit so stating that can be submitted to the agency in possession of the records, and it is suggested that you do so as well.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 27, 2005

E-MAIL

TO: Stacy Hodge

FROM: Robert J. Freeman, Executive Director RJF

Dear Ms. Hodge:

As you are aware, I have received your letter. You have sought guidance in your efforts in gaining access to records of Chemung County Family Court.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which pertains to agency records. Section 86(3) of the Freedom of Information Law defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

As such, the Freedom of Information Law does not apply to the courts or court records.

Relevant to the matter, however, is §166 of the Family Court Act. That statute states that:

> "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of

> the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

Since the records relate to you, it is suggested that you contact the clerk of the court or the judge, that you refer to §166, and that you indicate that your request does not involve "indiscriminate public inspection" of the records of your interest, but rather a request that is significant to your life.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4099
FOIL-AO-15710

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December 27, 2005

Mr. David M. Klein, P.E.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Klein:

We are in receipt of your November 21, 2005 request for an advisory opinion concerning the application of the Freedom of Information and Open Meetings Laws to various responses from and actions taken by the Town of Fort Ann.

Your first concern involves what you consider to be the Town's delayed responses to your requests. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period,

> depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

With respect to your second concern, that often responses are not complete, 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 response to your third concern, as general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." While §3101(d) of the Civil Practice Law and Rules (CPLR) authorizes confidentiality regarding material prepared for litigation, those kinds of records remain confidential in our opinion only so long as they are not disclosed to an adversary or filed with a court, for example. We do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

CPLR §3101 pertains to disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting

the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. One of those limitations, §3101(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."

This provision is intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on this provision in the context of a request made under the Freedom of Information Law is in our view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

The thrust of case law concerning material prepared for litigation is consistent with the preceding analysis, in that §3101(d) may properly be asserted as a means of shielding such material from an adversary.

In our view, whether the records in question have been communicated between the Town and an adversary, or have been filed with a court, any claim of privilege or its equivalent would be effectively waived. Once records in the nature of attorney work product or material prepared for litigation are transmitted to an adversary, i.e., from the Town to its adversary and *vice versa*, we believe that the capacity to claim exemptions from disclosure under §3101(c) or (d) of the CPLR or, therefore, §87(2)(a) of the Freedom of Information Law, ends. Conversely, however, if the records have not been disclosed to a person other than a client or clients, it appears that the assertion of the privilege would be proper.

It has been judicially determined 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)].

Your fourth concern is whether the Town's Engineer can attend an executive session of the Town Board. Relevant is §105(2) of the Open Meetings Law, which provides 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". Therefore, the only people who have the right to attend executive sessions are the members of the public body conducting the executive session. A public body may, however, authorize others to attend an executive session. While the Open Meetings Law does not describe the criteria that should be used to determine which persons other than members of a public body might properly attend an executive session, we believe that every law, including the Open Meetings Law, should be carried out in a manner that gives reasonable effect to its intent. Typically, those persons other than members of public bodies who are authorized to attend are the clerk, the public body's attorney, the superintendent in the case of a board of education, or a person who has some special knowledge, expertise or performs a function that relates to the subject of the executive session, such as an engineer.

Finally, in response to your fifth concern about the difficulty of identifying and tracking documents to which you are not provided access, there is nothing in the Freedom of Information Law or any 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, we are 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)].

We hope that this helps to clarify your understanding of the Freedom of Information and Open Meetings Laws.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Hon. Mary Jane Godfrey
Ruth Earl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1511

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December 27, 2005

E-MAIL

TO: John Visentin

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. Visentin:

I have received your letter in which you asked whether "a FOIL request made by one individual [is] subject to the provisions of FOIL."

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, with the exception of portions of certain kinds of requests, the records in question are accessible under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a public body, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests

are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

In short, except in the situation in which a request includes intimate personal information, in which case identifying details may be withheld, I believe that requests made under the Freedom of Information Law should generally be disclosed.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2005

Mr. Charles William Manners II
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Manners:

I have received your letter and the correspondence relating to it. The materials pertain to your requests for records made to Otsego County. Based on my review of the materials, it appears that many of the records sought have been made available, but that those indicating the "credentials" of the County's code enforcement officers and "architectural and engineering plans/blueprints" have been withheld.

In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Most relevant with respect to records indicating public employees' credentials 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 an employment application or similar documentation 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.

With regard to architectural or building plans, I note that 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.

Other considerations become relevant in relation to copyright. In an effort to obtain guidance, I have discussed the matter with a representative of the U.S. Copyright Office and the Office of Information and Privacy at the U.S. Department of Justice, which advises federal agencies regarding the federal Freedom of Information Act (5 U.S.C. §552), the federal counterpart of the New York Freedom of Information Law.

It is noted that the Federal Copyright Act, 17 U.S.C. §101 et seq., appears to have supplanted the early case law concerning the Act prior to its amendment in 1976. Nevertheless, 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.

In my view, attendant facts relating to the records are often important in determining rights of access. If architectural plans pertain to a unique structure, it is possible that disclosure to a competing architect would cause substantial injury to that person's competitive position. On the other hand, if architectural plans pertain to my house, which is not unique and which is part of a forty year old suburban development, disclosure would have virtually no competitive impact, and consequently, there would be no basis for a denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Carl F. Higgins
Laura A. Child

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2005

Ms. Lifon Huynh
Tarry Elm Business Center
Three West Main Street
Elmsford, NY 10523

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Huynh:

We are in receipt of your November 21, 2005 request for an advisory opinion concerning application of the Freedom of Information Law to a request and an appeal which have as yet gone unanswered by the City of Long Beach.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period,

> depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Finally, it is emphasized that the Freedom of Information Law pertains to existing records and §89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. Based on your correspondence, in several instances, you might have sought information that does not exist. For instance, you requested "names of firms who responded to the RFP" and "names of short-listed firms". If a list of names has not been previously compiled, the City would not be obliged to prepare such a list on your behalf. You also sought the "process for determining short-listing" and the "protocol for notifying firms of the City's decision to award the contract". Perhaps requesting a copy of the City's written policies and procedures governing contract awards, or documents reflecting the City's decisions, including minutes and/or bylaws, would be more productive. Again, if no such record exists, the City would not be required to prepare a description of a protocol or process on your behalf.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2005

Mr. Charles Dippolito
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Dr. Dippolito:

We are in receipt of your October 21, 2005 request for an advisory opinion concerning various requests for records which you have made to the City of Mount Vernon. Upon review of, and in response to the copies of correspondence between you and the City, we offer the following comments.

First, and by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In short, we believe that the City Council 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, we believe that when a City 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.

An issue of possible significance involves the requirement in §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought, as required by §89(3) of the Freedom of Information Law. We 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 our 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 we are unfamiliar with the recordkeeping systems of the City, to extent that the records sought can be located with reasonable effort, we 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 our opinion meet the standard of reasonably describing the records. Further, in the context of the request, a real question involves, very simply, where City officials might begin to look for records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within the City, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its SEQR determinations and all of its SEQR Full Environmental Assessment Forms 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.

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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

In your case, assuming your presentation of the facts is accurate and complete, it would appear that while the City has acknowledged the receipt of some of your requests and indicated an additional amount of time necessary to provide some of the requested documents, the City may have failed to respond to a number of others. Based on our review, it appears that the following requests remain outstanding:

Audio recording of Planning Board meeting on May 4, 2005;
All Plan examiner reports for all projects within the industrial and commercial area, including disapprovals, from July 2003 through July 2005;
All SEQR determinations by the Planning Board, and all postings of SEQR determinations, for all Type 1 Actions and Unlisted Actions, from July 2003 through July 2005;
Any and all policies regarding time frames in which SEQR determinations are published and/or posted publicly;
Any and all Appendix A SEQR Full Environmental Assessment Forms and all Plan Checklists submitted to the City between July 2003 and July 2005.

Accordingly, it would appear that the City has constructively denied your requests. We advise you to appeal. Before doing so, it is suggested that you contact the City Clerk or City Attorney to ascertain the identity of the person designated to determine appeals.

Third, with regard to any documents which you believe to have been inadvertently omitted, 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 for certain records.

With this in mind, however, please note that an agency need not create a record in response to a request, for the Freedom of Information Law pertains to existing records [see Freedom of Information Law, §89(3)]. Therefore, if, for example, the City's only cassette tape for the April 2005 meeting of the Planning Board is blank, as you allege, the City would not have any further obligation with regard to production of this record.

Similarly, we note that the City provided a record entitled "Planning Board Consultant Services Deposit Detail" in response to your request for copies of all escrow deposits that were requested by and paid to City of Mount Vernon for certain purposes. It may be that the City does not record the purpose for which a payment is made, in which case, it would be unable to provide such a record. On the other hand, if there is a guide or a key which clarifies this information in relation to the document provided, such record would be accessible under the Freedom of Information Law.

Fourth, we note that one of your requests to the City is to produce "complete and unedited correct and truthful version of the minutes" of the Planning Board. In this regard, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, we believe that they would be appropriate and meet legal requirements. We point out, too, that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

In some situations, such as those in which members of public bodies have met with resistance when attempting to include their comments in the minutes, it has been advised that a motion be made to include their statements in the minutes. If such a motion is approved, the inclusion of a statement is guaranteed. We recognize that you are not a member of the Planning Board. Nevertheless, we believe that you may ask any member to introduce a similar motion in an effort to ensure that your statement becomes part of the minutes.

Additionally, we note a reference to the State Administrative Procedure Act ("SAPA") in one of your earliest requests. Please be advised that SAPA does not apply to cities, but only to state agencies.

Finally, while the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Open Meetings and Freedom of Information Laws, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. At your request, a copy of this letter will be sent to City officials.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Mayor
Corporation Counsel
City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 15715

41 State Street, Albany, New York 12231
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December 28, 2005

Ms. Jean A. Black
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Black:

We are in receipt of your October 31, 2005 request for our assistance concerning a request which you have made to the Arkport Central School District.

Please note that while the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Freedom of Information Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions.

Assuming that the items of your interest can be generated based on the District's existing computer programs and copied onto a disk, we believe that the District must do so. Following is an excerpt from an article that our Executive Director prepared that deals with the issues that you have raised:

> **Format: Paper, Disk or Tape?**
>
> "FOIL's statement of intent indicates that agencies are required to make records available 'wherever and whenever feasible.' What if the agency chooses to disclose record by means of a computer printout, but the applicant has requested the record on a computer tape or disk? In Brownstone Publishers Inc. v. New York City Department of Buildings [166 AD2d 294 (1990)], the question involved an agency's obligation to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division:

> 'The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> 'Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" (id. at 295).'

"In another decision, it was held that: '[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape' [Samuel v. Mace, Sup. Ct., Monroe County (December 11, 1992), aff'd 190 AD2d 1067 (4th Dept. 1993)].

"In short, assuming that the conversion of format can be accomplished, that the data sought is available under FOIL, and that the data can be transferred from the format in which it is maintained to a format in which it is requested, an agency would be obliged to do so. Under those conditions, production of the record would not involve creating a new record or reprogramming, but rather merely a transfer of information into a format usable to the applicant.

More recently, it has been determined that when an agency has the ability to generate and disclose information maintained electronically with reasonable effort, it should be required to do so. That was the conclusion reached in New York Public Interest Research Group v. Cohen, 729 NYS2d 379 (2001). In that case, the Department of Health declined to redact electronic records, claiming that the necessity of creating a unique computer program to redact individual identifying information was not required by the Freedom of Information Law. Instead, the agency agreed to print out the information and redact the relevant confidential information by hand, at a cost of twenty-five cents per page. The court determined, based on the amount of time and resources required to undertake such an endeavor, and the accuracy of the computer-assisted redaction, that it made "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])." The court concluded, "[t]here 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."

Your questions raise another issue, which was also addressed in the article by our Executive Director; fees.

> "Section 87(1)(b)(iii) of FOIL stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy or the actual cost of reproduction unless a different fee was prescribed by 'law'. Chapter 73 of the Laws of 1982 replaced the word 'law' with the term 'statute'. As described in its annual report to the Governor and the Legislature by the Committee on Open Government (created by the enactment of FOIL in 1974 and reconstituted in the current statute), which was submitted in December of 1981 and which recommended the amendment that is now law:
>
> > 'The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies.'
>
> "Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act

of the State Legislature, a statute, would permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute.

"The specific language of FOIL and the regulations promulgated by the Committee indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> 'Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute.'

"The regulations promulgated by the Committee state in relevant part that:

> 'Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
> (2) search for records; or
> (3) any certification pursuant to this Part.'

"Based upon the foregoing, it is likely that a fee for reproducing electronic information would most often involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape) to which data is transferred.

"Although compliance with FOIL involves the use of public employees' time and perhaps other costs, the Court of Appeals has

> found that the Law is not intended to be given effect 'on a cost-accounting basis', but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY2d 341, 347 (1979)]."

We hope this helps to clarify your understanding of the Freedom of Information Law. At your request, a copy of this response will be forwarded to the Superintendent.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: William S. Locke

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1571/6

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December 28, 2005

Maggie R. Robb, Esq.
Trevett, Lenweaver & Salzer, P.C.
2 State Street - Suite 1000
Rochester, NY 14614

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Robb:

We are in receipt of your request for an advisory opinion concerning the application of the Freedom of Information Law to certain requests for records directed to the County of Monroe. The County has denied access to records documenting the closure of a certain road in the Town of Greece on May 24, 2005, during a visit by the President of the United States, on the grounds that disclosure could endanger the life or safety of any person, and that the information requested would reveal other than routine criminal investigative techniques and procedures.

From our perspective, while some aspects of the records might justifiably have been withheld, it is likely that a blanket denial of access was inappropriate and that other records must be disclosed. In this regard, we 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 our view, this phrase 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, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id. at 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. at 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, the records have been withheld in their entirety. Citing subdivisions (e) and (f) of §87(2), as in Gould, the County has engaged in a blanket denial in a manner which, in our view, is equally inappropriate. While we are not suggesting that the records sought must be disclosed in full, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the Division for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (id., 277; emphasis added).

Section 87(2)(e) which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations of judicial proceedings...
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The County's denial alludes to subparagraph (iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "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 procedures which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. We would conjecture, however, that not all of the procedures contained in the records sought of the closure could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in harmful effects of disclosure.

Section 87(2)(f) permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." As suggested above, we believe that the County is required to review the documentation at issue to determine which portions fall within this or the other exception.

The County's Records Appeal Officer indicted "you may also wish to send your inquiry to the United States Secret Service," indicating to us that the County may be in possession of some records generated by the Secret Service in regards to the road closing. Although we are not familiar with a particular provision of the federal Freedom of Information Act which may apply, this may

be an implied reference by the County. If there is a federal statute that forbids disclosure,§87(2)(a) of the Freedom of Information Law, which pertains to records which "are specifically exempted from disclosure by state or federal statute" would exempt such records from disclosure. Because there was little description from the County, however, this is not possible to ascertain.

Please note that while the Committee on Open Government is authorized to issue advisory opinions concerning application of the Freedom of Information Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. We note that your administrative appeals are exhausted. While we are not advising you to seek a judicial ruling on this matter, that alternative is available to you.

In an effort to attempt to avoid litigation, a copy of this opinion will be forwarded to the County's Records Appeal Officer.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: James P. Smith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 28, 2005

E-Mail

TO: Gloria McAndrews

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. McAndrews:

We are in receipt of your November 14, 2005 e-mail request for an advisory opinion concerning the Freedom of Information Law. As you relate, your school district's Superintendent made a tape recording of a meeting between the Superintendent and a teacher and her union representative. You request an opinion as to the accessability of that tape recording by the teacher's union representative, and by the public.

Because the teacher and the representative were parties to the conversation, a copy of the tape recording must be made available to them. In that regard, we offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to all agency records and that §86(4) of the Law defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Since the tape recording was produced by the Superintendent in the performance of his or her official duties, we believe that it constitutes a "record" subject to rights of access. We point out by means of analogy that, 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)].

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 this instance, those seeking the records were party to the conversations memorialized by the records. While it is possible that the tape recording could be withheld from the public at large to protect the privacy of the teacher or others, since she and her representative were parties to the conversation, none of the grounds for denial could in our opinion be asserted to withhold the tape from them.

We hope this helps to clarify your understanding of the Freedom of Information Law.

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15718

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December 28, 2005

Mr. Carlos Quinones
02-A-2181
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. Quinones:

I have received your letter in which you sought assistance in obtaining medical records under the Freedom of Information Law from the Long Island College Hospital.

In this regard, it is noted at the outset that the Freedom of Information Law applies to agency records, and that §86(3) of that law defines the term "agency" to mean:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, in general, the Freedom of Information Law applies to entities of state and local government. If the hospital that is the subject of your inquiry is private, the Freedom of Information Law would not be applicable.

Assuming that the Freedom of Information applies, in terms of rights granted by that statute, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (I) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Hospital personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent

that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 28, 2005

Mr. Sol Stern
City Journal
52 Vanderbilt Avenue
New York, NY 10017

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Stern:

As you are aware, I have received a variety of correspondence relating to your request for records of the New York City Department of Education. The request involves:

> "Those portions of the [FOIL] §87(3)(b) record that reveal the name public office address, title and salary of each officer and of each employee of the NYC Department of Education who works out of the Tweed Courthouse";

and

> "Those portions of the [FOIL] §87(3)(c) record that constitute a reasonably detailed current list by subject matter, of all records in the possession of each officer and of each employee of the NYC Department of Education who works out of the Tweed Courthouse."

In response to the first aspect of the request, it appears that the Department did not provide the information sought. In response to the second, you received five pages of material indicating "file categories", some identified by regional office, and others by subject area, i.e., assessment and accountability, contracts and purchasing.

In this regard, I offer the following comments.

First, in terms of rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record described above must be disclosed for the following reasons.

Pertinent to the matter is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. Miller dealt specifically with a request by a newspaper for the names and salaries of public employees, and in Gannett, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

Second, while it is clear that the Department must maintain a record identifying all of its officers and employees by name, public office address, title and salary, there is no requirement in my view that the Department must maintain a *separate* list of its officers and employees who work out of the Tweed Courthouse or any other Department location. If a separate list exists that identifies officers or employees who work at the Tweed Courthouse, I believe that the Department would be required to make it available to you. Further, if no such list exists, but the items of your interest are maintained within a database and can be extracted with reasonable effort, there is precedent indicating that the Department would be required to do so. In New York Public Research Group v. Cohen [729 NYS2d 379 (2001)], a request was made for portions of a database, and the New York City Department of Health contended that it would be required to create a new record in order to accommodate the applicant, and that it was not required to do so. Nevertheless, by means of the process of entering queries on a keyboard, the Department was able to extract those portions of the database that were requested, and the court held that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions" (id. 382-383).

When requests involve similar considerations, in my opinion, responses to them based on the precedent offered in NYPIRG must result in the disclosure of data stored electronically for which there is no basis for a denial of access. In this instance, if the Department is able to generate a list of employees by name, title, salary and their work location at the Tweed Courthouse, I believe that it would be required to do so.

Third, the other aspect of your request involves what has become known as the "subject matter list." As in the case of the payroll record, agencies are required to prepare a subject matter list, for §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. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

In your request, you asked for a subject matter list "of all the records in the possession of each officer and of each employee of the NYC Department of Education who works out of the Tweed Courthouse." From my perspective, there is no requirement that the Department do so. There may be categories of records that are kept at a variety of offices and locations under the aegis of the Department. In that circumstance, I do not believe that reference to those categories must be indicated or repeated by location; on the contrary, reference to the categories could be made once in a Department-wide subject matter list. Similarly, in my view, there need not be a separate subject matter list pertaining to records maintained at the Tweed Courthouse; rather the subject matter list must include reference to records maintained by the Department, irrespective of where the records are located.

With respect to the adequacy of the Department's subject matter list, it was recently held that:

> "a 'subject matter list need not refer to each an every document [respondent's] agency maintains, but only to categories of records in detail sufficient to permit an applicant to identify the category or records that may include the records sought' [Marino v. Morgenthau, 1 A.D.3d 275 (1st Dept. 2003), appeal dismissed 2 NY3d 780 (internal quotation omitted)]. An agency is not required to index all of its records, but may satisfy the 'spirit and litter' of the law by labeling records so they may be accessed and listing the 'broad variety of records it maintains' [D'Alessandro v. Unemployment Ins. Appeal Bd., 56 A.D.2d 762 (1st Dept. 1977)]. The list provided by the Comptroller's office is not a list by subject matter of the records in the agency's possession but rather a list of the departments within the agency, which would not assist a FOIL applicant in identifying the category of records sought."

I would conjecture that the materials sent to you representing the Department's subject matter list are inadequate to comply with law. For instance, there are likely numerous categories of records relating to students, and the materials are not, in my opinion, sufficiently detailed to enable a person seeking records to identify the category of records that might include those of his or her interest.

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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that

in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Best
Susan W. Holtzman

STATE OF NEW YORK
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December 29, 2005

Mr. George J. Brucia
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brucia:

I have received your letter and the materials relating to it. In all honesty, your correspondence was misplaced, and I apologize for the delay in response.

You wrote that you were recently elected as a trustee of the North Merrick Public Library and that a major concern within the community involves reconsideration of a bond issue that failed in 2004. Minutes of meetings of the Board of Trustees refer to an "architect's minutes", and "as a citizen", you requested the minutes pursuant to the Freedom of Information Law, but were "denied these 'notes' because 'they are the architect's work product and are intra-agency records and therefore are not public records." Now, in your capacity as a trustee, you expressed the view that you "need access on all relevant information."

In this regard, first, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records. Further, in my view, each member of a board should have equal access to records of the entity that he or she serves.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my 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.

Second, assuming that disclosure is based on the Freedom of Information Law, I point out that that statute pertains to all government agency records, and that §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."

If the "architect's minutes" or notes were prepared by or for an agency, such as the Library or its Board, or in that person's capacity as the Board's consultant, I believe that all such materials would constitute "records" that 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. There is no exception or provision that refers to an architect's work product.

If the architect served as a consultant to the Board, a decision rendered by the Court of Appeals, the states highest court, indicates that records prepared for the Board or communications with the Board would constitute "intra-agency materials" that fall within the scope of §87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY2d 131 (1985)]. Nevertheless, due to its structure, that provision often requires substantial disclosure. Specifically, §87(2)(g) provides that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

If the architect did not serve as a consultant, but rather in a more typical role as contractor providing services, the provision concerning intra-agency materials would not have applied. In that circumstance, I believe that the records at issue would be accessible in their entirety to the public, for none of the grounds for denial would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 29, 2005

Mr. William C. Brown, Jr.
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brown:

As you are aware, I have received your letter of November 23. I believe that my response of December 20 addressed many of the questions raised in your initial correspondence. With respect to the remaining issues, I offer the following comments.

First, you asked "to whom do [you] report violations." In this regard, this office serves as a source of guidance and performs in a manner akin to an ombudsman. Although the opinions prepared by this office are advisory, it is our hope that they are educational and persuasive. I note that a copy of my earlier response was sent to the agency to which your requests have been made, the Hoosick Falls Central School, with the goal of promoting understanding of and compliance with law. In addition to the advisory role of this office, as indicated in the earlier response, if an agency renders a final determination denying access to records, the person denied access may seek judicial review of the determination by initiating a proceeding under Article 78 of the Civil Practice Law and Rules.

Second, you raised questions concerning your contention that certain records made available to you are inaccurate. While I believe that it is in the public interest and an agency's interest to maintain accurate records, the Freedom of Information Law does not address that issue. In short, that law requires that government agencies disclose their records, unless an exception to rights of access appearing in §87(2) of the law may properly be asserted. Stated differently, an agency would be obliged by the Freedom of Information Law to disclose a record indicating that 2+2=5, but that law would not be require that the agency correct its error.

Lastly, the title of the Freedom of Information Law may be misleading, for it does not focus on information *per se*, but rather upon records. That statute provides in relevant part that an agency is not required to create a record in response to a request. Similarly, although agency staff may choose to provide information in response to questions, it is not required to do so to comply with the Freedom of Information Law. In short that law pertains to requests for existing records. Rather

than asking a question, i.e., "Is Gunter Dully receiving Health Insurance through the District", it is suggested that you request a record or portion of a record indicating that Gunter Dully receives health insurance through the District. If an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent, Hoosick Falls Central School

STATE OF NEW YORK
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December 29, 2005

Mr. Sam Sommer
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sommer:

I have received your letter and the materials attached to it. In consideration of the nature of the records sought and the response to your requests by Suffolk County officials, I offer the following comments.

First, it is important to 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, an agency may require a statement that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess records falling within the scope of your request. If the attorney no longer maintains the records, he or she should prepare an affidavit so stating that can be submitted to the agency in possession of the records, and it is suggested that you do so as well if necessary.

Second, assuming that neither you nor your attorney maintain possession of records of your interest, the decision rendered in Moore is significant in a different vein, for it was held that records that may ordinarily be withheld under the Freedom of Information Law must be made available if they have been introduced during a public judicial proceeding and made part of the court record.

Third, insofar as Moore indicates that court records maintained by the office of a district attorney or other agency are fall beyond the coverage of the Freedom of Information Law, it was overridden by the Court of Appeals. By way of background, 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.

In this regard, although the Appellate Division in Moore found that court records maintained by an agency fell outside the coverage of the Freedom of Information Law, the Court of Appeals reversed that holding. Newsday v. Empire State Development Corporation [98 NY 2d 746, 359 NYS2d 855 (2002)] dealt with a request for copies of subpoenas issued by a court and served upon a state agency by the office of a district attorney. In concluding that those records, despite having been prepared by and emanated from a court, are agency records subject to the Freedom of Information Law, it was stated that:

> "To be sure, had the subpoenas remained in the exclusive possession of the court on whose behalf they were issued, they would have been immune from compulsory disclosure under FOIL. That, however, would not have been due to the fact that it was the court that

> produced them, but because the Judiciary is expressly excluded from agency status under FOIL. Therefore, no 'information **** in any physical form' held or kept by a court as such is subject at all to FOIL, any more so than would records held or kept by a private person or any non-governmental entity. The immunity of the subpoenas from FOIL when once possessed by a court, however, does not run with those records. When they were served upon ESDC, a FOIL-defined agency, they were fully subject to FOIL disclosure in the absence of any showing by ESDC that some statutory exemption applies."

Based on the foregoing, records maintained by or for an agency, such as the office of a district attorney, irrespective of their origin, are subject to rights conferred by the Freedom of Information Law.

Lastly, with respect to autopsy reports and other records, 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 section 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."

One such statute is §677 of the County Law, which refers to autopsy reports and related records. As you are aware, subdivision (3), paragraph (b) of that provision states that:

> "Such records shall be open to inspection by the district attorney of the county. Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Based upon the foregoing, the Freedom of Information Law in my opinion is inapplicable as a basis for seeking or obtaining an autopsy report or other records described in §677, for the ability to obtain such records is based solely on §677(3)(b). In my view, only a district attorney and the next of kin of the deceased have a right of access to records subject to §677; any others would be required to Obtain a court order based on demonstration of substantial interest in the records. It is reiterated, however, that if the record in question was introduced as evidence, for example, during a public judicial proceeding, there would be no basis for a denial of access. It is also suggested that, in addition to the office of a medical examiner or coroner, the record may be maintained by the clerk

of the court it was made part of the court record. In that event, although the Freedom of Information Law would not apply, a request could be made to the court clerk pursuant to §255 of the Judiciary Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward Bannan
Tanja McCarthy

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December 29, 2005

Ms. Shirley J. Motyl
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Motyl:

We are in receipt of your November 15, 2005 request for an advisory opinion. Please note that while the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Freedom of Information Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions.

Before addressing the substance of your requests, we note that your request to the Committee, dated November 15, 2005, included a request to the Saratoga County Attorney to respond to your requests by November 18, 2005. Please note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests, however, there is no provision requiring an agency to respond based on the requestor's calendar.

According to your letter, it appears that the Saratoga County Animal Shelter has responded to your requests, at least in part, but that there may be items which remain outstanding. We note that you have sought the identities of those who work at the shelter, including the names of practitioners. With certain exceptions, the Freedom of Information Law does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article 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 list of employees is included among the records required to be kept by an agency pursuant to "subdivision three of section eighty-seven..." [see §87(3)(b)]. In our view, the "agency" is Saratoga County; the Animal Shelter is a unit within the County government. While I believe that the County's record required to be maintained pursuant to §87(3)(b) must include reference to all County officers and employees, there is no obligation to prepare a separate record

identifying employees of a particular unit. If such a record exists, in our opinion, it would be accessible. If none exists, there would be no obligation to prepare a new record on your behalf.

You have also sought the shelter's written policies and procedures for assessing whether animals require euthanasia, for performing euthanasia, and then also location of documentation kept in conjunction with these procedures. While we believe that the Freedom of Information Law requires the production of written policies and procedures, if they exist, it is our opinion that the physical location of any particular records, unless documented by the written policies and procedures, would not be required to 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.

In our opinion, guidelines, criteria or policies adopted by an agency must be disclosed pursuant to §87(2)(g). Although that provision is one of the grounds for denial, due to its structure, it 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 our view be withheld. We believe that guidelines and criteria 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).

Next, you inquire as to the accessibility of records reflecting the hours and days which a certain doctor and other veterinarians are present at the shelter. Again, if records exist which reflect such information, it is our opinion that the Freedom of Information Law requires disclosure. Based on a unanimous decision rendered by the state's highest court, the Court of Appeals, the records in question must be disclosed to comply with law. In this regard, we offer the following comments.

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 our opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, we 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 our view that records reflecting dates and times worked must be disclosed under the Freedom of Information Law.

Finally, you have requested access to records pertaining to a particular dog, specifically "the background on the dog Ashe." We are not familiar with either the level of detail memorialized in records maintained by the shelter, or any applicable retention schedule for such records. That being so, we cannot offer specific guidance concerning the matter.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Mark Rider, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 29, 2005

E-Mail

TO: Steven Taras

FROM: Camille S. Jobin-Davis, Assistant Director (85)

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Taras:

We are in receipt of your November 15, 2005 e-mail request for an advisory opinion pertaining to the Freedom of Information Law. In response, please be advised of the following:

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. It may be that the State Liquor Authority ("Authority") does not publish a list of all meetings, or a list of all meetings by type. If a list of meetings has not been previously compiled, the Authority would not be obliged to prepare such a list on your behalf.

Nevertheless, when and if the Authority notifies the Community Board of the individual meetings, it may be that the Authority creates a record of the notification. Any record memorializing the notification would, in our opinion, be accessible to the public, for it would consist of factual information within an "inter-agency" communication.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While one of the grounds for denial is pertinent, due to its structure, we believe that it would require disclosure in this instance. Relevant is §87(2)(g), which permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld. Again, an indication of the date of a meeting would be factual in nature and, therefore, would be available under subparagraph (i) of §87(2)(g).

Second, we appreciate your frustration communicating with the New York City Department of Consumer Affairs. To the extent that you seek access to records from the Department, we recommend you direct written requests for records to the Department's records access officer.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent with those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

"(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

In short, we believe that the Commissioner of the Department 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, we 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.

Finally, while the Department of Consumer Affairs is an agency of the City of New York, it is not a public body regulated by the Open Meetings Law. Unless there is a rule or regulation requiring the Department to hold public hearings in conjunction with the issuance of sidewalk permits, it would not be required to permit the public to attend the kind of gathering to which you referred.

In contrast both the State Liquor Authority Board and the Community Board are public bodies required to provide notice prior to their meetings pursuant to §104 of the Open Meetings Law. While that statute requires only that notice of the time and place of meetings be given, public bodies often prepare agendas. It may be worthwhile to seek agendas prepared by or for the Community Board prior to its meetings.

We hope this helps to clarify your understanding of the Freedom of Information and Open Meetings Laws.

CSJD:jm

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December 29, 2005

Mr. Scott A. Garera
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Garera:

I have received your letter and the materials attached to it. You expressed concern that the SUNY College at Farmingdale has improperly disclosed personal information about you and other faculty members.

In this regard, it is my understanding that the requests leading to the disclosures were made by one individual and were extensive. I have discussed the matter with officials at SUNY's central offices, and it was explained that the records at issue involve hundreds of pages and an arduous, often line by line review of their content to ascertain which portions could or must be withheld. Some of the items to which you referred were, in my view, improperly disclosed. However, based on discussions with SUNY staff, the disclosure of those items was inadvertent. In other instances, I believe that SUNY would have had the authority to deny access, but not the obligation to do so.

To consider your contentions properly, two statutes must be analyzed, the Freedom of Information Law and the Personal Privacy Protection Law. The former is broad in its scope, for it pertains to all records of an agency, such as the State University and its component institutions, and the term "record" for purposes of that statute is defined 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."

The latter pertains to personal information maintained by or for state agencies, and for purposes of that law, "record" is defined in §92(9) to mean:

> "...any item, collection or grouping of personal information about a subject which is maintained and is retrievable by use of the name or other identifier of the data subject irrespective of the physical form or technology used to maintain such personal information."

A "data subject", according to §92(3) of the Personal Privacy Protection Law, is a "natural person about whom personal information has been collected by an agency."

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves a situation in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter." Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter." Therefore, when a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing to the public under the Freedom of Information Law.

A series of judicial decisions represent a general finding that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have determined that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Seelig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

Because the State University is a state agency subject to the Personal Privacy Protection Law, I believe that it and the College, as a component of the University, are precluded from releasing records to the public the disclosure of which would constitute an unwarranted invasion of personal privacy. Pertinent to the matter is a decision cited earlier, Seelig v. Sielaff, supra. In Seelig, the lower court enjoined a New York City agency from releasing the social security numbers of

correction officers without their written consent. While the Appellate Division agreed that disclosure of social security numbers would result in an unwarranted invasion of correction officers' privacy, the Court unanimously reversed and vacated the judgment because the agency involved is an entity of local government. Specifically, it was found that:

> "The injunctive relief granted by the IAS Court was based upon Public Officers Law §92 (1), part of this State's Personal Privacy Protection Law. That law by its own terms excepts the judiciary, the State Legislature, and 'any unit of local government' from its purview. Consequently, the relief granted against the respondents was improper" (id., 299).

While a local government may opt to disclose personal information, even when disclosure would result in an unwarranted invasion of personal privacy, a state agency subject to the Personal Privacy Protection Law would be prohibited from so doing.

I would agree that disclosure of the identities of one's private employers would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §89(2)(b)(i)] and should have been withheld. I would agree, too, that disclosure of one's home telephone number and social security number would result in an unwarranted invasion of personal privacy. With respect to certain of the other items to which you referred, it is questionable whether SUNY was obliged to redact them. For instance, while marital status may be unrelated to one's duties, the fact that a person is married or, for that matter, divorced, involves matters that can be learned through requests to municipal clerks who are obliged to disclose [see e.g., Domestic Relations Law, §§19 and 235(3)]. One's professional affiliations often relate to the performance of his or her official duties and would not, in my opinion, be so intimate or personal that those referenced could be characterized, if disclosed, as an unwarranted invasion of personal privacy. On the other hand, portions of a resume, for example, that indicate a person's activities with a religious organization would in my view be clearly personal and, therefore, exempt from disclosure.

As suggested earlier, some of the records that were apparently disclosed could have been withheld in part. However, I do not believe that there would have been a requirement to do so. For example, performance evaluations and affirmative action forms appear to have been disclosed. In my opinion, while portions of those records could have been withheld, SUNY has the discretionary authority to disclose them. Having reviewed their contents, it is clear that they relate to your duties. Because that is so, and in consideration of the analysis offered above concerning unwarranted invasions of personal privacy, I do not believe that a denial on the basis of the exception pertaining to privacy in the Freedom of Information Law or, therefore, the Personal Privacy Protection Law, would have been applicable.

The provision of primary significance concerning the observation reports and forms pertains to communications between and among government officers and employees. Specifically, §87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

While portions of the evaluations and forms consist of expressions of opinion that may be withheld, others consist of factual information accessible to the public. In this instance, SUNY would not have been obliged to withhold those portions of the reports to which access could have been denied. In short, the Freedom of Information Law is permissive. The state's highest court has held that although an agency may withhold records in accordance with the exceptions to rights of access, it is not required to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)], unless a different provision of law, i.e., the Personal Privacy Protection Law, so directs.

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: Stacey Hengsterman
Wendy Kowalczyk
Marvin Fischer

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December 29, 2005

Ms. Annette Wanderer
[redacted]

The staff of the Committee 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. Wanderer:

As you are aware, I have received your letter and a variety of materials relating to it. You have complained that requests for records pertaining to you have been disclosed by the State University College at Farmingdale in a manner inconsistent with law.

The requests leading to the disclosures were made by one individual and were extensive. I have discussed the matter with officials at SUNY's central offices, and it was explained that the records at issue involve hundreds of pages and an arduous, often line by line review of their content to ascertain which portions could or must be withheld. Some of the items to which you referred were, in my view, improperly disclosed. However, based on discussions with SUNY staff, the disclosure of those items was inadvertent. In other instances, I believe that SUNY would have had the authority to deny access, but not the obligation to do so.

To consider your contentions properly, two statutes must be analyzed, the Freedom of Information Law and the Personal Privacy Protection Law. The former is broad in its scope, for it pertains to all records of an agency, such as the State University and its component institutions, and the term "record" for purposes of that statute is defined 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."

The latter pertains to personal information maintained by or for state agencies, and for purposes of that law, "record" is defined in §92(9) to mean:

> "...any item, collection or grouping of personal information about a subject which is maintained and is retrievable by use of the name or other identifier of the data subject irrespective of the physical form or technology used to maintain such personal information."

A "data subject", according to §92(3) of the Personal Privacy Protection Law, is a "natural person about whom personal information has been collected by an agency."

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves a situation in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter." Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter." Therefore, when a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing to the public under the Freedom of Information Law.

From my perspective, based on judicial interpretations, public disclosure of a social security number, for instance, absent the consent of a data subject, constitutes an unwarranted invasion of personal privacy. One element of a series of decisions is the finding that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have determined that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Seelig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

Because the State University is a state agency subject to the Personal Privacy Protection Law, I believe that it and the College, as a component of the University, are precluded from releasing records to the public the disclosure of which would constitute an unwarranted invasion of

personal privacy. Pertinent to the matter is a decision cited earlier, Seelig v. Sielaff, supra. In Seelig, the lower court enjoined a New York City agency from releasing the social security numbers of correction officers without their written consent. While the Appellate Division agreed that disclosure of social security numbers would result in an unwarranted invasion of correction officers' privacy, the Court unanimously reversed and vacated the judgment because the agency involved is an entity of local government. Specifically, it was found that:

> "The injunctive relief granted by the IAS Court was based upon Public Officers Law §92 (1), part of this State's Personal Privacy Protection Law. That law by its own terms excepts the judiciary, the State Legislature, and 'any unit of local government' from its purview. Consequently, the relief granted against the respondents was improper" (id., 299).

While a local government may opt to disclose personal information, even when disclosure would result in an unwarranted invasion of personal privacy, a state agency subject to the Personal Privacy Protection Law would be prohibited from so doing.

In sum, I do not believe that a state agency, such as SUNY, can validly disseminate the social security numbers of its employees (or others, such as students) to the public, without the consent of the subjects of those items, for the Personal Privacy Protection Law essentially forbids such disclosure. Insofar as other items, such as the identities of one's private employers, would, if disclosed, constitute an unwarranted invasion of personal privacy, the same conclusion would operate. Often the nature of one's private employment is relevant to his or her capacity to perform duties for SUNY or other agencies and must be disclosed. When that is so, identifying details pertaining to the private employer should, in my view, be deleted.

As suggested earlier, although the disclosure of your social security number and other personal details were disclosed in apparent contravention of the Personal Privacy Protection Law, there is no penalty that is referenced in that statute.

You complained, too, that "teaching observations" pertaining to you were disclosed without redaction. In my view, while portions of those records could have been withheld, SUNY has the discretionary authority to disclose them. Having reviewed their contents, it is clear that they relate to the performance of your duties. Because that is so, and in consideration of the analysis offered above concerning unwarranted invasions of personal privacy, I do not believe that a denial on the basis of the exception pertaining to privacy in the Freedom of Information Law or, therefore, the Personal Privacy Protection Law, would have been applicable.

The provision of primary significance concerning the observation reports pertains to communications between and among government officers and employees. Specifically, §87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

While portions of the observation reports consist of expressions of opinion that may be withheld, others consist of factual information accessible to the public. In this instance, SUNY would not have been obliged to withhold those portions of the reports to which access could have been denied. In short, the Freedom of Information Law is permissive. The state's highest court has held that although an agency may withhold records in accordance with the exceptions to rights of access, it is not required to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)], unless a different provision of law, i.e., the Personal Privacy Protection Law, so directs.

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: Stacey Hengsterman
Wendy Kowalczyk
Marvin Fischer

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December 29, 2005

Mr. Roy H. Schneggenburger
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Schneggenburger:

I have received your letter and the forms attached to it. You have raised questions concerning the adequacy of the forms.

To put the matter in perspective, first, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, 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 within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Second, 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, in consideration of the foregoing, neither of the forms that you attached are, in my view, necessary or fully accurate in terms of their content.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm